NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 144

5 JUNE 2001

17 JULY 2001

RALEIGH
2002

CITE THIS VOLUME
144 N.C. APP.

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1. Appointed and sworn in 29 April 2002 to replace Dexter Brooks who died 5 March 2002.
2. Appointed and sworn in 26 April 2002.
3. Currently assigned to the Court of Appeals.

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1. Appointed and sworn in to Superior Court 29 April 2002.

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RULES OF APPELLATE PROCEDURE CITED

CONSTITUTION OF UNITED STATES CITED

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARGARET WILLIAMS PITTS, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, PLAINTIFF v. AMERICAN SECURITY INSURANCE COMPANY, AMERICAN SECURITY INSURANCE GROUP, STANDARD GUARANTY INSURANCE COMPANY, AND WACHOVIA BANK OF NORTH CAROLINA, N.A., DEFENDANTS

No. COA00-703

(Filed 5 June 2001)

1. Appeal and Error— appealability—order denying class certification

An order denying class certification, though interlocutory, affects a substantial right and is appealable.

2. Class Action— motion for certification—prerequisites

When considering a motion for class certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, the trial court must first determine whether the party seeking certification has met its burden of showing that the three prerequisites to certification have been met: the first is the existence of a class; the second is that the named class representative will fairly and adequately represent the interests of all class members; and the third is that the proposed class members are so numerous that it is impractical to bring them all before the court. If all the prerequisites are established, the court must determine whether a class action is superior to other available methods for the adjudication of the controversy.

3. Class Action— existence of class—individual defenses—actions for fraud—common issues of law and fact

The trial court erred when it found that a class did not exist in an action arising from a collateral protection insurance program where the court considered possible defenses and found that a class necessarily does not exist in actions for fraud. The relevant inquiry is whether the common issues of law and fact predominate over the individual merits and damages. The potential individual issues here are outweighed by the common issues of law and fact.

4. Class Action— certification of class—adequacy of class representative—factors

The trial court erred when ruling on the adequacy of a class representative in an action arising from a collateral protection insurance program by considering alleged conflicts of interest relating to damages where the findings did not demonstrate an actual conflict, only a difference; an alleged lack of knowledge surrounding the allegations of the complaint, since a class representative is not rendered unsuitable because she lacks knowledge of the details of her case or the legal theories presented; that some of plaintiff's claims may be barred by the statute of limitations, but the issue of whether a plaintiff might ultimately prevail on the merits of her claim is not a proper consideration for whether she is an adequate class representative because a substitute representative may be provided; and that plaintiff did not seek counsel to redress a perceived wrong, because focus must be on plaintiff's adequacy as a class representative, not how she became aware of her claim. The only remaining finding regarding plaintiff's adequacy as a class representative is a criminal record that includes worthless check charges, but that record does not render her inadequate to represent the interests of the proposed class when weighed against all other factors.

5. Class Action— certification of class—numerosity requirement

A class action plaintiff's allegations of the existence of a class "reasonably believed to be in excess of 1,000 persons" and that the identity of the proposed class members could be determined from defendants' records was sufficient to satisfy the numerosity requirement for certification in an action arising from a collateral protection insurance program.

6. Class Action— certification of class—superior method of determining claim

The trial court erred when it concluded that a class action was not the superior method to determine claims arising from a collateral protection insurance program based on findings that this was a case of de minimus damages, that many of the causes of action required individualized proof, that damages would be based upon individual situations, and that the expansive nature of the proposed class would result in excessive transaction costs and difficulties. The record did not contain any evidence of the amount of damages the class members would recover nor any evidence to support the finding of excessive transaction costs and difficulties, while the findings regarding individualized issues of proof are collateral matters that do not outweigh the useful purposes of bringing a class action.

7. Class Action— certification of class—dispositive motions

Dispositive motions such as summary judgment are not properly considered until after a ruling on a motion for class certification.

Appeal by plaintiff, individually and on behalf of all persons similarly situated, from order and opinion filed 7 February 2000 by Judge Ben F. Tennille in Pitt County Superior Court. Heard in the Court of Appeals 17 April 2001.

The Blount Law Firm, P.L.L.C., by Marvin K. Blount, Jr., and Darren M. Dawson; and Murray & Murray Co., L.P.A., by John T. Murray and Sylvia M. Antalis, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Carl N. Patterson, Jr. and Melinda S. Dumeer, for defendant-appellees American Security Insurance Company and Standard Guaranty Insurance Company.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Reid C. Adams, Jr., Hada V. Haulsee, and John J. Bowers, for defendant-appellee Wachovia Bank of North Carolina, N.A.

GREENE, Judge.

Margaret Williams Pitts (Plaintiff), individually and on behalf of all persons similarly situated, appeals an order filed 7 February 2000 denying Plaintiff's motion for class certification, pursuant to Rule 23

of the North Carolina Rules of Civil Procedure, of claims against American Security Insurance Company (ASIC), Standard Guaranty Insurance Company (SGIC) (collectively, the American Security Defendants), and Wachovia Bank of North Carolina, N.A. (Wachovia).[1] Additionally, Plaintiff appeals the trial court's 7 February 2000 order granting summary judgment in favor of SGIC and granting partial summary judgment in favor of ASIC.

Plaintiff's claims against the American Security Defendants and Wachovia arise out of a collateral protection insurance (CPI) program[2] underwritten by the American Security Defendants and utilized by Wachovia. The record shows the following undisputed facts: In 1990, Plaintiff purchased a vehicle and financed the purchase through Wachovia. Plaintiff entered into a Note and Purchase Money Security Agreement (the Note) with Wachovia that contained the following pertinent provisions:

> The Purchaser-Debtor agrees to insure the collateral against theft, loss[,] and destruction, with policies acceptable to Seller-Secured Party and payable to Purchaser-Debtor and Seller-Secured Party as their interests may appear. . . .
>
> . . . Seller-Secured Party can, at its option, purchase insurance or perform any other obligations of Purchaser-Debtor for the account of Purchaser-Debtor and, unless Seller-Secured Party is reimbursed for such advance within ten days of notice to Purchaser-Debtor, Seller-Secured Party may, as of the date of such advance, add such advance . . . to the unpaid balance due hereunder.

Subsequent to obtaining the financing, Plaintiff breached her loan agreement with Wachovia on three occasions by failing to maintain

1. Plaintiff also named American Security Insurance Group as a defendant in this case; however, in an order filed 2 January 1998, all parties stipulated to the dismissal of Plaintiff's claims against American Security Insurance Group.

2. Generally, a borrower who uses collateral to secure a loan from a lending institution may be required by the terms of the loan agreement to maintain insurance on the collateral. When a borrower breaches the loan agreement by failing to maintain the required insurance, the lending institution may act to insure the collateral and, pursuant to the loan agreement, extend additional credit to the borrower to pay for the insurance provided. To provide insurance for collateral upon a borrower's breach, an insurance company may offer an insurance policy to a lending institution pursuant to a CPI program. Under a CPI program, a borrower who breaches her agreement to maintain insurance on the collateral is automatically placed under a CPI policy that insures the collateral. This placement of a borrower pursuant to a CPI policy is called "force-placement."

the insurance required by the Note. When each breach occurred, Plaintiff was sent notice by Wachovia of her obligation to maintain insurance on the collateral and Plaintiff was force-placed under a CPI policy. The first insurance certificate force-placing Plaintiff became effective on 28 July 1991; the second insurance certificate force-placing Plaintiff became effective on 30 November 1991; and the third insurance certificate force-placing Plaintiff became effective on 20 July 1992. Plaintiff received notice from Wachovia of each forced-placement, and Wachovia extended to Plaintiff additional credit in the amount required to pay for the CPI policies. This amount of additional credit was added to Plaintiff's loan balance with Wachovia. The CPI program used by Wachovia to force-place insurance on borrowers was created by ASIC and, at all relevant times, was underwritten by one of the American Security Defendants.

In a complaint filed 25 March 1996, Plaintiff alleged the following regarding the CPI program underwritten by the American Security Defendants[3] pursuant to which she was force-placed: the amount financed for borrowers by lending institutions to pay for the force-placed insurance was based on the borrowers' gross loan balances, including unearned interest, rather than the net loan balances, resulting in greater profits for the lending institution; the force-placed insurance program "offered numerous endorsements in addition to basic comprehensive and collision coverage" required by the borrowers' lending agreements, and these additional endorsements resulted in a greater extension of credit to the borrowers; the amount of extension of credit for the purchase of the insurance premium was based on the remaining term of the loan rather than a more limited period of time, thereby generating a greater premium and greater loan amount; and the CPI program "offered monetary payments to lenders as an incentive to force-place borrowers," including "administrative fees, special cancellation payments, premium refunds[,] and offers to purchase CD[]s from lending institutions."

Based on the allegations regarding the American Security Defendants' CPI program, Plaintiff alleged claims against the American Security Defendants for tortious interference with contract, unjust enrichment, and unfair or deceptive trade practices. Additionally, Plaintiff alleged claims against Wachovia for unjust

3. Plaintiff's 25 March 1996 complaint alleged claims against Wachovia and ASIC based on the CPI program. In an amended complaint dated 21 July 1997, Plaintiff added SGIC as a defendant and alleged identical claims against SGIC as were alleged against ASIC in the 25 March 1996 complaint.

enrichment, breach of contract, breach of good faith and fair dealing, breach of fiduciary duties, fraud/fraudulent concealment, and unfair or deceptive trade practices. Plaintiff alleged these claims individually and on behalf of members of the following proposed class: "All persons and entities who . . . were extended additional credit by Wachovia as a result of an insurance loan program designed and marketed by [the American Security Defendants, for the purchase of the [American Security Defendants' CPI] policy." Additionally, Plaintiff alleged:

> The members of the Class for whose benefit this action is brought are so numerous that joinder of all class members is impracticable. The exact number of the Class is unknown to Plaintiff. However, the number of these persons is reasonably believed to be in excess of 1,000 persons and can be determined from records maintained by [d]efendants.

On 25 March 1996, Plaintiff filed a motion for certification of the proposed class. In a deposition taken 6 March 1997, Plaintiff testified that she understood what it meant to be named as a representative of a class action. Plaintiff testified that she did not know what the terms "tortious interference with contract" and "breach of fiduciary duty" meant; however, she understood that these causes of action dealt with insurance that Wachovia provided when Plaintiff failed to maintain insurance on her vehicle. She also understood she was alleging Wachovia had breached the contract that it had entered into with her.

In motions dated 21 August 1997, the American Security Defendants and Wachovia requested summary judgment on all claims alleged against them. In an order dated 2 February 1998, the trial court denied these motions. The American Security Defendants subsequently filed a second motion for partial summary judgment dated 17 March 1998 on the ground Plaintiff's claims for tortious interference with contract and unjust enrichment as to both ASIC and SGIC were barred by the applicable statutes of limitations. Additionally, the American Security Defendants moved for summary judgment as to Plaintiff's claim for unfair or deceptive trade practices against SGIC on the ground the claim was barred by the applicable statute of limitations. Finally, the American Security Defendants moved for summary judgment as to Plaintiff's unfair or deceptive trade practices claim against ASIC "to the extent that this claim is based on the first two CPI certificates issued to Plaintiff" on the ground the claim was

barred by the applicable statute of limitations. On 14 August 1998, the trial court heard arguments regarding the American Security Defendants' motions for summary judgment and Plaintiff's motion to certify the proposed class. In an order filed 7 February 2000, the trial court granted summary judgment in favor of SGIC as to all of Plaintiff's claims and granted summary judgment in favor of ASIC as to Plaintiff's tortious interference with contract claim and unjust enrichment claim.[4]

Additionally, in its 7 February 2000 order, the trial court addressed the issue of whether a class existed, Plaintiff was an adequate representative for the class, and a class action was the superior method to determine the claims alleged in Plaintiff's complaint.

I. existence of a class

Plaintiff argued at the certification hearing that "uniform actions give rise to common issues that predominate over individual issues, rendering the case appropriate for class action treatment." Plaintiff contended "the language in the promissory notes is the same for all potential class members"; "the policies issued by the American Security Defendants were all substantially the same"; "Wachovia's response to a borrower's breach of the loan contract was uniform—a standard notice was sent informing the borrower that Wachovia had force-placed insurance on the collateral"; and "Wachovia owned a master insurance policy covering all potential class members." Subsequent to the certification hearing, the trial court found "there is some common nucleus of operative facts"; nevertheless, the trial court concluded a class did not exist. The trial court recognized the following individual issues: (1) "the proposed class includes individuals who financed the purchase of an automobile through Wachovia from 1969 to the date of the institution of this lawsuit," thus, the applicable statutes of limitations may bar some proposed class members from maintaining the alleged claims; (2) "establishing the elements of fraud requires Plaintiff to make individual showings of facts," thus, Plaintiff's claims "are not appropriate for class action

4. The 2 February 1998 order denying summary judgment was entered by Superior Court Judge D.B. Herring, Jr. Judge Herring subsequently became ill and this case was reassigned to Special Superior Court Judge Ben F. Tennille. Judge Tennille stated in his 7 February 2000 order that the American Security Defendants' 21 August 1997 motion for summary judgment did not allege Plaintiff's claims against them were barred by the statute of limitations; thus, Judge Tennille's consideration of this issue was not barred by the rule that one superior court judge cannot overrule another superior court judge on the same issue in the same case.

treatment"; (3) although "Plaintiff's proof with respect to [claims for breach of contract, breach of fiduciary duty, and breach of duty of good faith and fair dealing] may be common to the class, this [c]ourt finds that proof of damages in this case is individualized" and is a necessary element of Plaintiff's claims; (4) two different policies were issued to Wachovia by the American Security Defendants, one in 1978 and one in 1992, and "[t]he changing circumstances throughout the policy's history [as well as the changing notices sent to borrowers under the different policies] support a finding that a single class does not exist"; (5) the calculation of damages for various class members based on their claim that they were damaged by the commissions Wachovia received will differ depending on the profitability for Wachovia of the CPI program in any given year; (6) there is a conflict of interest between those borrowers who benefitted from a lower deductible under the force-placed insurance and those who were harmed by the lower deductible; and (7) "Wachovia has a potential claim or set-off against [Plaintiff]." The trial court, therefore, determined these "varying factual circumstances support [its] finding that Plaintiff . . . failed to establish the existence of a single identifiable class."

II. adequacy of class representative

The trial court made the following findings of fact regarding whether Plaintiff would be an adequate class representative of the proposed class: (1) evidence was presented that Plaintiff "has a conflict of interest with other members of the proposed class" because Plaintiff's personal insurance policy had higher premiums than the force-placed policy, the use of the gross loan balance rather than the net loan balance to compute Plaintiff's premium resulted in a lower premium for Plaintiff, Plaintiff's premiums were lower under a remaining-term policy than they would have been under an annual policy, some proposed class members may have benefitted from the issuance of additional endorsements under the force-placed policy, and some proposed class members may have benefitted from a lower deductible under the force-placed policy; (2) Plaintiff has a lack of knowledge surrounding the allegations in the case and she "has not materially participated in the prosecution of this action"; (3) Plaintiff has a criminal record that includes worthless check charges which may affect Plaintiff's credibility; (4) most of the claims asserted by Plaintiff are barred by the applicable statutes of limitations; and (5) rather than seeking counsel to "redress a perceived wrong," Plaintiff was contacted by her bankruptcy attorney, through a letter drafted in

part by class counsel, regarding her potential claim and suggesting she contact class counsel. Based on these findings, the trial court determined Plaintiff was "not an adequate class representative." The trial court did not make any findings regarding whether Plaintiff would be an adequate representative for class members located outside of North Carolina; however, at the hearing on class certification, Plaintiff stated she was seeking certification of a class consisting of North Carolina members only.

III. numerosity of proposed class

The trial court stated in its order that "[t]he numerosity requirement has not been raised as an issue before the [c]ourt, but is a concern to the [c]ourt because the record in this case is devoid of any factual support for any finding of numerosity." The trial court then stated that "[w]hile the [c]ourt is not declining to certify the class for failure to establish the numerosity requirement, it notes that the requirement is in Rule 23 for a reason and must be met by the party seeking class certification."

IV. superior method of adjudication

The trial court made the following findings regarding whether a class action was the superior method to determine the claims at issue: (1) "this is a case of de minimus damages"; (2) "multiple causes of action have been asserted, many of which require individualized proof"; (3) "ascertainment of damages will be based upon individual situations"; and (4) "the expansive nature of the proposed class will result in excessive transaction costs and difficulties." Based on these findings, the trial court concluded a class action was not the superior method to determine the claims at issue. The trial court, therefore, denied certification of the proposed class.

The issues are whether: (I) the trial court erred by finding "[P]laintiff has failed to establish the existence of a single identifiable class"; (II) the trial court erred by finding Plaintiff "is not an adequate class representative"; (III) the uncontradicted evidence in the record shows Plaintiff established the numerosity of the proposed class; and (IV) the trial court's findings of fact support its conclusion that a class action was not the superior method to determine the claims at issue.

[1] An order denying class certification, though interlocutory in nature, "affect[s] a substantial right" and is, therefore, appealable.

Frost v. Mazda Motor of Am., Inc., 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000). On appeal, this Court is bound by the trial court's findings of fact if those findings are supported by competent evidence. *Nobles v. First Carolina Communications*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993).

[2] When considering a motion for class certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, the trial court must first determine whether the party seeking certification has met its burden of showing that the three prerequisites to certification of a class have been met. *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 7, 254 S.E.2d 223, 230, *disc. review denied*, 297 N.C. 609, 257 S.E.2d 217 (1979). The first prerequisite to certification is the existence of a class. *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997). "[A] 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

The second prerequisite to certification is that the named class representatives will "fairly and adequately represent the interests of all members of the class." *Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431. To fairly and adequately represent the class members, the class representatives must have no conflict of interest with the members of the class, the class representatives "must have a genuine personal interest, not a mere technical interest, in the outcome of the case," and the "class representatives within this jurisdiction [must] adequately represent members outside the state." *Id.*

The third prerequisite to certification is that the proposed class members are "so numerous that it is impractical to bring them all before the court." *Id.* The test for "impracticability" is "not 'impossibility' of joinder, but only difficulty or inconvenience of joining all members of the class." *English*, 41 N.C. App. at 6-7, 254 S.E.2d at 229. "The number is not dependent upon any arbitrary limit but rather upon the circumstances of each case." *Id.* at 7, 254 S.E.2d at 229. Additionally, there is no requirement that the party seeking certification allege in her certification motion the exact number of proposed class members or their identities. *See* 1 *Newberg on Class Actions*

§ 3.05, at 3-18 -19 (3d ed. 1992) [hereinafter, *Class Actions*].[5] Such a requirement "would foreclose most class litigation because of the impossibility of identifying all class members at the outset and would make large class suits unduly burdensome because of the great expense involved in identifying members." *Id.* at 3-19 -21.

If the trial court finds the party seeking certification has established the three prerequisites to certification, the trial court must then determine whether "a class action is superior to other available methods for the adjudication of th[e] controversy." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. A class action "should be permitted where [it is] likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results"; however, the trial court must balance these useful purposes against "inefficiency or other drawbacks." *Id.* at 284, 354 S.E.2d at 466. When making this determination, the trial court is not limited to the consideration of the prerequisites to bringing a class action as previously set forth. *Nobles*, 108 N.C. App. at 132, 423 S.E.2d at 315. Some proper considerations include, but are not limited to, the amount of recovery compared to the cost of administration of the lawsuit, *see Maffei v. Alert Cable TV*, 316 N.C. 615, 621-22, 342 S.E.2d 867, 872 (1986), "the interest of members of the class in individually controlling the prosecution or defense of separate actions," "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," and "the difficulties likely to be encountered in the management of a class action," *see* Fed. R. Civ. P. 23(b)(3). A conclusion as to whether a class action is the superior method of adjudication is within the discretion of the trial court and is binding on appeal absent an abuse of discretion. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. Nevertheless, the trial court must make findings of fact to support its conclusion. *See Nobles*, 108 N.C. App. at 132-33, 423 S.E.2d at 315-16.

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5. We note that *Class Actions* focuses on Federal Rule 23 and cases interpreting that rule. Thus, the cases cited in *Class Actions* are not binding on this Court. Nevertheless, to the extent that we cite to *Class Actions*, we find the reasoning of the commentary, as well as the cases cited therein, instructive. *See Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 16, 454 S.E.2d 278, 286 (1995) (reasoning of federal class action cases, though not binding, may be instructive), *disc. review denied* 340 N.C. 260, 456 S.E.2d 831 (1995).

I

existence of a class

[3] In this case, the trial court stated that while "there is some common nucleus of operative facts," Plaintiff's case contains numerous individual issues that render class treatment inappropriate. First, the trial court found as an individual issue that the statute of limitations might bar some class members from maintaining the proposed claims. This consideration by the trial court that Wachovia and/or the American Security Defendants may have a defense to claims asserted by some members of the proposed class relates to the merits of individual plaintiff's claims and should not be considered at the certification stage of the proceedings. *See* 1 *Class Actions* § 3.16, at 3-88 -90 (defenses applicable to individual class members should be resolved in a trial on the merits and do not preclude maintenance of a class action, as the focus of class certification "is properly on the typicality of the plaintiff's claim as it applies to the general liability issues [and] not on the plaintiff's ultimate ability to recover"); *see, e.g.*, *Hamilton*, 118 N.C. App. at 11-12, 454 S.E.2d at 283-84 (some members of the class unable to recover based on the merits of their claims). The trial court, therefore, erred by considering possible defenses when it made the determination that the common issues did not predominate over issues affecting individual class members.

Second, the trial court found as an individual issue that "proof of damages in this case is individualized." While individualized proof of damages may be considered when determining whether a class exists, the relevant inquiry is whether the common issues of law or fact in the case predominate over the individualized damages issue. Thus, when a plaintiff establishes an issue of law common to all class members, the possibility of individualized damages is a collateral matter.[6] *See Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 431-32 (rejecting the defendant's argument that, because the recoveries of the proposed class members will vary, the proposed class should not be certified); 1 *Class Actions* § 3.16, at 3-87 (most courts have

6. We acknowledge that damages is an element of Plaintiff's contract claim and, thus, the proposed class members would have to prove the existence of damages to succeed on such a claim. As it is unclear at this preliminary stage of the proceedings how damages will be determined in this case and whether all members of the proposed class would be able to prove damages, it is error to find a class necessarily does not exist based on the possibility that some proposed class members may not be able to prove damages. If the proposed class is certified and it is determined at trial that some class members cannot prove damages, then individual claims that require proof of damages may be dismissed.

rejected argument that differences in amount of individual damages render class action improper). Moreover, the trial court may not consider the measure of damages until the nature of a breach has been determined; thus, such a consideration is often premature at the certification stage of the proceedings. *See Maffei*, 316 N.C. at 620, 342 S.E.2d at 871 (when the nature of the breach is uncertain and is to be resolved at a trial on the merits, the measure of damages cannot be determined at the certification stage of the proceedings). The issue of damages, therefore, must be considered in the context of whether the common issues of law or fact predominate over any collateral issue as to individualized damages.[7]

Third, the trial court found as an individual issue that "establishing the elements of fraud requires Plaintiff to make individual showings of facts" on the element of reliance and, thus, Plaintiff's claims "are not appropriate for class action treatment."[8] The effect of the trial court's finding is to conclude, as a matter of law, that a class does not exist for the purposes of class certification whenever the actions asserted by the proposed class will require individualized showings of facts. There is no requirement under Rule 23, however, that the claims asserted in a class action be factually identical as to all class members. Rather, the requirement for the existence of a class is that the same issue of law or fact predominate over any individual issues. Thus, the trial court erred by finding a class necessarily did not exist because Plaintiff's claims included a claim for fraud. *See Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 30, 86 S.E.2d 893, 900 (1955) (plaintiff properly brought action on behalf of himself and other owners of cemetery lot who were allegedly defrauded based on representations made by defendant regarding lots, as each class member who was induced by defendant's representations has a common interest with plaintiff). Moreover, the benefit of allowing consumer fraud actions to proceed as class actions must be considered when determining whether the element of reliance, an individual issue, renders a class non-existent. "The desirability of providing recourse for the injured consumer who would otherwise be finan-

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7. Similarly, a finding that "Wachovia has a potential claim or set-off against [Plaintiff]" raises a collateral matter as to Plaintiff's individual damages. While this collateral matter may be considered when determining whether a class exists, the proper test is whether the common issues of law or fact predominate over this collateral matter, in conjunction with any other individual issues raised.

8. To recover in an action for fraud in North Carolina, a Plaintiff must show actual reliance. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 663, 464 S.E.2d 47, 57 (1995).

cially incapable of bringing suit and the deterrent value of class litigation clearly render the class action a viable and important mechanism in challenging fraud on the public." 4 *Class Actions* § 21.29, at 21-55; *see also Maffei*, 316 N.C. at 620, 342 S.E.2d at 871 (recognizing "one of the basic purposes of class actions is to provide a forum whereby claims which might not be economically pursued individually can be aggregated in an efficient an economically reasonable manner"). A class, therefore, may exist in cases involving fraud claims when the common issues of fact or law predominate over any individual issues. Further, in weighing whether the common issues predominate over any individual issues, the trial court should consider public policy favoring protection of consumers from fraud in cases where, absent the availability of a class action, the consumers would for economic reasons be unlikely to bring an action against the offending parties.

Finally, the trial court found as an individual issue that alleged changes in Wachovia's CPI policy with the American Security Defendants, made in 1978 and 1992, create individualized issues in this case. The trial court stated these changes in the policies could result in differing damages as well as the need for individualized showings on the claims for fraud. As noted above, individualized damages is a collateral issue and, although individualized showings may be required in actions for fraud, this does not in and of itself preclude a finding of the existence of a class.

In summary, the trial court erred when ruling on the existence of this class when it considered possible defenses to the claims alleged by Plaintiff and found a class necessarily does not exist in cases involving actions for fraud. Thus, the potential individual issues that remain in this case are the collateral issue of damages and the individual showing required in a fraud action. These potential individual issues are outweighed by the common issues of law and fact. Such common issues include: (1) "the language in the promissory notes is the same for all potential class members"; (2) "the policies issued by the American Security Defendants were all substantially the same"; (3) "Wachovia's response to a borrower's breach of the loan contract was uniform—a standard notice was sent informing the borrower that Wachovia had force-placed insurance on the collateral"; and (4) "Wachovia owned a master insurance policy covering all potential class members." Accordingly, we hold the trial court erred when it found a class did not exist.

II

adequacy of class representative

[4] In this case, the trial court found Plaintiff was not an adequate class representative. First, the trial court found Plaintiff "has a conflict of interest with other members of the proposed class" because Plaintiff's personal insurance policy had higher premiums than the force-placed policy, the use of the gross loan balance rather than the net loan balance to compute Plaintiff's premium resulted in a lower premium for Plaintiff, and Plaintiff's premiums were lower under the remaining-term policy than they would have been under the annual policy. These three findings by the trial court do not demonstrate a conflict of interest as to the common claims alleged in Plaintiff's complaint; rather, these findings demonstrate that Plaintiff's damages may be different from the damages of other class members. A difference in the amount of damages does not create a material conflict of interest between Plaintiff and the other proposed class members. *See Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 431-32 (differing interests among members of class does not necessarily create a conflict of interest as to the common issues that define the class). Furthermore, as the appropriate method for calculating the alleged damages suffered by the class members is uncertain at this point in the proceedings, the record does not support the trial court's finding that issues surrounding Plaintiff's alleged damages create a conflict of interest. Additionally, the trial court found as a conflict of interest that some proposed class members may have benefitted from the issuance of additional endorsements under the force-placed policy and some of the class members may have benefitted from a lower deductible under the force-placed policy. However, there is no evidence in the record to support a finding that any members of the proposed class benefitted from the allegedly wrongful additional endorsements and lower deductible. *See* 1 *Class Actions* § 3.25, at 3-136 ("[m]any courts have held that speculative conflict should be disregarded at the class certification stage"). Furthermore, assuming some class members did benefit from these alleged breaches of their contracts, these benefits are relevant to the issue of damages and do not create a material conflict of interest between Plaintiff and members of the proposed class. Thus, the trial court erred by finding Plaintiff is an inadequate class representative based on a conflict of interest.

Second, the trial court found Plaintiff was an inadequate class representative because she has a lack of knowledge surrounding the allegations in the case and she "has not materially participated in the

prosecution of this action." Initially, we note that the record does not contain evidence to support the trial court's finding that Plaintiff "has not materially participated in the prosecution of this action." The record shows Plaintiff filed an affidavit in this case and gave extensive deposition testimony. Plaintiff's apparent lack of appearance at pretrial hearings, such as the 14 August 1998 hearing on Plaintiff's motion for class certification, is not a material lack of participation. Additionally, a plaintiff's knowledge regarding the allegations in her complaint is relevant to her adequacy as a class representative only to the extent that a lack of knowledge prevents the plaintiff from insuring "the interests of absent class members will be adequately protected." *See English*, 41 N.C. App. at 7, 254 S.E.2d at 230. A class representative is not rendered unsuitable because she lacks knowledge of the details of her case or the legal theories presented. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, 15 L. Ed. 2d 807, 814 (1966) (plaintiff's lack of understanding of allegations in complaint did not subject her shareholder derivative action to dismissal); 1 *Class Actions* § 3.34, at 3-165 (most courts have rejected challenge to adequacy of class representative based on the class representative's ignorance of facts or theories of liability). The record in this case shows Plaintiff was unable to explain in her deposition testimony the legal nature of her claims and was unable to define "tortious interference with contract" or "fiduciary." Nevertheless, Plaintiff's testimony demonstrated she understood that her claims related to Wachovia providing her with insurance on her vehicle after she failed to provide the required insurance. She also understood that she was alleging Wachovia breached its contract with her. Plaintiff's lack of knowledge at her deposition as to the specific legal nature of her claims does not render her unable to protect the interests of the proposed class members. Thus, the trial court erred by finding Plaintiff's lack of knowledge rendered her an inadequate class representative.

Third, the trial court found Plaintiff is an inadequate class representative because she has a criminal record that includes worthless check charges. As with any factors concerning a plaintiff's adequacy to represent a class, a plaintiff's personal background, including previous criminal convictions, must be considered based on whether such a background will prevent the plaintiff from representing the interests of the class. In this case, the trial court found Plaintiff's previous criminal convictions would affect her ability to represent the interests of the class because the criminal convictions might be admitted into evidence to impeach Plaintiff's credibility at

trial. Thus, to the extent that these criminal convictions harm Plaintiff's credibility as a witness, the trial court properly considered the convictions.

Fourth, the trial court found Plaintiff was not an adequate class representative because some of her claims may be barred by the applicable statutes of limitations. The issue of whether a plaintiff might ultimately prevail on the merits of her claim is not a proper consideration for whether she is an adequate class representative. *See* 1 *Class Actions* § 3.29, at 3-149 (the "named plaintiff need not demonstrate a probability of success on the merits or show in advance that he or she suffered damages in order to serve as the class representative"). If, subsequent to class certification, Plaintiff's claims are dismissed based on the statute of limitations, a substitute class representative may be provided to represent the class on the claims that have been dismissed. The trial court, therefore, erred by considering possible defenses to Plaintiff's claims when addressing whether Plaintiff is an adequate class representative.

Finally, the trial court noted at length in its order that Plaintiff did not seek counsel to "redress a perceived wrong"; rather, Plaintiff received a letter from her attorney suggesting that she might have a claim. This consideration regarding how Plaintiff became aware of her possible claims has no relevance to Plaintiff's adequacy as a class representative. Indeed, it seems likely that should the proposed class be certified in this case, the other members of the class will learn of their potential claims without first seeking counsel to "redress a perceived wrong." The focus of Plaintiff's adequacy as a class representative must remain on whether Plaintiff is able to represent the interests of the proposed class members. Thus, the trial court erred in this consideration.

In summary, the trial court erred when ruling on Plaintiff's adequacy as a class representative when it considered: (1) alleged conflicts of interest that relate to the damages of members of the proposed class, (2) Plaintiff's alleged lack of knowledge surrounding the allegations in her complaint, (3) that some of Plaintiff's claims may be barred by the statute of limitations, and (4) that Plaintiff did not seek counsel to "redress a perceived wrong." Thus, the only remaining finding by the trial court regarding Plaintiff's adequacy as a class representative is that Plaintiff has a criminal record that includes worthless check charges; however, when weighed against all other factors, the record does not support a finding that Plaintiff's criminal record renders her inadequate to represent the interests of the proposed

class. We, therefore, hold the trial erred by finding Plaintiff is not an adequate class representative. Additionally, we note that while the trial court did not make any findings regarding whether Plaintiff was an adequate class representative for class members outside of this State, the record shows Plaintiff sought certification of a class consisting solely of North Carolina members. Thus, this factor was not relevant to a determination of class certification.

III

numerosity of proposed class

[5] In this case, the trial court did not make any findings regarding the numerosity of the proposed class. Plaintiff alleged the existence of a class "reasonably believed to be in excess of 1,000 persons." Additionally, Plaintiff alleged the identity of the proposed class members "can be determined from records maintained by [d]efendants." These allegations by Plaintiff are sufficient to satisfy the numerosity requirement that it would be impractical to join all members of the proposed class. Further, the record does not contain any evidence Plaintiff's estimation of the class size is not a good faith estimate. *See* 1 *Class* Actions § 3.05, at 3-20 (good faith estimate of class size sufficient). Generally, when a trial court fails to make required findings of fact, the case must be remanded to the trial court for entry of findings. *See Sholar Business Assocs. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000). However, when the evidence in the record as to a finding is not controverted, remand is not required. *See id.* at 304, 531 S.E.2d at 240. Because Plaintiff's allegations are sufficient to support a finding of numerosity and the evidence regarding numerosity is not controverted, we hold Plaintiff has met her burden of establishing this prerequisite to certification.

IV

superior method of adjudication

[6] In this case, the trial court concluded a class action was not the superior method to determine the claims at issue based on the following findings of fact: (1) "this is a case of de minimus damages"; (2) "multiple causes of action have been asserted, many of which require individualized proof"; (3) "ascertainment of damages will be based upon individual situations"; and (4) "the expansive nature of the proposed class will result in excessive transaction costs and difficulties." The record in this case does not contain any evidence as to the actual amount of damages the class members would recover should they

succeed on their claims; therefore, the record does not contain competent evidence to support the trial court's finding regarding the de minimus nature of damages. Similarly, the record does not contain any evidence to support the trial court's finding that "the expansive nature of the proposed class will result in excessive transaction costs and difficulties." Finally, the trial court's remaining findings regarding individualized issues of proof, including proof as to damages, are collateral matters in this case that do not outweigh the useful purposes in bringing a class action such as preventing multiplicity of suits and inconsistent results. *See Dublin v. UCR, Inc.*, 115 N.C. App. 209, 214-17, 221, 444 S.E.2d 455, 458-60, 462 (upholding certification of class as superior method of adjudication when class consisted of an estimated 4,000 members, action included claims for breach of contract and unfair or deceptive trade practices, and damages would presumably be small as to individual plaintiffs), *disc. review denied and appeal dismissed*, 337 N.C. 800, 449 S.E.2d 569 (1994). Accordingly, the trial court erred when it found Plaintiff did not meet her burden of establishing the prerequisites to certification. Additionally, the trial court abused its discretion when it concluded a class action was not the superior method to determine the claims at issue. The trial court's 7 February 2000 order is, therefore, reversed and this case is remanded to the trial court for entry of an order allowing Plaintiff's motion for class certification.

order granting summary judgment

[7] Dispositive motions, such as motions for summary judgment, are not properly considered by the trial court until after ruling on a motion for class certification. *See* 2 *Class Actions* § 7.15, at 7-51 (noting recent decisions in several jurisdictions have held that "class certification issues should be addressed before consideration of a dispositive motion"). In addition to promoting judicial economy, the rationale for this rule is that, should a class be certified, the class would have an opportunity to provide a substitute class representative for any claims disposed of as to the individual plaintiff. *See* 59 Am. Jur. 2d *Parties* § 79, at 499 (1987) ("certification of class is to be undertaken with no consideration of the merits of the [named] plaintiffs' claims"); 59 Am. Jur. 2d *Parties* § 58, at 466, § 87, at 508-09 (proper class representative may be substituted if the named class representative is no longer a proper representative because of her conduct or her interests).

In this case, the trial court ruled on the American Security Defendants' motions for summary judgment subsequent to its denial

of certification. However, because we reverse the certification portion of the trial court's 7 February 2000 order, we vacate the summary judgment portion of that order. On remand, the trial court must enter an order certifying Plaintiff's proposed class. Subsequent to entry of a certification order, the trial court may consider any dispositive motions as to Plaintiff's claims and the claims of other individual class members.

Reversed in part, vacated in part, and remanded.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. DARYL KENT MASON

No. COA99-1629

(Filed 5 June 2001)

1. **Evidence— videotape—insufficient foundation—not prejudicial**

The admission of a store security videotape in an armed robbery prosecution was harmless error where the State did not establish a proper foundation for its admissibility in that the evidence was insufficient to establish that the system was properly functioning on the date of the robbery, the testimony was insufficient to establish that the tape accurately represented the events it purported to show, and the chain of custody was not adequately established, but there was other evidence providing a substantial basis for the jury's verdict.

2. **Evidence— cross-examination—audiotape not allowed—not prejudicial**

The trial court neither abused its discretion nor coerced defendant into presenting evidence in a prosecution for the armed robbery of a store by refusing to allow defendant to cross-examine an employee with a tape recording of her 911 call. The judge merely ruled against the use of an audiotape and did not prevent defendant from exploring this avenue of inquiry; furthermore, defendant was permitted to introduce the tape during his case in chief.

3. Criminal Law— prosecutor's argument—curative instruction

The trial court did not err in an armed robbery prosecution by not granting a mistrial where defendant objected to the prosecutor's argument concerning defendant's failure to present evidence to rebut the State's case, the court sustained the objection, and the court directed the jury "not to consider that." Any error was sufficiently cured by the court's instructions.

Judge WALKER concurring in the result.

Appeal by defendant from judgment entered 18 December 1998 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 14 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General E. Clementine Peterson, for the State.

Mark J. Simeon, for the defendant-appellant.

BIGGS, Judge.

Daryl Kent Mason (defendant) appeals from a judgment entered 18 December 1998, following his conviction of robbery with a dangerous weapon. We find error in the admission at trial of a videotape, but hold that the error was harmless on the facts of this case. Accordingly, we affirm the conviction and judgment below.

The defendant was tried for the armed robbery of an Eckerd drugstore located in Durham. The evidence presented at trial is summarized as follows: On the night of 7 January 1998, Camella Carter (Carter), Tonya Dickerson (Dickerson), and Vicki Perez (Perez) all were employed at Eckerd's store. The defendant was a former Eckerd's employee who had recently stopped working there. At approximately 11:30 or 11:45 P.M., shortly before the store closed at midnight, the defendant came into Eckerd's and spoke with Carter. He asked her who else was working that night, and asked for change to buy a candy bar. He was wearing a white nylon 'windbreaker' jacket over a black sweatshirt. After speaking with the defendant, Carter resumed her duties, and the defendant walked to the front cash register, which was operated by Dickerson. A few minutes after the store closed, Carter heard Dickerson scream, followed by another person shouting "[s]hut up!" She looked up from her work, saw the

defendant with a gun pointed at Perez, and heard him say "[t]his is a robbery." Although the robber was masked, Carter recognized the defendant by his clothes—a black sweatshirt and white pants that matched the windbreaker she had noticed him wearing a few minutes earlier. The defendant demanded money from Perez, and led her toward the front of the store. Camella ran to a storage room, where she hid during the rest of the incident. She saw nothing more; however, a few minutes later, she heard someone opening and shutting the back door to the store, then throwing what sounded like keys onto the floor. Carter testified that no one used the back door except employees, and also that she had not seen the defendant leave the store before closing. She was certain of her identification of defendant as the person who had robbed Eckerd's.

Dickerson testified that she had worked with the defendant at two different stores: at Eckerd's, and also at a nearby Food Lion grocery. On 7 January 1998, the defendant came into Eckerd's just before closing and asked Dickerson who else was working that evening. He mentioned buying a candy bar, but he never purchased anything. Dickerson noticed that he wore a white windbreaker; she could not see his pants from behind her cash register. She did not see him leave the store before it closed. After their conversation, Dickerson returned to work. A few minutes after the store closed, Dickerson felt a tap on the shoulder. When she turned around, she saw two masked men with guns and began screaming. She recognized the defendant's voice when one of the men yelled "[s]hut up Tonya!" The defendant left her with his accomplice, while he went toward the cash register operated by Perez. Dickerson could not see Perez's part of the store, but in a few minutes the defendant returned to the area near her cash register, holding a clear plastic trash bag filled with cash. Dickerson was certain that the defendant was one of the two who robbed the store: she recognized his voice, and also his white nylon pants matched the jacket he was wearing when he spoke with her shortly before the robbery. After taking money from several cash boxes in the store, the robbers demanded the keys to the employees' back door. They ordered Carter, Dickerson, and Perez into the ladies' room, and then fled from the store. Neither Carter nor Dickerson recognized the second gunman.

When the State sought to introduce a store surveillance videotape at trial, the defendant objected, and a voir dire was conducted on the tape's admissibility. The trial court allowed the admission of the videotape. On appeal to this Court, the defendant assigns error to its

admission, arguing that the State failed to establish an adequate foundation for its admissibility.

Evidence presented at trial during the voir dire showed the following: Neither Carter nor Perez testified on voir dire. Dickerson testified on voir dire that Eckerd's was using a store security camera system on 7 January 1998. As far as she knew, it was operating properly that night. However, she had no information about maintenance, testing, or operation of the machine, had never tested it, and did not know the brand or model of the recording device. She had not played any part in making the recording that evening, as that was the responsibility of Perez, who was evening manager. The night that the store was robbed, Dickerson saw Perez handing a videotape to a police officer, but did not know his name. At some point after the robbery, Dickerson viewed a tape in which she was shown speaking with the defendant in Eckerd's. It also appeared to show the defendant robbing Perez at gunpoint. However, from her location in the store, Dickerson had been unable to see Perez during the robbery, so she had not seen the defendant rob Perez or demand money from her. Thus, she could not attest to the accuracy of the videotaped robbery scenes, although she could state that the segments of tape in which she was present appeared to be accurately videotaped.

Dan Merit, Eckerd's general manager, testified that Eckerd's security system had eight cameras that could be programmed to videotape various locations in the store. The system also included a VCR, and a separate machine that controlled which cameras would record at any given time. He described the employees' procedure for operating the system as "basically what you do is you put the tape in, you hit the record button, you see whether the record light comes on." He was not in the store during the robbery, or when the tape was given the police. Merit had no reason to believe that the system was malfunctioning on 8 January 1998. However, he did not keep any records on the maintenance or testing of the system, and he had not checked the tapes made during the days immediately before and after the robbery to assess whether the system was properly functioning. Further, Merit testified that the store system "is a preprogrammed time-lapse VCR recorder and I am not technically minded enough to tell you how the doggone thing works," and that "I truthfully don't know how the thing works." At some point in the six months following the robbery, the VCR had broken and was replaced.

Officer Pitt of the Durham City Police testified that he had retrieved a videotape from the police evidence locker several days

after the robbery. He recalled that the tape's label indicated that it came from the store; however, he had not been at Eckerd's the night of the robbery, and was not the officer who had obtained custody of the tape. Officer Marsh, another Durham police officer, testified that he had been at Eckerd's on the night of the robbery. He had summoned an identification technician to retrieve the tape and other physical evidence, but he had not touched the tape himself, or taken custody of it. The tape was shown on voir dire, and Dickerson testified to the accuracy of the portion of the tape that showed her conversation with the defendant before the robbery. Following the voir dire hearing, the trial court denied the defendant's suppression motion, and ruled that the tape was admissible as substantive evidence. The videotape was then shown to the jury over defendant's objection. Dickerson attested to the accuracy of the segments of tape in which she was present. Due to the nature of the Eckerd's photo surveillance system, the events depicted on the tape would appear at an unnaturally fast speed when the tape was shown on a conventional VCR. To avoid this 'fast-action' playback, the court directed the prosecutor to play the tape on the VCR's 'slow motion' setting. However, after a few minutes on slow motion, the tape would automatically revert to high speed until Officer Pitt could stop the tape and restart it in slow motion. This resulted in intermittent "gaps" of approximately 30 seconds.

After the tape was played, the jury heard testimony by Officers March and Pitt of the Durham police force, concerning their investigation of the case. Marsh was at Eckerd's the night of the robbery to interview witnesses and secure the scene; and Pitt conducted the subsequent investigation. The identification technician who had retrieved the tape the night of the robbery did not testify at trial; nor did Perez, the cashier who was shown being robbed on the videotape.

[1] The general rule is that the admissibility of a videotape is governed by the same rules that apply to still photographs. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970) (upholding admission of film of driver charged with DWI, taken after his arrest). Upon a proper foundation, videotapes, like photographs, are admissible at trial for either illustrative or substantive purposes:

> Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not pro-

> hibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

N.C.G.S. § 8-97 (1999). In the present case, the store surveillance tape was admitted for substantive purposes. This Court has noted that when "a videotape depicts conduct of a defendant in a criminal case, its potential impact requires the trial judge to inquire 'carefully into its authenticity, relevancy, and competency[.]' " *State v. Billings*, 104 N.C. App. 362, 371, 409 S.E.2d 707, 712 (1991) (citation omitted). The standard for the admission of a videotape was articulated in *State v. Cannon*, 92 N.C. App. 246, 374 S.E.2d 604 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), in which this Court stated:

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, (illustrative purposes); (2) 'proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape;' (3) testimony that 'the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing' (substantive purposes); or (4) 'testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.'

Id. at 254, 374 S.E.2d at 609 (citations omitted). In *Cannon* the proponent of the videotape at issue offered testimony from a witness who had seen the filmed events when they occurred, attesting to the videotape's accuracy; testimony that the machine had been installed just six weeks earlier and was working properly on the night of the offense; and testimony from a law enforcement officer that he had maintained exclusive custody of the film since the night of the robbery.

The *Cannon* standard has been followed in subsequent cases addressing the foundation required before a videotape may properly be admitted into evidence. In *State v. Mewborn*, 131 N.C. App. 495, 507 S.E.2d 906 (1998), the defendant challenged the admission of a videotape of the armed robbery of a store. The State offered testimony from a store employee that the VCR was working properly on the day of the offense. Other testimony by a law enforcement officer who had viewed the tape immediately after the incident, and by the

officer who had assumed custody of the tape shortly after the incident and had viewed it that night, established that the tape was in the same condition and depicted the same events as on the night of the robbery. This Court held that, taken together, the testimony of the three witnesses was sufficient to "satisfy the test enunciated in *Cannon.*" *Id.* at 499, 507 S.E.2d at 909.

This Court recently applied the same test to a situation in which the foundation was insufficient. In *State v. Sibley*, 140 N.C. App. 584, 537 S.E.2d 835 (2000), the defendant was arrested along with several others, at a house that was not his residence, and subsequently was charged with possession of a firearm by a convicted felon and possession of cocaine. The defendant objected to the admission at trial of a videotape seized from the premises that showed the defendant holding weapons similar to those found in the house. Testimony at trial established an unbroken chain of custody. However, the State did not call any witnesses to testify that the camera was operating properly, or that the videotape accurately presented the events that were filmed. This Court applied the *Cannon* test in its inquiry into the videotapes' admissibility. It held that the videotapes were not properly authenticated, and thus were inadmissible.

We evaluate the admissibility of the videotape offered in the instant case against the backdrop of *Cannon*, *Mewborn*, and *Sibley.* These cases define three significant areas of inquiry for a court reviewing the foundation for admissibility of a videotape: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody. In the instant case, the evidence was deficient in each of these areas.

Two of the State's witnesses, Dickerson and Merit, were asked about the surveillance system, and both expressed the opinion that it was in working order. However, neither one knew anything about the maintenance or operation of the camera system. Dickerson testified that she could not even operate her home VCR, but relied upon her husband; Merit candidly admitted that he did not know "how the doggone thing works" and did not conduct the recommended inspection or maintenance of the camera or monitors. Some time after the robbery, the VCR had malfunctioned, and was replaced. None of the State's witnesses gave testimony to indicate that there was any routine maintenance or testing of the Eckerd's security system. Nor was there testimony from any witness that the tapes made on days imme-

diately preceding and following the robbery had been examined. The evidence presented at trial was insufficient to establish that the store security system was properly functioning on 8 January 1998.

The trial testimony also was insufficient to establish that the tape accurately represented the events it purported to show. The tape included segments of routine activity in the store, including a conversation between Dickerson and the defendant before Eckerd's closed. It also depicted someone robbing a woman identified by other witnesses as a cashier named Vicki Perez. However, Ms. Perez did not testify at trial, so there was no testimony attesting to the accuracy of this crucial part of the tape. Although Dickerson could identify the segment of tape showing her in conversation with the defendant, the more significant part of the tape was never authenticated.

Additionally, the chain of custody was not adequately established. Testimony indicated that Perez had given the tape to a law enforcement officer on the night of the offense. However, neither Perez nor that officer appeared at trial. No testimony was presented from any witness who had handled the tape on 8 January 1998. In fact, the evidence on chain of custody began chronologically with Officer Pitt, who did not get the videotape from a police locker until several days after the robbery at Eckerd's.

Defendant argues further that the videotape should not be allowed because of the incompatibility of the equipment used to record the videotape and that used in the courtroom for playback, in that it created 30 second intervals. We find it unnecessary to address this argument in view of our discussion herein.

For the reasons discussed, we find that the State failed to sufficiently authenticate the contents of the videotape, or to establish an unbroken chain of custody, or to show that the store security system was properly functioning on the day of the robbery. The evidence presented at trial concerning the videotape did not lay a proper foundation for its admissibility, and thus it was error to admit the videotape.

However, not all trial errors require reversal. The error must be material and prejudicial. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983) (admission of irrelevant evidence held not prejudicial on facts of case). An error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C.G.S. § 15A-1443(a)

(1999). Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless. *State v. Francis*, 343 N.C. 436, 471 S.E.2d 348 (1996) (trial court's error in admitting witness's statement held harmless where defendant showed no likelihood of different result had statement been excluded); *State v. Fluker*, 139 N.C. App. 768, 535 S.E.2d 68 (2000) (error not grounds for reversal where there is no reasonable possibility that, absent the error, the trial would have had a different result). On the other hand, the erroneous admission of evidence is reversible if it appears reasonably possible that the jury would have reached a different verdict without the challenged evidence. *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001) (erroneous admission of expert testimony in child sex abuse case held reversible error on facts of case). The defendant bears the burden of showing that he was prejudiced by the admission of the evidence. *State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986).

In the present case, there was substantial evidence of the defendant's guilt. The state presented testimony from two eyewitnesses, Carter and Dickerson, both of whom confidently identified the defendant as one of the men who had robbed Eckerd's. Both had been employed at Eckerd's with the defendant, and Tonya Dickerson had also worked with him at a Food Lion grocery. This is consistent with testimony that the robber had yelled "[s]hut up Tonya!" when Dickerson shouted. The defendant's behavior before the robbery was inherently suspicious: coming into the store shortly before closing without buying anything, and asking two different clerks for the names of other employees on duty that night. Both Carter and Dickerson had noticed the defendant's white nylon jacket during their conversations with him during store hours, and both noticed that the robber wore a matching pair of pants. Additionally, the robber appeared familiar with store procedures; he asked for the keys to the back door, which was used only by employees and was not visible to the public. Taken together, this evidence provides a substantial basis for the jury's verdict.

We conclude that the defendant has not met his burden of showing that there is a reasonable possibility that a different verdict would have resulted from the exclusion of the videotape. We also have considered the defendant's other assignments of error pertaining to the replay of this videotape in response to a jury request, and find that any error was harmless. Accordingly, we hold that the admission at trial of the store videotape constituted harmless error.

[2] The defendant next assigns error to the trial court's refusal to allow him to cross examine Dickerson with a tape recording of a call she had made to the '911' operator. On direct examination, Dickerson testified that she had participated in the 911 call, and had given the emergency operator a description of the robber. However, she did not remember the details of this conversation. The defendant sought to cross-examine Dickerson with a tape recording of the call, in order to reveal inconsistencies between her trial testimony and what she had told the 911 operator. The trial judge ruled that the defendant could not play a tape recording on cross-examination, although he might introduce the tape during his case in chief.

The defendant correctly states the general rule that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611 (b) (1999). Dickerson's prior statements to the 911 operator were relevant to the issue of the weight to accord her testimony. However, Rule 611 also 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). "[T]he scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 666 (2000), *disc. review denied*, 353 N.C. 394, 547 S.E.2d 37 (2001) (citation omitted). In this case, the trial judge did not prevent the defendant from exploring this avenue of inquiry. The court merely ruled against the use of an audiotape for cross-examination. However, the defendant could have conducted his cross-examination about the 911 call by questioning the witness from a transcript of the call. Further, the defendant was permitted to introduce the tape during his case in chief. We hold that the court neither coerced the defendant into presenting evidence, nor abused its discretion. This assignment of error is overruled.

[3] Finally, the defendant assigns error to the trial court's refusal to declare a mistrial in response to certain comments of the prosecutor during his closing argument to the jury. In the closing argument, the

prosecutor made several references to the defendant's failure to present evidence to rebut the State's case. In addition, the prosecutor made the following statement:

> There is no evidence the defendant ever left the store. That's what the crux of the case is all about. That's what the defense should have presented you in the case. Anybody come in here from the defense to tell you as a witness that Daryl Mason left the store? If you were wrongly accused, don't you think that would be important to your defense? *I was not in that store.* (emphasis added)

The defendant objected to this statement. The trial judge sustained his objection, and directed the jury "not to consider that." Defendant contends the prosecutor's remarks were an improper comment on his failure to testify, and required the trial court to declare a mistrial. We disagree.

A defendant's right not to testify is guaranteed under the Fifth Amendment to the U.S. Constitution, applicable to the states by the Fourteenth Amendment, as well as by Article I, § 23 of the North Carolina Constitution. It is axiomatic that "[a] criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994) (citation omitted). Such comment should be "cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. Trull*, 349 N.C. 428, 453, 509 S.E.2d 178, 194 (1998). However, in its closing argument, the prosecutor may properly bring to the jury's attention the defendant's failure to produce exculpatory evidence, or to contradict evidence presented by the State. *State v. Parker*, 350 N.C. 411, 516 S.E.2d 106 (1999); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982). Further, if challenged, the prosecutor's remarks should be examined in the context of the entire argument, and of the evidence presented at trial. *State v. Penland*, 343 N.C. 634, 472 S.E.2d 734 (1996). We have employed these principles in our consideration of the record, and find that the error, if any, was sufficiently cured by the trial judge's instructions, and that a mistrial was not required.

For the reasons discussed above, we conclude that there was no prejudicial error and that the defendant's conviction and judgment below should be affirmed.

No error.

Judge SMITH concurs.

Judge WALKER concurring in the result with separate opinion.

WALKER, Judge, concurring in the result.

I would defer to the trial court's determination that a sufficient foundation had been established by the State to admit the videotape into evidence. The thrust of the defendant's argument relates to the playback of the videotape during the trial. In his brief, the defendant characterizes his argument in part as follows:

> Surveillance video recordings such as those at issue here are different from normal videotaping, however, because they involve the taking (and playback) of substantially fewer photographs and at a much different rate, so as to permit the use of less videotape to cover a longer period of time without the need to change videotape cassettes. Hence, 'time-lapse' videography.
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> At this trial, the state offered absolutely no evidence at trial to explain the time-lapse videography recording process or playback process, and no evidence which explained why the playback was so problematic. The state admits that the problem was with their use of the wrong machine, but they never cured the problem either. There can be no question but that the videotape playback was the heart and soul of the state's case, relying upon it to prove a negative, that the defendant never left the store.
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> The most telling evidence of the total lack of description of the process or system by which such a time-lapse videotape was produced, and the unmitigated absence of a showing that the process produced an accurate result came from the jury itself which, during deliberation, questioned the court about (1) the missing gaps of footage, and (2) which of the machines was faulty . . . .

Again, the trial court is in the best position to assess whether the playback of the videotape under the circumstances would aid the jury in its decision.

IN RE POPE

[144 N.C. App. 32 (2001)]

IN THE MATTER OF: EVA LEONIA GRACE POPE, MINOR CHILD

No. COA00-873

(Filed 5 June 2001)

Termination of Parental Rights— progress in therapy—probability of repeated neglect

The trial court correctly terminated respondent's parental rights pursuant to N.C.G.S. § 7B-1111(1) where respondent argued that she had complied with all of the services recommended and had made good progress in therapy, but the court found that she had made no progress and concluded that there was a probability of a repetition of neglect if the child was returned to respondent's custody.

Judge TYSON dissenting.

Appeal by respondent mother from judgment filed 9 May 2000 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 8 May 2001.

Charlotte A. Wade for Buncombe County Department of Social Services, petitioner-appellee.

Michael E. Casterline for Rachel Emily Pope, respondent-appellant.

Attorney Advocate Judy N. Rudolph for Guardian ad Litem, Cindy Sellars,-appellee.

GREENE, Judge.

Rachel Emily Pope (Respondent) appeals a judgment filed 9 May 2000 terminating her parental rights as the mother of Eva Leonia Grace Pope (the minor child).

The record shows that on 1 June 1999, the Buncombe County Department of Social Services (DSS) filed a petition, in pertinent part, to terminate the parental rights of Respondent pursuant to N.C. Gen. Stat. § 7A-289.32(2)[1] (neglect) and N.C. Gen. Stat. § 7A-289.32(3)[2]

1. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1111(a)(1) (1999).

2. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1111(a)(2) (1999).

(willfully leaving minor child in foster care for more than 12 months). The trial court held hearings on the petition on 22 October 1999, 16 November 1999, and 17 November 1999. Subsequent to the hearings, the trial court made the following pertinent findings of fact:

> 12. That [DSS] initially filed a juvenile petition February 26, 1998, alleging that the minor child was an abused and neglected child. That the allegations of abuse were based on the physical condition of the minor child, who was then 9 months old and had been admitted to Memorial Mission Hospital on February 23, 1998, for failure to thrive. At the time of admittance to the hospital, the minor child weighed only a little over 12 pounds; she was below the 5th percentile for her age; and, presented as a typical 3 month old instead of 9 months old. The minor child could not sit up independently, would not attempt to push herself up if lying on her stomach, had difficulty grasping objects, and she continually held her arms in an upright position at a 90 degree angle.
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> 13. That the allegations of neglect in the original juvenile petition were that the minor child had not been examined by a pediatrician since her birth but had only seen chiropractors and naturopatic doctors, and that the hospital physicians had ruled out medical reasons for the [minor] child's condition, indicating that the cause of the [minor] child's condition was the failure of [Respondent] to provide proper care for the [minor] child.
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> 14. That on April 23, 1998, [Respondent] consented to an adjudication of neglect in that the minor child did not receive the proper care and supervision from [Respondent], and did not receive the necessary medical care from [Respondent]. In the adjudication[,] [Respondent] consented to all the allegations contained in the juvenile petition, and stated to the court that she did not understand the extent of the minor child's physical needs, but that she now understands those needs since reading the medical records.
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> 18. That Ms. Foster [the sister of Respondent,] is a resident of Buncombe County, North Carolina. That Ms. Foster returned to Raleigh in February, 1998, at which time [Respondent] allowed Ms. Foster to bring the minor child back with her to Buncombe

County for a visit. That Ms. Foster was extremely concerned about the minor child's condition in that the child was listless; she la[y] without moving; her arms were raised over her head at a 90 degree position; and she was emaciated. Due to her concerns, Ms. Foster took the minor child to see Dr. Sechlar at Asheville Pediatrics on February 23, 1998, at which time Dr. Sechlar immediately admitted the child to Memorial Mission Hospital for failure to thrive.

. . . .

20. That while the [minor] child was hospitalized, the hospital staff was concerned about [Respondent's] behaviors. That the staff attempted to discuss with [Respondent] the [minor] child's condition and needs, but [Respondent] would respond by talking about her ([Respondent's]) problems. [Respondent] was never willing to discuss or acknowledge that [the minor] child was starving to death at the time the [minor] child was admitted to the hospital.

21. That the minor child was starving to death before [Respondent's] eyes. Nevertheless, [Respondent] testified at this hearing that the minor child was fine, healthy, happy, well fed, and reaching all her developmental milestones until Ms. Foster took the child to Buncombe County, and that the child's problems all began due to th[e] change in her environment. [Respondent] testified that all the problems were the fault of Ms. Foster, and the only problem [Respondent] needed to fix was to get the minor child a pediatrician.

22. That [DSS] provided many services to [Respondent] to aid her in correcting the conditions which led to the removal of the minor child from her care. [Respondent] has had a psychological evaluation; has been referred to and attended Dialectic Behavior Therapy sessions at Blue Ridge Center; has participated in and completed parenting classes; and has visited with the child on a regular basis. That [Respondent] has made no progress even with all these services, and even after 21 months [Respondent] is still insisting that it was solely Ms. Foster's fault that the minor child is in the custody of [DSS]. That [Respondent] has no insight as to the reason that [DSS] became involved in this case, and still lacks any understanding of the seriousness of [the minor] child's condition in February, 1998.

23. That [Respondent] had a psychological evaluation done on April 23, 1998, and a copy of said evaluation was admitted into evidence and is incorporated herein by reference as though fully set out herein. That [Respondent] has a personality disorder with seriously disturbed thinking. Her psychological condition is difficult to change; and change would require that [Respondent] be highly motivated to change; and that she acknowledge her problems and work diligently in therapy to change her thinking. That without effective treatment for her personality disorder, there would be a high risk that [Respondent] would continue to treat the minor child as she has done in the past. That [Respondent] has a very high IQ and is able to function well to meet her own needs.

24. That [Respondent] testified at this hearing that she did not agree with the psychological evaluation; denied that she had any disturbed thinking; denied that she had done anything to place the minor child at risk; testified that the only reason [DSS] had taken custody was due to the fault of Ms. Foster; and testified that the only thing she would change if the [minor] child was returned to her care would be to get the [minor] child a pediatrician. That [Respondent] testified[,] . . . "I've racked my brain trying to figure out" why the minor child was starving to death in February, 1998, but did not know why that had occurred.

25. That [Respondent] has been provided supervised visits twice a week at [DSS]. That these visits were supervised by the social worker, who used these supervised visits to show [Respondent] appropriate child care skills. That the social worker requested that [Respondent] be prepared to feed the [minor] child at these visits, and had referred [Respondent] to nutritional services so she could learn what and how to feed [the minor] child. Despite these efforts, [Respondent] continued to try [to] feed the [minor] child inappropriately both in the manner she tried to feed her and the food she brought to feed the [minor] child. Even after being told that the [minor] child could have an allergic reaction to strawberries, [Respondent] brought strawberries to feed the [minor] child. Further, [Respondent] continued to place the [minor] child in risky situations; specifically, on one occasion[,] [Respondent] stood on a toddler's chair, placed the minor child on a window sill and let go of the [minor] child. That the room this occurred in had cement floors. That the social worker had to intervene to tell [Respondent] that this was dangerous, but

> [Respondent] did not appear to care or understand. That the social worker had to instruct [Respondent] to take the [minor] child down from the windowsill.
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> . . . .
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> 31. That it is clear to the court that [Respondent] dearly loves [the minor child], and that [Respondent] has made within the limits of her ability a sincere effort to be reunited with [the minor child] and to comply with court orders. However, there is no evidence at all that with all her efforts [Respondent] is now or will ever be able to provide for [the minor child] in a way that would allow [the minor child] to grow up healthy, happy and well developed; nor is there any evidence that would give this court the hope that [Respondent] could in the near future make the changes necessary to allow the [minor] child to be placed back with [Respondent] safely.

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

> 3. That the Court finds by clear, cogent and convincing evidence that grounds exist to terminate the parental rights of [Respondent] pursuant to N.C.G.S. 7B-1111[(a)](1) in that she has neglected the minor child when the minor child was placed into the custody of [DSS], she ha[s] continued to neglect the minor child while the [minor] child has been in the custody of [DSS] and it is reasonably probable that she would continue to neglect the minor child if she were returned to her care[.]

The trial court then ordered the termination of Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), N.C. Gen. Stat. § 7B-1111(a)(2) (willfully left in foster care), and N.C. Gen. Stat. § 7B-1111(a)(3) (willfully failed to pay support).

The dispositive issue is whether the trial court's findings of fact support a conclusion of law that there is a probability of repetition of neglect if the minor child were returned to Respondent.[3]

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3. Although Respondent assigns error to the trial court's findings of fact numbers 12 through 26, Respondent does not argue in her brief to this Court that these findings of fact are not supported by clear and convincing evidence in the record. Thus, this Court is bound by the trial court's findings of fact. *See Baker v. Log Systems, Inc.*, 75 N.C. App. 347, 350-51, 330 S.E.2d 632, 635 (1985) (where appellant does not bring forth in her brief exceptions to findings of fact, she is deemed to have abandoned them under Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure).

Respondent argues "the trial court erred when it concluded that [Respondent] would continue to neglect the minor child when [Respondent] had complied with all of the services recommended and had made good progress in therapy." We disagree.

Neglect, within the meaning of N.C. Gen. Stat. § 7B-101(15), is one of the grounds which can support the termination of parental rights. N.C.G.S. § 7B-1111(a)(1) (1999). To prove neglect in a termination case, there must be clear and convincing evidence: (1) the juvenile has not, at the time of the termination proceeding, "receive[d] proper care, supervision, or discipline from the juvenile's parent . . . or . . . is not provided necessary medical care," N.C.G.S. § 7B-101(15) (1999); *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984); and (2) the juvenile has sustained "some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment as a consequence of [such] failure," *see In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). If there is no evidence of neglect at the time of the termination proceedings, however, parental rights may nevertheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232. Thus, the petitioner need not present evidence of neglect subsequent to the prior adjudication of neglect. *See In re Caldwell*, 75 N.C. App. 299, 302, 330 S.E.2d 513, 516 (1985).

In this case, Respondent did not have custody of the minor child at the time of the termination proceedings. The trial court, therefore, did not make any findings the minor child was neglected at the time of the termination proceedings. The trial court, however, made findings there had been a previous adjudication of neglect in 1998. The 1998 adjudication of neglect was based on findings the minor child "was starving to death" while in Respondent's custody and suffered from "failure to thrive"; "hospital physicians had ruled out medical reasons for the [minor] child's condition, indicating that the cause of the [minor] child's condition was the failure of [Respondent] to provide proper care for the [minor] child"; and Respondent did not seek medical care for the minor child. Although Respondent utilized many services provided by DSS subsequent to the 1998 adjudication of neglect, the trial court found as fact Respondent "made no progress even with all these services" and Respondent "still lacks any understanding of the seriousness of [the minor] child's condition in

February, 1998." The trial court also found as fact that at the time of the termination hearing, Respondent

> denied that she had done anything to place the minor child at risk; testified that the only reason [DSS] had taken custody was due to the fault of Ms. Foster; and testified that the only thing she would change if the [minor] child [were] returned to her care would be to get the child a pediatrician.

Additionally, the trial court found as fact that during Respondent's supervised visitations with the minor child, Respondent continued "to try and feed the [minor] child inappropriately both in the manner she tried to feed her and the food she brought to feed the [minor] child." These findings of fact support a conclusion of law that if the minor child were returned to Respondent's custody, there would be a probability the minor child would not receive proper care from Respondent or proper medical care, and the minor child would sustain physical and/or mental impairment as a result of such failure. It follows that if the minor child were returned to Respondent's custody, there would be a probability of repetition of neglect.[4] Accordingly, the trial court's 9 May 2000 judgment, terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), is affirmed.[5]

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge TYSON dissents.

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4. We note that the trial court's conclusion of law states "it is *reasonably probable* that [Respondent] would continue to neglect the minor child if she were returned to her care." (Emphasis added.) Although the proper legal standard for determining whether parental rights should be terminated under section 7B-1111(a)(1) is whether there is a *probability* of repetition of neglect, *see Ballard*, 311 N.C. at 716, 319 S.E.2d at 232, this error is harmless because the trial court's findings of fact support a legal conclusion that there is a probability of repetition of neglect, *see In re Bluebird*, 105 N.C. App. 42, 51, 411 S.E.2d 820, 825 (1992) (trial court's failure to correctly state in its order the specific statutory ground for termination is harmless error when the findings of fact support a legal conclusion that grounds for termination exist).

5. Because the trial court properly terminated Respondent's parental rights under section 7B-1111(a)(1), we need not address Respondent's arguments in her brief to this Court that her parental rights were improperly terminated pursuant to section 7B-1111(a)(2) and section 7B-1111(a)(3). *See In re Davis*, 116 N.C. App. 409, 413, 448 S.E.2d 303, 305, *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994).

TYSON, Judge, dissenting.

I would reverse the order and remand for further proceedings toward reunification, consistent with the minor child's best interest, in light of the overriding purpose of the Juvenile Code toward reunification of a child with the natural parent. I respectfully dissent from the majority's conclusion that the trial court appropriately entered an order terminating respondent's parental rights.

Because I would hold that the trial court erred in terminating respondent's parental rights based on neglect, G.S. § 7B-1111(1), I will also address the additional independent grounds on which the trial court based termination: (1) respondent's willfully leaving the child in foster care for more than 12 months, G.S. § 7B-1111(2); and (2) respondent's willful failure to pay child support, G.S. § 7B-1111(3). I would hold that there is not clear, cogent and convincing evidence to support either of these additional grounds for the trial court's order terminating respondent's parental rights.

A. Purpose of the Juvenile Code

The essential intent and aim of the Juvenile Code "is to reunite the parent(s) and the child, after the child has been taken from the custody 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 purposes 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-1111, applicable to termination of parental rights, 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 overriding goals.

B. Standard of Review

Our standard of review for the termination of parental rights is whether the court's " 'findings of fact are based upon clear, cogent and convincing evidence' and whether the 'findings support the conclusions of law.' " *In re Huff*, 140 N.C. App. 288, 292, 536 S.E.2d 838, 840 (2000), *appeal dismissed, disc. review denied*, — N.C. —, — S.E.2d — (No. 523P00) (1 February 2001) (citing *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996)); *see also*, *In re McLemore*, 139 N.C. App. 426, 428, 533 S.E.2d 508, 509 (2000). Our review of the trial court's findings of fact is limited to whether there is competent evidence to support the findings; however, the trial court's conclusions of law are reviewable *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services, Inc.*, 124 N.C. App. 332, 335-36, 477 S.E.2d 211, 214-15 (1996).

Clear, cogent and convincing evidence "is greater than the preponderance of the evidence standard required in most civil cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citation omitted). It has been defined as "evidence which should fully convince." *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 177 S.E. 176, 177 (1934) (quotation omitted) (emphasis supplied).

C. Background

The uncontroverted evidence establishes that, at the time of the hearing, respondent was a thirty-nine year old college-educated woman. Respondent holds an undergraduate B.S. degree in recreational therapy, and has a high level of intelligence. Respondent lived in a home for pregnant and unwed women from February to August, 1997. The baby was born on 25 May 1997 and weighed 7 pounds, 10 ounces. Respondent left California and returned home to North Carolina in December, 1997, where she lived with her parents in Raleigh.

Respondent's sister, Sherry Foster, visited Raleigh during December 1997. During this visit, Ms. Foster took the child to a doctor in Raleigh without respondent's knowledge or permission. The doctor examined the child, and found her to be in satisfactory condition. Also during this visit, Ms. Foster dissuaded respondent from taking the child to the hospital in Raleigh after respondent expressed concern over her child's congestion.

Ms. Foster returned to Raleigh in February 1998. On or about 22 February 1998, respondent consented to Ms. Foster's taking her child to the Foster's home in Asheville ostensively for a visit. On 23 February 1998, Ms. Foster took the child to a doctor in Asheville without respondent's knowledge. The child was admitted to the hospital for "failure to thrive." The child was approximately 9 months old, and weighed approximately 12 pounds. Respondent never regained custody of her child. Despite respondent's requests to have the matter transferred to Wake County, respondent's child remained in Buncombe County. Respondent was forced to relocate her home and secure employment in Asheville in order to be close to her child, and defend the allegations in this case.

D. Neglect

I disagree with the majority's opinion that the trial court appropriately terminated respondent's parental rights under G.S. § 7B-1111(1). A prior adjudication of neglect cannot be the sole basis for terminating parental rights. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). Rather, in determining neglect, "the trial judge must find evidence of neglect at the time of the termination proceeding." *In re Blackburn*, 142 N.C. App. 607, 611, 543 S.E.2d 906, 909 (2001) (citing *Ballard* at 716, 319 S.E.2d at 232).

Although the record here contains evidence supporting the prior adjudication of neglect, the record must contain clear, cogent and convincing evidence that respondent would continue to neglect the child at the time of the termination proceeding. I would hold that the record does not contain such clear, cogent and convincing evidence as to support the trial court's findings and conclusion that, as of the date of the termination proceeding, respondent would neglect the minor child.

Respondent complied with all court orders, and completed all DSS-recommended services in the case plan to prepare her for reunification with her minor child. The trial court found that respondent made "a sincere effort to be reunited with her daughter and to comply with court orders." Both the trial court and DSS found that respondent "dearly loves [the minor child]" and visits her twice a week. DSS reported to the court that the visits go well, that respondent "is anxious to have the child returned to her care," and that respondent "is willing to do whatever is necessary to have her child returned to her." Respondent testified that she attended and com-

pleted weekly parenting classes over a period of several weeks. The record reflects that respondent attended every class.

The record also reveals that, after completion of the DSS case plan, respondent's ability to care for her minor child improved. DSS submitted a report to the court on 1 June 1998, stating that respondent was nearing completion of parenting classes, and that "[d]uring the supervised visitation [respondent] interacts with [the minor child] appropriately and demonstrates appropriate parenting skills."

On 22 September 1998, DSS further reported to the court that respondent was doing well in her DSS-recommended monthly therapy sessions, and that respondent's therapist, Nancy Mercer, "reports that [respondent] is doing well and that she [Mercer] has no concerns." In a report from Mercer dated 4 March 1999, Mercer states that respondent "has appropriately owned responsibility and regret for the circumstances surrounding her daughter's removal from her custody. . . . [T]he concerns she has presented to me regarding the child have always seemed legitimate and appropriate. . . . [Respondent] appears to be functioning well and has no symptoms of mood, anxiety or substance abuse problems. Her overall attitude has been one of cooperation, willingness and motivation."

I would hold that the record does not contain clear, cogent and convincing evidence that respondent would continue to neglect the child at the time of the termination proceeding, and after respondent's completion of all DSS-required services. The evidence shows respondent's acknowledgment of regret for past decisions regarding the child, and improvement in respondent's ability to care for the child and understand the child's needs. The essential purpose in interpreting G.S. § 7B-1111 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. I cannot agree with the majority's opinion that termination of respondent's parental rights under these circumstances was proper, or that the result reached was "fair and equitable," consistent with the express purposes of G.S. § 7B-100, as interpreted by *Shue*, *supra*.

E. Willfully Leaving Child in Foster Care

The trial court concluded that respondent violated G.S. § 7B-1111(2), in that respondent "willfully left the child in foster care for more than 12 months without showing to the satisfaction of the

court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child." I would hold that this conclusion is clearly erroneous for the reasons enumerated above. The record does not contain clear, cogent and convincing evidence that respondent failed to show "reasonable progress under the circumstances." To the contrary, the evidence clearly shows that respondent willingly completed all DSS case plan requirements and improved her ability to care for the child.

Moreover, respondent consented to the child's initial placement in non-secure custody with respondent's sister. Respondent regularly visited her child, until her visitation rights ceased in May 1999, approximately 5 months prior to termination of her parental rights. A June 1998 DSS report indicated that respondent had not missed a single session of visitation with her child. Throughout the child's placement with the Fosters, the evidence showed that respondent and Ms. Foster had few discussions, and that their relationship cooled considerably over time. Ms. Foster did not always allow respondent to speak to her child. Ms. Foster also resisted allowing grandparent visitation. Ms. Foster further testified that respondent was upset to learn that the child called the Fosters "Mama" and "Daddy."

The record does not contain clear, cogent and convincing evidence that supports the trial court's conclusion of law that (1) respondent willfully left the child in foster care; and (2) respondent failed to show reasonable progress in her ability to care for the child during the child's placement with DSS. I would reverse and remand.

F. Willful Failure to Pay Support

The trial court concluded that respondent "for a continuous period of six months. . . has willfully failed for such period to pay a reasonable portion of the cost of care for the minor child although physically and financially able to pay some portion greater than zero," in violation of G.S. § 7B-1111(3). I would hold that the clear, cogent and convincing evidence in the record mandates the opposite conclusion.

The evidence establishes that respondent was never under court order to pay support. The record does not contain any evidence that DSS initiated legal proceedings requiring that respondent pay sup-

port. A DSS witness testified that she was not aware that any such court order had been issued. Respondent also testified that she had "never been under any court order to pay support." Moreover, although DSS knew that respondent had initiated proceedings to require that the child's biological father pay child support in California, there is no evidence that DSS attempted to assist respondent or to follow through in procuring support from the child's biological father.

Notwithstanding the lack of a court order, respondent testified that on many occasions, she stated to the Fosters, "[i]f there's anything you need, just let me know. I can get a hold of it." On various occasions, respondent brought food and clothes to the child. Respondent also requested from DSS a list of the Foster's expenses for the child. DSS did not provide respondent with the requested list.

Respondent testified that the Fosters "were willing to help out" with respondent's own expenses. Ms. Foster testified that the Fosters were willing to help support respondent financially upon her relocation to Asheville. Mr. Foster told respondent, "[w]e're willing to help you," and offered to assist with respondent's rent payments. Ms. Foster further testified that they "never formally asked [respondent] to provide any support for the child," and that the Fosters never contacted the support agency to initiate support proceedings.

The word willful as applied in termination proceedings under the statute has been defined as " 'disobedience which imports knowledge and a stubborn resistance.' " *Bost v. Van Nortwick*, 117 N.C. App. 1, 14, 449 S.E.2d 911, 919 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995) (quoting *In re Roberson*, 97 N.C. App. 277, 280, 387 S.E.2d 668, 670 (1990)). " 'Willful' has also been defined as 'doing an act purposely and deliberately.' " *Id.* (quoting *Roberson* at 281, 387 S.E.2d at 670).

I cannot agree that the clear, cogent and convincing evidence reveals a *willful* failure to pay support where (1) the record does not establish that respondent was ever under a court order to pay support; (2) Ms. Foster led respondent to believe they were helping respondent with her expenses; and (3) respondent did provide food and clothes to the child while the child was in the Foster's care. The record does not contain clear, cogent and convincing evidence that supports the trial court's conclusion of law that respondent violated G.S. § 7B-1111(3).

In light of the essential aims of the Juvenile Code, I would reverse the trial court's order terminating respondent's parental rights, and remand for further proceedings toward reunification. Accordingly, I respectfully dissent.

RICHARD RAY HILL AND WIFE, SOPHIA HILL, PLAINTIFFS v. STEPHEN T. WILLIAMS AND WIFE, PATRICIA WILLIAMS, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. DELLINGER DRYWALL, INC., THIRD-PARTY DEFENDANT

No. COA00-222

(Filed 5 June 2001)

1. Discovery— interrogatories—failure to supplement—sanctions denied

The trial court did not abuse its discretion by denying defendants' pre-trial motions for sanctions in a negligence action arising from a Rottweiler attack where plaintiffs did not supplement their responses to interrogatories regarding a veterinarian's testimony, defendants filed motions in limine to prohibit the testimony and for sanctions on the morning of trial, and the court denied those motions but ordered that the witness be made available to defendants by telephone that day. Defendants sought to prohibit testimony rather than compel discovery, defendants' motions did not reference a Rule of Civil Procedure, defendants were aware of the witness four months before trial and aware of plaintiffs' intention that he render opinions on the Rottweiler breed two months before trial, defendants declined to depose the witness and waited until the week of trial to file their motions, and the court afforded defendants the opportunity to "depose" the witness.

2. Witnesses— expert—veterinarian—characteristics of Rottweilers

A veterinarian's opinion testimony regarding the Rottweiler breed was admissible in a negligence action arising from an attack by a Rottweiler where the witness testified that he had studied the characteristics and behavioral traits of various breeds while in veterinary school, that he was a small animal practicing veterinarian, and that he had cared for approximately five hundred Rottweilers. The court did not abuse its discretion by deter-

mining that the witness was better qualified than the average juror to have an opinion on the characteristics of the breed; his testimony was not rendered inadmissible because he was not specifically an expert on Rottweilers.

3. Animals— dog attack—negligence action—knowledge of breed characteristics

The trial court did not err by denying defendants' motions for a directed verdict and judgment notwithstanding the verdict in a negligence action arising from a Rottweiler attack where the action was based on defendants being chargeable with knowledge of the general propensities of the breed rather than on knowledge of their dog's vicious propensities; a veterinarian described the Rottweiler breed as strong, aggressive, temperamental, suspicious of strangers, protective of its space, and unpredictable; and defendants offered no evidence to refute that testimony. The question of defendants' negligence in not restraining the dog in light of the knowledge of the breed chargeable to them was for the jury.

4. Animals— dog attack—contributory negligence

Motions in a dog attack case for a directed verdict and judgment notwithstanding the verdict based upon plaintiff's contributory negligence were properly denied where plaintiff was working inside defendants' home when he was asked by his employer to assist in repairing a machine outside the house; he went with his employer although he did not trust the dog; he did not provoke or attempt to touch or approach the dog in any way; there was testimony that defendants had told tradespeople that the dog was tame and playful and would not bite; and the dog jumped on plaintiff and bit off his ear. While arguably adequate to submit contributory negligence to the jury, the evidence did not exclude every reasonable inference other than plaintiff's failure to exercise the same care for his safety as a reasonably careful and prudent person under the same or similar circumstances.

Appeal by defendants from judgment entered 22 June 1999 and order entered 9 July 1999 by Judge Richard D. Boner in Lincoln County Superior Court. Heard in the Court of Appeals 10 January 2001.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by E. Fielding Clark, II, for plaintiff-appellees.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for defendant-appellants.

JOHN, Judge.

Defendants and third-party plaintiffs Stephen T. Williams and his wife Patricia Williams (defendants), appeal the trial court's 22 June 1999 judgment (the judgment) and the court's 9 July 1999 order. We conclude defendants' appeal is unfounded.

Plaintiffs Richard Ray Hill (Richard) and his wife, Sophia Hill, filed the instant action 12 February 1997, alleging "Rowdy" (Rowdy), a Rottweiler dog owned by defendants, attacked Richard and severed a portion of his right ear. Plaintiffs sought recovery on two theories. First, plaintiffs asserted defendants were negligent in failing to keep Rowdy restrained while Richard was working on their property. Plaintiffs also claimed defendants knew or should have known of Rowdy's vicious propensities. Plaintiffs sued for actual medical damages, lost wages, and loss of consortium.

Defendants denied plaintiffs' allegations in their 25 March 1997 answer and further pled Richard's alleged contributory negligence as a defense. In addition, defendants subsequently filed a third-party complaint against Drywall, Richard's employer at the time of the incident. Drywall answered, denying the material allegations of the third-party complaint.

The evidence adduced at trial tended to show the following: In February of 1994, Richard, a drywall finisher, was employed by Drywall in the construction of defendants' new home at Lake Norman. Although Drywall employees and other tradespersons worked daily at the residence, defendants were employed in Statesville during the day and Rowdy was allowed to roam their lakefront lot without supervision while defendants were absent. However Rowdy, a fully grown male weighing approximately one hundred-twenty pounds, was constrained by an underground electrical shock fence to restrict him to defendants' property. Richard testified, "he didn't trust the dog," when he first saw it at the premises and consequently placed a scrap piece of sheetrock across the stairway to block Rowdy from coming upstairs where Richard was working at defendants' home.

Robin and Loy Dellinger (Robin; Loy) were co-owners of Drywall. Robin testified that, upon seeing Rowdy during his first visit to the job site, he was "taken back" because the dog was a Rottweiler. Loy related that he asked defendants if the dog would bite him or his employees and was told Rowdy was "playful and he wouldn't bite[.]"

On 16 February 1994, Robin asked Richard to help repair a texturizing machine hooked up to a van parked near the lake on defendants' lot. Although he had seen Rowdy lying near the waterfront earlier that day, Richard stopped his work inside the residence and accompanied Robin to the machine. As the pair began their repairs, Rowdy jumped on Richard, knocked him against the machine, bit off Richard's ear and swallowed it. Robin grabbed Richard and thrust him into the passenger seat of the van. Rowdy thereupon ran to the open passenger side window and again jumped at Richard. After Richard closed the window, Robin drove the van to the hospital. Rowdy pursued the vehicle to the extent allowed by the electric fence. As a result of the attack, Richard underwent substantial surgery and was hospitalized three times.

Mitchell Dellinger (Mitchell) testified that, prior to the commencement of construction on defendants' house, he went to the site to administer ground termite treatment. Rowdy jogged towards Mitchell's truck and barked at him. Mitchell would not get out of the truck because of the size of the dog. When Patricia Williams came out, Mitchell asked her to confine the dog and she did so.

Dr. David Wilson (Dr. Wilson), a local veterinarian who had treated over five hundred Rottweiler dogs since the 1980's, was qualified as plaintiffs' expert witness. Dr. Wilson testified that the Rottweiler breed was brought to the United States from Germany in the mid-1980's for use as a guard dog or a dog of personal protection. He indicated the breed was aggressive and temperamental, suspicious of strangers, protective of their space, and unpredictable. Dr. Wilson further related that he took great care in examining mature Rottweiler dogs in his veterinary practice, and that he had a safety concern with Rottweilers because they were considered to be dogs that might bite. However, he also acknowledged he had seen Rottweiler dogs be great family dogs. Finally, Dr. Wilson conceded he did not consider himself an expert on the behavior characteristics and traits of the Rottweiler breed, and that he had no opinion concerning the Rottweiler in question.

At the close of plaintiffs' evidence, the trial court granted defendants' motion to dismiss plaintiffs' claim of keeping an animal with vicious propensities. However, the court denied defendants' corresponding motion to dismiss plaintiffs' negligence claim.

Defendants testified they had purchased Rowdy as a puppy and family pet in 1990. Karen Knox (Knox), John Brawley (Brawley) and Beth Webster (Webster), friends and relatives of defendants, related having observed Rowdy on several occasions during visits to defendants' home between 1991 and 1994. According to Knox, she had never observed Rowdy act aggressively or in a dangerous manner. Brawley stated Rowdy was a good house pet and especially good with children. Webster indicated she had never observed Rowdy growl and noted the dog acted fine, even when defendants were not at home and other people were on the property. Harry Williams, who constructed the foundation for defendants' new residence, testified that Rowdy acted fine around him and other tradespersons.

At the close of all evidence, defendants' renewed motions for directed verdict were denied. The trial court subsequently instructed the jury that plaintiffs had the burden of proving

> defendants failed to use ordinary care under the existing circumstances by failing to confine or restrain their dog while plaintiff [Richard] was working on their premises[,]

and that defendants' negligence was a proximate cause of Richard's injury. In addition, the jury was instructed that

> the owner of a domestic animal, such as a dog, is charged with knowledge of the general propensities of the animal and the owner must exercise due care to prevent injury from conduct which the owner may reasonably anticipate.

The trial court also submitted to the jury the issues of Richard's alleged contributory negligence, the negligence of third-party defendant Drywall, and plaintiffs' claim of loss of consortium by Richard's wife.

By its verdict, the jury unanimously determined Richard had been injured by the negligence of defendants, that he did not contribute to his injuries by his own negligence, that defendants' negligence proximately caused Richard's wife to lose consortium of her husband, and that the negligence of Drywall did not contribute to Richard's injuries. In a 9 July 1999 order, the trial court denied

defendants' subsequent motion for judgment notwithstanding the verdict. Defendants appeal.

[1] Defendants' first contend the trial court erred by denying their pre-trial motions *in limine* to prohibit the testimony of Dr. Wilson and for sanctions (defendants' pre-trial motions). We disagree.

Review of the procedural context of defendants' pre-trial motions reveals the instant complaint was filed 12 February 1997. In July 1997, defendants filed interrogatories requesting, *inter alia*, certain information as to any expert witnesses plaintiffs intended to use at trial. Letters from defendants requesting that plaintiffs supplement discovery concerning expert witnesses were mailed 28 April and 6 November 1998. On 2 February 1999, plaintiffs filed a supplemental interrogatory response identifying Dr. Wilson as an expert witness and stating his anticipated testimony might include

> matters relative to the Rottweiler breed of dog, and the general nature, characteristics and care of the Rottweiler breed as well as give particular characteristics and matters concerning the Rottweiler. He may give opinions relative to the Rottweiler owned by the Defendants which will be based upon the knowledge of the breed.

On 10 February and 15 April 1999, defendants directed two letters to plaintiffs pointing out that the supplemental response had addressed only the subject matter of the expert's testimony. Defendants requested that a statement of Dr. Wilson's opinions be provided. Plaintiffs thereupon filed a second supplemental response stating Dr. Wilson would be "called upon to testify about and give opinions relative to matters of the Rottweiler breed of dog," that he "may be called upon to render opinions concerning the proper care of a Rottweiler," and that "he may give opinions relative to the Rottweiler owned by the Defendants[.]" On 4 May 1999, defendants again wrote requesting that plaintiffs supply the substance of opinions expected to be given by Dr. Wilson, but did not thereafter seek to depose Dr. Wilson.

On the morning of trial, 1 June 1999, defendants filed their motions. The trial court denied the motions, but ordered Dr. Wilson to be made available to defendants by telephone that day. Defendants' counsel spoke with Dr. Wilson by telephone during a recess prior to jury selection.

On appeal, defendants maintain the trial court's grant of telephone access to Dr. Wilson was inadequate and that sanctions constituted the only appropriate remedy for plaintiffs' unseasonable failure to supplement responses to plaintiffs' interrogatories.

N.C.G.S. § 1A-1, Rule 26(e)(1) (1999) provides:

> A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

It is well established that the purpose and intent of Rule 26(e)(1) is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery. *See Willoughby v. Wilkins*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 99-100 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 697 and 310 N.C. 631, 315 S.E.2d 698 (1984). Imposition of sanctions pursuant to N.C.G.S. § 1A-1, Rule 37(d) (1999) for failure to comply with Rule 26 (e) is within the sound discretion of the trial court. *Imports Inc. v. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978).

In *Willoughby*, the plaintiff learned of a new expert defense witness ten days before trial, was able to depose the witness only one day prior to the peremptorily set trial date, and did not obtain a copy of the deposition transcript because of illness in the court reporter's family. *Willoughby*, 65 N.C. App. at 642, 310 S.E.2d at 100. On at least three occasions in the two years preceding trial, the most recent but three weeks before the peremptorily set date and in response to plaintiff's motion to compel discovery, the defendants "asserted that no determination had been made as to the experts they would present at trial." *Id.* at 639, 310 S.E.2d at 98. This Court reversed the trial court's denial of the plaintiff's motion to compel discovery, stating

> where a case has been set for trial peremptorily . . . , the court may not properly refuse to intervene to compel discovery on a material feature of the case, such as the identity of expert witnesses . . . .

Id. at 643, 310 S.E.2d at 101. We emphasized that our ruling was directed at the trial court's failure to compel discovery as opposed to the discretionary motion for sanctions under Rule 37. *Id.*

Unlike the circumstance in *Willoughby*, however, defendants' pre-trial motions herein did not seek to compel discovery, but rather to impose the sanction of prohibiting the testimony of Dr. Wilson. We note parenthetically that, although requesting the imposition of a Rule 37 sanction, *see* G.S. § 1A-1, Rule 37 (b)(2)b. (permissible sanctions under Rule 37 include prohibiting a party "from introducing designated matters in evidence"), defendants' pre-trial motions failed to reference a designated Rule of Civil Procedure notwithstanding the strictures of Rule 6 of the North Carolina General Rules of Practice for the Superior and District Courts ("[*a*]*ll* motions . . . shall state the rule number or numbers under which the movant is proceeding" (emphasis added)).

In addition, Dr. Wilson was not a *new* expert witness. Defendants learned of Dr. Wilson as plaintiffs' potential expert witness four months prior to trial and were aware of plaintiffs' intention that Dr. Wilson render opinions about the Rottweiler breed two months before trial. Moreover, notwithstanding the deficiency in plaintiffs' supplemental response, defendants declined to depose Dr. Wilson and elected to wait until the week of trial to file their pre-trial motions. Finally, before the jury was selected, the trial court afforded defendants an opportunity to "depose" Dr. Wilson. Notwithstanding plaintiffs' failure to provide to defendants the substance of Dr. Wilson's anticipated testimony, *see* G.S. § 1A-1, Rule 26(e)(1), we cannot say under these circumstances that the trial court abused its discretion by denying defendants' pre-trial motions. *See Imports Inc. v. Credit Union*, 37 N.C. App. at 124, 245 S.E.2d at 800.

[2] Defendants next argue Dr. Wilson's opinion testimony regarding the Rottweiler breed was inadmissible based upon his acknowledged lack of expertise in the area. Defendants' contention is unfounded.

Opinion testimony by an expert witness is ordinarily admissible if there is evidence that the witness,

> through study or experience, or both . . . , has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject matter of his testimony.

Maloney v. Hospital Systems, 45 N.C. App. 172, 177, 262 S.E.2d 680, 683, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980). With respect to qualifying a witness as an expert, this court observed that

> '[i]t is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession.'

Robinson v. Seaboard System R.R., Inc., 87 N.C. App. 512, 517-18, 361 S.E.2d 909, 913 (1987) (quoting *State v. Ballard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Finally,

> [a] finding by the trial judge that the witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed on appeal absent a complete lack of evidence to support his ruling.

Conner v. Continental Indus. Chemicals, Inc., 123 N.C. App. 70, 77, 472 S.E.2d 176, 181 (1996).

In the case *sub judice*, Dr. Wilson testified he had attended N.C. State University and veterinary school at the University of Georgia. While a student at the University of Georgia, Dr. Wilson studied the characteristics and behavioral traits of various dog breeds. Finally, he related he was a small animal practicing veterinarian who had cared for approximately five hundred Rottweiler dogs since the early eighties.

We hold the trial court did not abuse its discretion in determining that Dr. Wilson, by virtue of his education, training, experience, and twenty-year practice as a veterinarian, was better qualified than the average juror to have an opinion upon the characteristics of Rottweiler breed. *See Maloney*, 45 N.C. App. at 177, 262 S.E.2d at 683-84. Finding no abuse of discretion in the qualification of Dr. Wilson as an expert, we further conclude that the trial court did not err in allowing Dr. Wilson to relate his experience with Rottweiler dogs and the manner in which he customarily dealt with them in his practice, and also to express an opinion concerning the general behavior of the breed. That Dr. Wilson was not specifically an expert on Rottweilers did not render his opinion testimony inadmissible. *See id.*

[3] Lastly, defendants maintain the trial court erred by denying their motions at trial for directed verdict and for judgment notwithstanding the verdict (JNOV) (defendants' trial motions). We do not agree.

> In ruling on a motion for directed verdict or for judgment notwithstanding the verdict made by a defendant pursuant to G.S.

> sec. 1A-1, Rule 50, the court must consider the evidence in the light most favorable to the plaintiff and resolve all conflicts in his favor. The plaintiff must receive the benefit of every inference which may reasonably be drawn in his favor. The granting of either motion is appropriate only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff.

Hicks v. Food Lion, Inc., 94 N.C. App. 85, 88, 379 S.E.2d 677, 679 (1989) (citations omitted).

Defendants first assert there was insufficient evidence as a matter of law to establish a prima facie case of negligence against defendants. Defendants are mistaken.

Initially, we note this Court has observed that "not all actions seeking recovery for damage caused by a domestic animal need involve the vicious propensity rule," *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979), generally described as a strict liability type of determination relying upon "proof of vicious propensity and knowledge by the owner." *Id.* at 406, 259 S.E.2d at 387. Further, we have explained that in circumstances other than those concerning vicious propensity,

> [t]he owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and he must exercise due care to prevent injury from reasonably anticipated conduct.

Id. at 407, 259 S.E.2d 383, 388.

In *Williams v. Tysinger*, 328 N.C. 55, 399 S.E.2d 108 (1991), moreover, our Supreme Court discussed a mother's claim to recover medical expenses after her minor child was kicked in the head by a horse. *Id.* at 56, 399 S.E.2d at 109. The gravamen of the mother's negligence action against the owner of the horse was identified as

> not the wrongful keeping of a vicious animal; rather . . . the encouraging two young children to play with a horse after being warned by the children's mother that they had no familiarity with horses or any other large animals.

Id. at 60, 399 S.E.2d at 111. Accordingly, the issue of the owner's negligence therein was not dependent upon the owner's knowledge of any vicious or dangerous propensities of the horse. Nonetheless, the Court held the owner was chargeable on a claim of negligence with knowledge of the *general* propensities of the horse, including "the

fact that the horse might kick without warning or might inadvertently step on a person." *Id.*

Although no case in this jurisdiction has invoked the *Williams* rule where the domestic animal was a dog, we conclude that application of the rule is appropriate on the facts herein. The negligence of defendants as owners of Rowdy was not premised upon their knowledge of the dog's vicious propensities; that claim was dismissed by the trial court and plaintiffs have not cross-appealed. Rather, for purposes of plaintiffs' negligence claim, defendants, "as owners of [Rowdy], [we]re 'chargeable with the knowledge of the general propensities,' " *id.* at 60, 399 S.E.2d at 111 (quoting *Griner*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388), of the Rottweiler animal.

Plaintiffs' expert Dr. Wilson related that the Rottweiler breed was brought to the United States in the mid-1980's for use as a guard dog or dog of personal protection. He described the Rottweiler breed as very strong, aggressive and temperamental, suspicious of strangers, protective of its space, and unpredictable. Dr. Wilson further testified that he took great care while examining mature Rottweiler dogs in his practice because they were believed to be dogs that might bite.

Defendants offered no evidence, through an expert witness or otherwise, to refute the testimony of Dr. Wilson regarding the general propensities and behavior traits of the Rottweiler breed. Under the *Williams* rule, therefore, defendants were chargeable in a negligence action with knowledge of the general propensities of a Rottweiler dog as reflected in plaintiffs' evidence, including that a Rottweiler might attack or bite a stranger located in its territory. *See id.* In short, the question of defendants' negligence in failing to restrain Rowdy in light of their knowledge of the Rottweiler animal's general propensities was an issue for the jury and the trial court did not err in denying defendants' trial motions in that regard.

[4] Alternatively, defendants' argue Richard was guilty of contributory negligence as a matter of law in failing to request defendants to confine or restrain Rowdy while Richard was working at their home, and also in agreeing to assist Robin in repairing the texturizing machine outside the house although aware Rowdy was running loose on defendants' property. We disagree.

It is well established that

"[e]very person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he

> fails to exercise such care . . . he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."

Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965) (citations omitted).

In addition, when the trial court considers a defendant's motion for a directed verdict on the grounds that the evidence establishes plaintiff's contributory negligence as a matter of law, the issue is whether

> "the evidence taken in the light most favorable to plaintiff establishes h[is] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge."

Rappaport v. Days Inn, Inc., 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979) (quoting *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976)). Consequently, the issue of contributory negligence is ordinarily a question for the jury rather than an issue decided as a matter of law. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 456, 406 S.E.2d 856, 862 (1991).

Under the foregoing authorities, therefore, the

> question here is whether the evidence taken in the light most favorable to [] plaintiff[s] allows no reasonable inference except [Richard's] negligence: that a reasonably prudent and careful person exercising due care for his or her safety,

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 469, 279 S.E.2d 559, 563 (1981), would have requested defendants to restrain Rowdy while that person was on defendants' premises or would have refused to work in an area where the animal was at large.

In the case *sub judice*, the evidence viewed in the light most favorable to plaintiffs indicated Richard was working inside the defendants' home when asked by Robin, co-owner of Drywall and Richard's employer, to assist in the repair of a texturizing machine located outside the house. Although he had seen Rowdy in the area

earlier and "did not trust" the dog, Richard accompanied Robin to the lakefront area of the premises where Rowdy was lying down in grass near the water. While Richard helped Robin work on the machine, Rowdy jumped on Richard, biting off his ear. Richard in no way provoked Rowdy nor attempted to touch or approach the dog in any way. Defendant Stephen Williams testified he had told tradespersons Rowdy was tame and would not bite and Loy testified he had been told Rowdy was playful and did not bite.

Defendants' contention to the contrary, we cannot hold the foregoing to constitute contributory negligence as a matter of law. While arguably adequate to sustain submission of the issue of Richard's contributory negligence to the jury, the evidence failed to exclude every reasonable inference save that of Richard's failure to exercise the same care for his safety as a reasonably careful and prudent person under the same or similar circumstances would have exercised. *See id.* Differing inferences arising from contradictions in the evidence are for resolution by the jury. *See Rappaport*, 296 N.C. at 384, 250 S.E.2d at 247. Accordingly, to the extent defendants' trial motions relied upon Richard's alleged contributory negligence as a matter of law, such motions were properly denied by the trial court.

No error.

Judges WYNN and McGEE concur.

CAROLYN LAVERNE WOMACK, PLAINTIFF-APPELLANT v. EMMA McMANUS STEPHENS, DEFENDANT-APPELLEE

No. COA00-661

(Filed 5 June 2001)

1. Negligence— contributory—pedestrian struck by automobile

The trial court did not err by granting a directed verdict for defendant on the issue of plaintiff's contributory negligence in an action arising from a collision between a pedestrian and an automobile where plaintiff, after consuming alcohol, was crossing outside a marked crosswalk at night, in an area that was dimly lit, dressed in dark clothing, with the lanes of oncoming traffic unob-

structed and plaintiff's headlights shining, and never looked toward the oncoming vehicles despite the imminent presence of two vehicles coming upon her.

2. Negligence— last clear chance—pedestrian struck by automobile

The trial court erred by failing to instruct the jury on last clear chance in an action arising from a collision between a pedestrian and an automobile where there was sufficient evidence of plaintiff's negligent failure to pay attention to her surroundings and to discover her imminent peril, the evidence establishes that defendant saw plaintiff and recognized plaintiff's position of peril, there was evidence raising an inference that defendant had the time and means to avoid hitting plaintiff, and evidence was presented from which a jury could infer that defendant negligently failed to use the available time and means to avoid plaintiff.

Appeal by plaintiff from order entered 1 February 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 28 March 2001.

Donaldson & Black, P.A., by Rachel Scott Decker, for plaintiff-appellant.

Frazier & Frazier, L.L.P., by Torin L. Fury, for defendant-appellee.

TYSON, Judge.

Carolyn Womack ("plaintiff") appeals the trial court's entry of a directed verdict in favor of Emma McManus Stephens ("defendant"). We reverse, and award plaintiff a new trial.

On 24 September 1995, plaintiff was injured when struck by defendant's vehicle as plaintiff attempted to cross by foot the 200-block of South English Street in Greensboro, North Carolina. The collision occurred at approximately 1:30 a.m. In this block, South English Street is a straight, four-lane road with two northbound lanes and two southbound lanes separated by a double yellow line. The posted speed limit is 35 miles per hour.

Witness, Eugene Siler ("Siler") was driving his vehicle in the outer, right-hand southbound lane of South English Street at approx-

imately 1:30 a.m. Siler testified he was traveling at an approximate speed of 35-38 miles per hour. Defendant was driving her vehicle approximately two car-lengths behind Siler in the same lane.

At about this time, plaintiff attempted to cross the southbound lanes of South English Street. Plaintiff had crossed the two northbound lanes of the street without incident. Plaintiff did not cross South English Street in a marked pedestrian crossing or at an intersection. Plaintiff testified that she had lived near South English Street for several years, and that she knew there were crosswalks located a quarter of a mile north, and another located a quarter of a mile south from where she attempted to cross. There was one street light in the vicinity of where plaintiff attempted to cross, but no light directly where plaintiff entered the road. Siler testified that where plaintiff was crossing there was "only one street light, and it's not directly from where [plaintiff] was crossing. It's real dim, dark, from where [plaintiff] was trying to cross."

Plaintiff had crossed the center line of the two southbound lanes when Siler's car approached in the outer, right-hand southbound lane. Siler testified that at first, he did not see plaintiff, who was wearing a black coat and blue jeans. But as Siler approached plaintiff in the street, he "caught like a little flash of [plaintiff's] shirt." Siler testified that he began to brake immediately, and swerved to the right to avoid hitting plaintiff. Siler stated that as he swerved, he heard defendant hit her brakes. He further testified that, from his rear view mirror, he saw that "[defendant] didn't have time to swerve, and she started going in the opposite direction." Siler stated that it was only "moments after [he] hit [his] brakes and swerved" that "[defendant] started screeching her horn," but that "[defendant] hit her brakes . . . probably about—about 10, 15 seconds later."

As Siler approached plaintiff in the right-hand lane, plaintiff backed up to the dividing line of the two southbound lanes. The investigating officer, B.S. Williamson ("Officer Williamson"), testified that the evidence showed defendant was traveling behind Siler. As Siler began to brake, defendant moved into the left-hand, inner southbound lane to avoid colliding with Siler. At the same time, plaintiff moved back toward the center of the southbound lanes, where the right-hand corner of defendant's car hit plaintiff. Siler testified that plaintiff never looked at him, but simply backed up to the dividing line of the two southbound lanes and into defendant's line of travel.

Defendant told Officer Williamson that she could not see plaintiff until she began to move into the left-hand lane. Defendant further stated that her brakes locked, and that she did not have enough time to avoid hitting plaintiff. Officer Williamson testified that the skid marks from defendant's car began in diagonal fashion near the center line, indicating that defendant braked just as she started to pass Siler in the left-hand lane. He further testified that the total length of the skid mark was 75 feet long, and 31.7 feet before impact, beginning in defendant's lane of travel and crossing over the center line. The front right hood of defendant's car was damaged.

Evidence was presented tending to establish that plaintiff had consumed alcohol during the day and evening leading up to the accident. Plaintiff testified that on the evening before the accident, 22 September 1995, she consumed a combination of marijuana, cocaine, and beer. Plaintiff testified that she slept that night, and resumed drinking beer when she awoke on 23 September 1995, the day leading up to the accident. Plaintiff consumed beer that day and evening, and she testified that she "was going to drink more beer with a friend" at the time of the accident.

Siler testified that after the collision, he approached plaintiff as she lay in the street. He testified that plaintiff was yelling and trying to stand, but that she could not stand because her leg was broken. He stated that plaintiff "had a real strong smell of alcohol on her breath."

At the close of plaintiff's evidence, defendant moved for a directed verdict. The trial court granted defendant's motion on 1 February 2000. Plaintiff appeals.

The sole issue on appeal is whether the trial court erred in directing a verdict in favor of defendant. We agree with defendant that the evidence establishes plaintiff's contributory negligence as a matter of law. However, we hold that the trial court erred in failing to submit the issue of last clear chance to the jury.

Our standard of review on the grant of a motion for directed verdict is "whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000) (citing *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825

(1993)). A directed verdict should be granted in favor of the moving party only where " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and 'if the credibility of the movant's evidence is manifest as a matter of law.' " *Law Offices of Mark C. Kirby, P.A. v. Industrial Contractors, Inc.*, 130 N.C. App. 119, 123, 501 S.E.2d 710, 713 (1998) (quoting *Lassiter v. English*, 126 N.C. App. 489, 493, 485 S.E.2d 840, 842-43, *disc. review denied*, 347 N.C. 137, 492 S.E.2d 22 (1997)).

I. Contributory Negligence

[1] Plaintiff assigns error to the trial court's grant of defendant's motion for directed verdict on grounds that defendant did not establish plaintiff's contributory negligence as a matter of law. We disagree.

In *Wolfe v. Burke*, 101 N.C. App. 181, 398 S.E.2d 913 (1990), this Court outlined the common law and statutory duty of a pedestrian in crossing a road:

> In North Carolina, a pedestrian has 'a common law duty to exercise reasonable care for his own safety by keeping a proper lookout for approaching traffic before entering the road and while on the roadway.' *Whitley v. Owens*, 86 N.C. App. 180, 182, 356 S.E.2d 815, 817 (1987). Further, N.C. Gen. Stat. § 20-174(a) (1989) provides that a pedestrian 'crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.'

Id. at 185, 398 S.E.2d at 915. The *Wolfe* court noted that a plaintiff's failure to yield a right of way in violation of G.S. § 20-174(a) is not contributory negligence *per se*, but that such failure is " 'evidence of negligence to be considered with other evidence in the case in determining whether the plaintiff is chargeable with negligence which proximately caused or contributed to his injury.' " *Id.* at 186, 398 S.E.2d at 916 (quoting *Dendy v. Watkins*, 288 N.C. 447, 456, 219 S.E.2d 214, 220 (1975)). "Even though failing to yield the right-of-way to an automobile is not contributory negligence *per se*, it may be contributory negligence as a matter of law." *Id.* at 186, 398 S.E.2d at 916 (citing *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47 (1985), *affirmed*, 315 N.C. 383, 337 S.E.2d 851 (1986)).

The trial court must direct a verdict for the defendant "when all the evidence so clearly establishes [plaintiff's] failure to yield the

right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible." *Ragland v. Moore*, 299 N.C. 360, 364, 261 S.E.2d 666, 668 (1980) (quoting *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E.2d 214, 216 (1964)); *see also, e.g., Brooks v. Francis*, 57 N.C. App. 556, 291 S.E.2d 889 (1982) (judgment as a matter of law proper where uncontroverted evidence shows that plaintiff's failure to use due care was at least one proximate causes of plaintiff's injuries.).

In *Meadows, supra*, this Court held that the plaintiff was contributorily negligent as a matter of law where the evidence showed that the plaintiff's negligence in crossing a highway was at least one proximate cause of the accident. *Meadows*, 75 N.C. App. at 90, 330 S.E.2d at 50. In that case, the evidence in the light most favorable to the plaintiff revealed the following: that plaintiff was standing in the defendant's highway lane of travel; that the defendant, with his vehicle headlights burning, turned onto the highway at a distance at least 100 feet from the plaintiff; that the road was straight and visibility unobstructed; and that just before impact the defendant's vehicle was traveling at about 43 miles per hour. *Id.*

This Court found significant that "between the time [defendant's] car turned onto the highway and the time of the collision, [plaintiff] took one or two steps towards the center of the road." *Id.* We noted that it was the "plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed." *Id.* at 89, 330 S.E.2d at 50 (emphasis supplied) (quoting *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E.2d 214, 216-7. *Accord Garmon v. Thomas*, 241 N.C. 412, 85 S.E.2d 589 (1955) (plaintiff was negligent in failing to keep a "timely lookout")). We stated:

> The courts of this State have, on numerous occasions, applied the foregoing standard of due care when the plaintiff was struck by a vehicle while crossing a road at night outside a crosswalk. If the road is straight, visibility unobstructed, the weather clear, and the headlights of the vehicle in use, a plaintiff's failure to see and avoid defendant's vehicle will consistently be deemed contributory negligence as a matter of law. See *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967); *Blake v. Mallard*; *Hughes v. Gragg*, 62 N.C. App. 116, 302 S.E.2d 304 (1983); *Thornton v. Cartwright*, 30 N.C. App. 674, 228 S.E.2d 50 (1976).

Id. at 89-90, 330 S.E.2d at 50.

In *Price*, our Supreme Court held that the plaintiff's intestate was contributorily negligent as a matter of law where the evidence showed that the decedent was crossing the road at night and without the benefit of a crosswalk. *Price*, 271 N.C. at 696, 157 S.E.2d at 351-52. The defendant's vehicle was approaching the decedent at a rate of 60 miles per hour in a 55 mile per hour zone, on a straight stretch of road, and with the vehicle headlights shining. *Id.* In holding that any liability for defendant's negligence was precluded by the plaintiff's own negligence, the Supreme Court stated:

> If defendant were negligent in not seeing plaintiff's intestate, who was dressed in dark clothes, in whatever length of time he might have been in the vision of her headlights, then plaintiff's intestate must certainly have been negligent in not seeing defendant's vehicle as it approached, with lights burning, along the straight and unobstructed highway. We must conclude that plaintiff's intestate saw defendant's automobile approaching and decided to take a chance of getting across the road ahead of it, or in the alternative, that he not only failed to yield the right of way to defendant's automobile, but by complete inattention started across the highway without looking. In any event . . . plaintiff's intestate's negligence was at least a proximate cause of his death.

Id. (citations omitted).

We also hold that the evidence in this case establishes that plaintiff's own negligence was at least one proximate cause of her injuries. The evidence shows that plaintiff was attempting to cross the southbound lanes of South English Street at 1:30 a.m. in an area that was dimly lit. The evidence further shows that plaintiff was not crossing the street in a marked crosswalk, or at an intersection, despite knowing that crosswalks were located a quarter of a mile north and south of where plaintiff actually crossed. Plaintiff wore dark clothes and had been drinking alcohol for most of the day and evening leading up to the accident. Plaintiff was in route to drink more alcohol with a friend.

Officer Williamson testified that the 200-block of South English Street is a straight road, and its view is not obstructed by hills or curves. Plaintiff also testified that South English Street is a straight road. Defendant testified that her headlights were working on low beam at the time of the accident. Siler corroborated defendant's testimony, stating that he could see defendant's headlights in his rearview mirror. Siler further testified that at no time did plaintiff

look toward his oncoming vehicle. Evidence also established that the oncoming vehicles were traveling at approximately 35 miles per hour, the posted speed limit.

In summary, the evidence reveals that plaintiff, after consuming alcohol, was crossing outside of a marked crosswalk at night, in an area that was dimly lit, dressed in dark clothing, that the lanes of oncoming traffic were straight and unobstructed by curves or hills, and that defendant's headlights were shining. Plaintiff never looked toward the oncoming vehicles, despite the imminent presence of two vehicles coming upon her, and despite her duty to maintain a proper lookout for approaching vehicles. Under the reasoning in *Meadows* and *Price*, such evidence constitutes contributory negligence as a matter of law. *See also*, *Thornton*, 30 N.C. App. at 676, 228 S.E.2d at 52 ("Following *Price*, we hold that even if defendant was negligent in failing to see and avoid plaintiff's decedent, plaintiff's decedent was also contributorily negligent as a matter of law in failing to see and avoid defendant. The motion for directed verdict was correctly granted."). The trial court did not err in directing a verdict in favor of defendant on the issue of plaintiff's contributory negligence.

II. Last Clear Chance

[2] Plaintiff assigns error to the trial court's grant of defendant's motion for directed verdict on grounds that plaintiff presented sufficient evidence to submit the issue of last clear chance to the jury, notwithstanding plaintiff's contributory negligence. We agree.

We re-emphasize that in reviewing the grant of a directed verdict, we view the evidence in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. *See Fulk*, 138 N.C. App. at 429, 531 S.E.2d at 479. "The issue of last clear chance, '[m]ust be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine.' " *Kenan v. Bass*, 132 N.C. App. 30, 32-33, 511 S.E.2d 6, 7 (1999) (quoting *Trantham v. Sorrells*, 121 N.C. App. 611, 468 S.E.2d 401, *disc. review denied*, 343 N.C. 311, 471 S.E.2d 82 (1996)).

In *Vancamp v. Burgner*, 328 N.C. 495, 402 S.E.2d 375, *reh'g denied*, 329 N.C. 277, 407 S.E.2d 854 (1991), our Supreme Court enumerated the elements that a plaintiff must establish to invoke the doctrine of last clear chance:

'All the necessary elements of the doctrine [of last clear chance] are . . . as follows: 'Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him. [Citing 26 cases as authority].'

Id. at 498, 402 S.E.2d at 376-77 (quoting *Clodfelter v. Carroll*, 261 N.C. 630, 634-35, 135 S.E.2d 636, 638-39 (1964)).

In *Nealy v. Green*, 139 N.C. App. 500, 534 S.E.2d 240 (2000), this Court stated that in order to satisfy the first element of the doctrine of last clear chance, a plaintiff must be contributorily negligent, consisting of the plaintiff's " 'failure to pay attention to [the plaintiff's] surroundings and discover [the plaintiff's] own peril.' " *Id.* at 505, 534 S.E.2d at 244 (quoting *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988)). Evidence that a plaintiff does not see an approaching vehicle or is not facing an oncoming vehicle will satisfy this element, "our courts reasoning that the pedestrian who did not apprehend imminent danger 'could not reasonably have been expected to avoid injury.' " *Id.* at 506, 534 S.E.2d at 244 (quoting *Watson v. White*, 309 N.C. 498, 505, 308 S.E.2d 268, 272 (1983)).

In *Vancamp*, we noted that a pedestrian who is attempting to walk across a street, and is about to walk in front of an oncoming vehicle, is "obviously in peril before she steps directly in front of the car." *Vancamp v. Burgner*, 99 N.C. App. 102, 104, 392 S.E.2d 453, 455 (1990), *affirmed*, 328 N.C. 495, 402 S.E.2d 375 (1991). We stated further that the driver of an automobile has a duty to look ahead and outside her immediate lane of travel to see a plaintiff, who is about to step into the driver's lane of travel. *Id.*

In the present case, plaintiff was attempting to cross the southbound lanes of South English Street in an area that was dimly lit, without the benefit of a crosswalk, and having consumed alcohol throughout the day and evening. Plaintiff testified that when she saw Siler's car approaching, she "just backed back up." Plaintiff testified that, "[i]t just scared me, stunned me, so, I backed back up." Siler testified that plaintiff never looked at him, and that plaintiff simply "just backed up in front of [defendant]." Thus, plaintiff was not facing defendant's oncoming vehicle. Such evidence is sufficient to establish plaintiff's negligent failure to pay attention to her surroundings and to discover the imminent peril involved in backing into the center of the two southbound lanes, and into defendant's line of travel.

The *Nealy* court held that the second element of the doctrine was satisfied where the defendant testified he noticed the plaintiff walking on the road and that he could not see the plaintiff's face. The court found such evidence was sufficient to create a reasonable inference that the defendant knew the plaintiff was not looking towards traffic and could not see the defendant's vehicle approaching. *Nealy*, 139 N.C. App. at 506, 534 S.E.2d at 244.

Here, the evidence showed that defendant saw plaintiff in her line of travel prior to hitting plaintiff. Defendant testified that she first saw plaintiff "about the same time" as she noticed Siler's vehicle slowing. Defendant testified that she saw that plaintiff "was already out there in the middle of the street," and that defendant tried "to move to keep from bumping [Siler] so he wouldn't hit [plaintiff]." Defendant further testified that as she swerved, she saw plaintiff "backing up into [her] path." The evidence establishes that defendant saw plaintiff and recognized plaintiff's position of peril as plaintiff, facing another direction, began to back into defendant's line of travel.

The *Nealy* court further held that this element could be satisfied even if a defendant did not actually recognize the plaintiff's peril, since a defendant "owe[s] plaintiff a duty to maintain a proper lookout whereby, through 'the exercise of reasonable care, [he] could have discovered plaintiff's perilous position.' " *Id.* at 506-07, 534 S.E.2d at 244 (quoting *Watson*, 309 N.C. at 505, 308 S.E.2d at 272-73). The evidence in this case is such that a jury may reasonably infer that defendant recognized plaintiff's position of peril and inability to escape imminent danger.

In order to satisfy the third element of the doctrine, a plaintiff must show that the defendant " 'had the time and means to avoid the

injury to the plaintiff by the exercise of reasonable care after [she] discovered or should have discovered plaintiff's perilous condition.' " *Id.* at 507, 534 S.E.2d at 245 (quoting *Watson*, 309 N.C. at 505-06, 308 S.E.2d at 273). "The reasonableness of a defendant's opportunity to avoid doing injury must be determined on the particular facts of each case." *Vancamp*, 328 N.C. at 499, 402 S.E.2d at 377.

Defendant testified that she saw plaintiff in the street "about the same time" that Siler began to slow to avoid hitting plaintiff. Defendant testified that she swerved to avoid hitting Siler, but that as she swerved, she saw plaintiff "backing up into [her] path." Siler testified that it was only "moments after [he] hit [his] brakes and swerved" that "[defendant] started screeching her horn," but that "[defendant] hit her brakes . . . probably about—about 10, 15 seconds later."

This evidence, taken as a whole and considered in the light most favorable to plaintiff, raises an inference that defendant had the time and means to avoid hitting plaintiff. The evidence shows defendant knew, for several seconds, that plaintiff was in the middle of the road, that defendant sounded her horn upon swerving to the left, but that 10 to 15 seconds passed before defendant applied her brakes to avoid hitting plaintiff.

In holding that the third element of the doctrine had been satisfied, the *Nealy* court found significant that the defendant, in attempting to avoid the plaintiff, had "pulled into the left lane only slightly notwithstanding that such lane was free of oncoming traffic and defendant could safely have proceeded farther." *Id.* at 508, 534 S.E.2d at 245; *see also*, *Knote v. Nifong*, 97 N.C. App. 105, 108, 387 S.E.2d 185, 187, *disc. review denied*, 326 N.C. 597, 393 S.E.2d 879 (1990) (third element established by testimony that, if defendant had moved vehicle further across highway, plaintiff's motorcycle would have been able to get by defendant's vehicle, thereby avoiding collision).

In this case, the evidence shows that plaintiff was standing near the center of the two southbound lanes. No other vehicles were approaching from behind defendant in either the right of left-hand lanes. As in *Nealy*, the evidence raises an inference that defendant could have taken further evasive action to avoid hitting plaintiff.

Viewing this evidence in the light most favorable to plaintiff, a jury could infer that the fourth element of the doctrine has been met: that defendant negligently failed to use the available time and means

to avoid plaintiff, and for that reason, the plaintiff was injured. We hold that the trial court should have instructed the jury on the issue of last clear chance.

We again emphasize, as we stated in *Nealy*, "that our holding the evidence to have been sufficient to require submission of a last clear chance issue to the jury does not compel an affirmative answer to the issue by the jury . . . as some contradictory evidence was introduced." *Id.* at 511, 534 S.E.2d at 247. Such contradictions are for the jury to determine. *Id.* "Failure to submit the issue of last clear chance when supported by substantial evidence is error and requires a new trial." *Hales v. Thompson*, 111 N.C. App. 350, 356, 432 S.E.2d 388, 392 (1993).

New trial.

Judges WALKER and HUNTER concur.

ROBERT KENT ANDREWS AND JONES ANDREWS, PLAINTIFFS V. ROBERT W. CRUMP, IN HIS INDIVIDUAL CAPACITY AS THE MANAGER OF THE CONTROLLED SUBSTANCE TAX SECTION OF THE NORTH CAROLINA DEPARTMENT OF REVENUE; R.A. HUGHES, IN HIS INDIVIDUAL CAPACITY AS THE DEPUTY SECRETARY, CONTROLLED SUBSTANCE TAX SECTION OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANTS

No. COA00-140

(Filed 5 June 2001)

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

An order refusing to grant summary judgment or dismiss a case which declines to recognize a claim of governmental immunity affects a substantial right and is subject to immediate appeal.

2. **Immunity— governmental—prior federal action—issues of fact**

The trial court properly refused to dismiss or to grant summary judgment for defendants on plaintiffs' state law claims on the basis of issue preclusion and governmental immunity where defendants filed a controlled substance tax assessment against plaintiffs after marijuana was found on their property even though plaintiffs were not arrested; the certificates of tax liability

were eventually canceled; plaintiffs filed an action for a number of claims, including violation of 42 U.S.C. § 1983, malicious prosecution, and intentional infliction of emotional distress in state court; that action was removed to federal court; the federal magistrate determined that the § 1983 claim was barred by defendants' qualified immunity but declined to exercise jurisdiction over the state claims, dismissing them without prejudice; the action was re-opened in state court; and that court found that defendants were not shielded by qualified or sovereign immunity and that the state claims were not barred by res judicata. The issue of claim preclusion is not involved because the federal magistrate did not decide the state claims, and the determination that defendants had qualified immunity against the § 1983 claims does not mandate a finding that defendants have immunity to the state law claims because the § 1983 claim involved the objective reasonableness of the official's conduct based upon law clearly established at the time, while immunity to state claims involves a subjective determination of the state of mind of the governmental actor (corrupt or malicious conduct). Defendants have not answered plaintiffs' allegations of corrupt and malicious conduct and issues of fact remain as to whether defendants may be entitled to immunity.

Appeal by defendants from order entered 7 October 1999 by Judge L. Todd Burke in Alleghany County Superior Court. Heard in the Court of Appeals 20 February 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for defendant-appellants.

Law Office of Harold J. Bender, by R. Deke Falls, for plaintiff-appellees.

HUDSON, Judge.

Defendants appeal an order of Judge L. Todd Burke declining to dismiss or to award summary judgment against plaintiffs' claims of malicious prosecution, intentional infliction of emotional distress, conspiracy to maliciously prosecute, and conspiracy to inflict emotional distress. Defendants argue plaintiffs' causes of action are barred by the doctrines of governmental immunity and claim preclusion. We affirm the trial court and remand for continuation of the proceedings below.

Facts pertinent to this case are as follows: on 14 July 1992, State Bureau of Investigation Special Agent Jeffrey Sellers was informed that a tractor trailer containing marijuana controlled by the Drug Enforcement Administration (DEA) was to be brought into western North Carolina by a group of undercover DEA agents and a cooperating informant. Law enforcement officers planned to arrest the individuals who had ordered the marijuana. On 16 July, the DEA agents and informant who were driving the truck met suspects John Anthony Norris, Donnie McLamb, and Steven Shew at a motel in Surry County. The three suspects then led the tractor trailer to a barn on a farm owned by Jones and Robert Andrews in Alleghany County, arriving around 9:15 p.m.

Sellers and approximately nineteen other federal, state, and county law enforcement officers set up surveillance of the barn at that time. At 10:41 p.m., the tractor trailer left the farm. Sometime thereafter, a 1986 Honda drove into the area where the officers were watching the barn and then drove away. The driver of the car was identified as a white male wearing glasses, and the car's tags indicated it was registered to Bonnie Andrews, known by local officers to be the recently separated wife of Robert Andrews.

Just after midnight, officers approached the barn. Steven Shew exited the barn and had a short conversation with the Alleghany County sheriff. Shew told the sheriff he was "just doing a little work" and that he had leased the barn from Robert Andrews. Inside the barn, officers found approximately 2,000 pounds of marijuana.

At approximately 1:28 a.m., officers went to the house of Jones Andrews. All the lights in the house were out, and it took him several minutes to get to the door. When Jones answered the door, it appeared he had just gotten out of bed. He told the officers he had not leased his barns to anyone and gave them permission to search his other barn. He thereafter accompanied the officers to the home of his son, Robert.

They approached Robert's house at around 2:00 a.m., and officers saw the 1986 Honda they had identified several hours earlier parked there. Robert came to the door quickly, fully dressed and wearing boots. The officers asked why he was fully dressed at that hour, and Robert told them he had fallen asleep on the couch. He said he had arrived at his residence at 5:00 p.m. the evening before and had not left since. When officers questioned him about seeing the Honda near the barn, Robert said his 15-year old son had been driving it earlier

that night. His son had told him he had seen some vehicles on the farm, but his son had assumed they were there for fox hunting. Officers did not question Robert's son.

Robert stated he had not leased the barn to anyone and did not know whose barrels of marijuana were in it. When informed that Steve Shew had been arrested in connection with the marijuana, Robert said he had heard rumors Shew was involved in drugs, but that he did not know him that well. Shew owed the Andrews money for some Christmas trees sold to him in the past, but Robert had never had any other dealings with him. Law enforcement officers did not believe they had probable cause to arrest Jones or Robert Andrews in connection with the marijuana, and no criminal charges were brought against them.

Hours after the marijuana was found, the Alleghany County sheriff contacted defendant R.A. Hughes, Deputy Secretary of the Controlled Substance Tax Section of the North Carolina Department of Revenue. Hughes immediately drove to Alleghany County to investigate the propriety of levying a controlled substance tax against those involved in the drug drop-off.

The controlled substance tax was enacted by the North Carolina General Assembly in 1989 and requires drug dealers to purchase stamps to affix to controlled substances in their possession. 1989 N.C. Sess. Laws ch. 772, § 1. The law imposes a tax against dealers who possess controlled substances without having purchased the proper stamps for them. The pertinent statute in effect during the events of the case *sub judice* stated:

> Notwithstanding any other provision of law, an assessment against a dealer who possesses a controlled substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary [of Revenue] shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary.

N.C.G.S. § 105-113.111 (amended in 1997 to substitute "an unauthorized substance" for "a controlled substance" in first sentence).

Subsequent to his visit to Alleghany County, Hughes decided sufficient evidence existed to levy the controlled substance tax against Robert Andrews. He based his decision on the following information given to him by Special Agent Sellers and the Alleghany County sheriff: that Steve Shew had said he had rented the barn from Robert, that

the vehicle which had been driven in the area of the barn after the drop-off was registered to Robert's wife, and that when officers went to Robert's house to talk with him he was fully dressed and appeared "very nervous." Hughes conferred with his supervisor, defendant Robert Crump, and received Crump's approval to make a tax assessment based on the above information.

On 21 July 1992, Hughes issued a "Notice of Controlled Substance Tax Assessment" against Robert Andrews, pursuant to N.C. G.S. § 105-113.111. The assessment consisted of a $3,175,200.00 tax, a $3,175,200.00 penalty, and $21,273.84 in interest, for a total of $6,371,673.84, based upon the seizure of 2,000 pounds of marijuana from the Andrews' barn.

On 22 July 1992, Hughes filed a "Certificate of Tax Liability" with the Alleghany County Clerk of Superior Court, which constituted a lien on real property owned by Robert Jones from the date it was docketed, pursuant to N.C.G.S. § 105-242(c). Approximately two weeks later, Hughes filed another "Certificate of Tax Liability" with Surry County, as he had learned Robert owned land in Surry County as well. At the time he filed these certificates, Hughes knew Jones and Robert Andrews were in the Christmas tree business.

On or about 3 August 1992, Robert Andrews filed an objection to the assessment and a request for a hearing. On 11 September 1992, he and his attorney met with Crump for a pre-hearing conference and requested a statement of the evidence upon which the tax assessment and lien were based. Thereafter, Crump wrote to Special Agent Sellers requesting him to set forth the evidence against Robert. Sellers' supervisor, J.S. Momier, Jr., wrote back on 12 October 1992 detailing the events of 16 and 17 July 1992 and ending with the following conclusion:

> Due to the facts that Shew had used the Andrews farm as a drop site for such a large amount of marijuana, that Andrews' vehicle was seen in the area around the barn by the surveillance teams while the marijuana was being worked in the barn, that at 2:00 a.m. in the morning when officers spoke with Andrews that he was fully dressed and appeared to be very nervous, and that by Steve Shew's statement that he leased the barn from Robert Andrews, it is believed that Robert Andrews was a silent partner for this shipment of marijuana and supplied the drop site for Shew.

Robert Andrews' attorney wrote Crump on 12 November 1992, urging him to make a prompt decision on the propriety of the assessment so that Robert "could sell his Christmas trees." He also wrote that "[a]s a direct result of the tax assessment still pending, my client has had to seek the protection of the Bankruptcy Court." Plaintiffs have alleged that the liens prohibited them from selling the Christmas trees on their property, and that without the income from the trees, they could not pay the mortgages on the property.

At some point in the fall of 1992, Hughes heard that Shew had recanted his statement that Robert Andrews had leased the barn to him. He also learned that it was Robert Andrews' son, not Robert himself, who had driven the Honda in the area of the barn on the night in question. Based on these facts, he came to the conclusion that the assessment should be lifted and shared this opinion with Crump. Crump then asked Hughes to find out if there was any other information tying Robert to the marijuana. Hughes reported back that he could not find any.

On 26 February 1993, United States Bankruptcy Judge Marvin R. Wooten entered an "Order Determining Tax Liability" on behalf of Robert Andrews, finding that "[t]he tax, penalty and interest assessed against the Debtor were assessed without good and valid basis in law or fact." Judge Wooten further found that the North Carolina Department of Revenue (DOR) had expressly consented to the tax cancellation sought by Robert Andrews. Judge Wooten ordered DOR to withdraw the tax assessment and release the liens filed in Alleghany and Surry counties within fifteen days. On approximately 21 March, Crump ordered Hughes to cancel the Certificates of Tax Liability. Hughes canceled the liens in Alleghany County on 23 March 1993 and in Surry County on 25 March 1993.

On 10 July 1995, Robert and Jones Andrews filed in Alleghany County Superior Court the suit which is the subject of this opinion. They alleged the defendants had seized their property in violation of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983; maliciously prosecuted them in violation of the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983; maliciously prosecuted them in violation of state law; intentionally inflicted emotional distress upon them in violation of state law; and conspired together to commit all of the above violations. Jones Andrews was included as a plaintiff in that he co-owned property subject to the liens with his son. On 26 September 1995, defend-

ants responded with a motion to dismiss the plaintiffs' claims pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6).

On 6 September 1994, plaintiffs filed in the Western District of the United States District Court essentially the same complaint filed in Allegheny County Superior Court. Plaintiffs and defendants made a joint motion to remove the case from the Alleghany Superior Court trial docket pending resolution of the federal case, which motion was approved.

A Memorandum of Decision was filed 16 October 1996 by United States Magistrate Judge H. Brent McKnight in response to defendants' motion for summary judgment. He determined, in short, that plaintiffs' federal claims pursuant to 42 U.S.C. § 1983 (section 1983) were barred by the defendants' qualified immunity. He declined to exercise pendent jurisdiction over plaintiffs' state law claims and dismissed them without prejudice.

Plaintiffs thereafter moved the Alleghany County Superior Court to re-open the case, and defendants followed with a motion for summary judgment which incorporated their earlier motion to dismiss. Defendants' motion asserted that the doctrine of *res judicata* barred plaintiffs' state claims based on the federal court's finding that defendants had qualified immunity to plaintiffs' section 1983 claims.

The order of Judge L. Todd Burke was filed on 7 October 1999, denying defendants' motions to dismiss and for summary judgment. The trial court concluded it had jurisdiction over the parties and the subject matter, and that plaintiffs had adequately stated claims for malicious prosecution, intentional infliction of emotional distress, and conspiracy to commit the preceding torts. It further found that defendants were not shielded as a matter of law under the doctrines of qualified or sovereign immunity, and that plaintiffs' state law claims were not barred by the doctrine of *res judicata*. Defendants filed notice of appeal to this Court on 4 November 1999.

[1] Normally, no appeal lies from an order refusing to dismiss a case or to grant summary judgment; however, when such an order declines to recognize a claim of governmental immunity on the part of defendants, it is subject to immediate appeal on that issue, as a substantial right is affected. *Denegar v. City of Charlotte*, 115 N.C. App. 166, 166-67, 443 S.E.2d 778, 779 (1994). We proceed therefore to address the immunity issues raised by defendants.

[2] The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion), cited by defendants in their arguments for immunity, have been developed in order to protect parties from the burden of relitigating previously decided matters. *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Under claim preclusion, where a "second action between two parties is upon the same claim, the prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action." *Id.* at 492, 428 S.E.2d at 161. When a second action between the same parties involves different claims, however, the doctrine of issue preclusion bars retrial only of "issues actually litigated and determined in the original action." *Id.*

In the present case, the trial court allowed plaintiffs' state law claims of malicious prosecution, intentional infliction of emotional distress, and conspiracy to commit these torts to move forward. These claims were not decided by the federal court; rather, Magistrate Judge McKnight declined to decide plaintiffs' state law claims and dismissed them without prejudice. Therefore, the doctrine of claim preclusion is not involved here.

Defendants argue that the federal court's finding that defendants had "qualified immunity" to plaintiffs' section 1983 claims operates under the doctrine of issue preclusion to mandate a finding by the state court that defendants have governmental immunity to plaintiffs' state law claims. We must therefore determine what issues were actually decided by the federal court with regard to defendants' immunity. To do so, it is necessary to examine the concept of "qualified immunity" as it is set forth in the federal law of section 1983 claims.

Section 1983 is a vehicle by which private citizens can sue government officials acting under color of state law for violation of their constitutional rights. Governmental officials sued in their individual capacities, as were the defendants in this case, may be held liable for money damages under section 1983. *See Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). They may, however, raise the defense of qualified immunity to section 1983 claims. *Id.*

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982).

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate the subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 818, 73 L. Ed. 2d at 410-11; *see* footnote 30 (explicitly applying the Court's decision to section 1983 claims).

North Carolina law regarding the immunity of government actors to suit under state law claims differs from the law of immunity in federal section 1983 actions. *See, e.g., Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760, *cert. denied*, 347 N.C. 270, 493 S.E.2d 746 (1997) (analyzing immunity to state law claims and section 1983 claims under different standards). It may be summarized as follows:

> It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.

Meyer v. Walls, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997) (quoting *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). Public employees, as opposed to public officials, do not enjoy the same protection, and may be held liable for mere negligence in the performance of their duties. *Id.*

Immunity of public officials to state law claims therefore involves a determination of the subjective state of mind of the governmental actor, *i.e.*, whether his actions were corrupt or malicious. By contrast, the U.S. Supreme Court stated in *Harlow v. Fitzgerald* that in determining qualified immunity to section 1983 cases, the trial court need not delve into the subjective motivation of the government actor. 457 U.S. at 815-18, 73 L. Ed. 2d at 409-10. Rather, the court

should examine the objective reasonableness of the official's conduct based upon law clearly established at the time. 457 U.S. at 818, 73 L. Ed. 2d at 410; *but cf. Corum*, 330 N.C. at 777, 413 S.E.2d at 286 (where the "clearly established law" contains a subjective element such as motive or intent, that element is properly a part of summary judgment analysis).

True to the dictate of *Harlow*, in the present case, Magistrate Judge McKnight did not consider the subjective intentions of the defendants in placing the tax liens on plaintiffs' property. Instead, he conducted a complex analysis of federal case law in effect at the time the liens were placed and determined, based on that case law, that although defendants did not have probable cause to believe Robert Andrews possessed marijuana, it was reasonable for the defendants to have been unaware that placing the liens constituted a seizure implicating the Fourth Amendment. *Andrews v. Crump*, 984 F. Supp. 393, 411-12 (W.D.N.C. 1996). He did not determine the defendants' actual knowledge or intentions regarding the violation of plaintiffs' rights. Thus, the federal judge's determination that defendants had qualified immunity against plaintiffs' section 1983 claims does not operate under the doctrine of issue preclusion to mandate a finding that defendants have immunity to plaintiffs' state law claims, which do involve issues of intent and state of mind.

Given that the federal court declined to rule on plaintiffs' state law claims and that defendants' qualified immunity to plaintiffs' section 1983 claims does not translate into governmental immunity to the state law claims, the trial court properly denied defendants' motion for summary judgment, which was based on the theories of issue and claim preclusion.

Assuming *arguendo* that defendants may be considered public officials as opposed to employees, their governmental immunity to the state law claims rests on whether their actions were "corrupt or malicious." Plaintiffs' complaint repeatedly alleges that the actions of defendants in placing the tax liens were corrupt and malicious. Plaintiffs allege, specifically, that defendants knew Robert Andrews had no involvement in criminal activity, yet proceeded to file the liens against him anyway.

Defendants have not filed an answer to plaintiffs' complaint, did not attach any evidence in contravention of plaintiffs' allegations to their motion for summary judgment, and did not make any arguments to the trial judge other than that the federal opinion pre-

cluded a finding of malice on the part of defendants. Although defendants did refer to certain depositions of law enforcement officers and Hughes at the hearing on the motion for summary judgment, the transcript of the hearing indicates they were not considered by the judge. *See* N.C. R. Civ. P. 56(c) (motion for summary judgment shall be served at least 10 days before the hearing). As defendants have not countered plaintiffs' allegations of corrupt and malicious conduct, issues of fact remain as to whether defendants may be entitled to governmental immunity.

Defendants additionally contend that plaintiffs' complaint cannot state a claim against them in their individual capacities because plaintiffs allege defendants were at all pertinent times acting within the scope of their employment. This assertion is without merit. Whether a plaintiff's allegations relate to actions outside the scope of a defendant's official duties is relevant in determining if the defendant is entitled to immunity, but it is "not relevant in determining whether the defendant is being sued in his or her official or individual capacity." *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888.

Defendants' remaining arguments were not assigned as error, and do not involve issues of immunity, and thus we do not address them. *See* N.C. R. App. P. 10(a) (Court's review limited to consideration of assignments of error set out in the record on appeal).

In conclusion, the trial court's refusal to dismiss or to grant summary judgment against plaintiffs' state law claims on the basis of issue preclusion and governmental immunity was proper.

Affirmed.

Judges GREENE and McCULLOUGH concur.

NANCY UNDERWOOD GROVES, PLAINTIFF v. COMMUNITY HOUSING CORPORATION OF HAYWOOD COUNTY, A NORTH CAROLINA NON-PROFIT CORPORATION, AND THE TOWN OF WAYNESVILLE, BY AND THROUGH ITS BOARD OF ALDERMEN, A BODY POLITIC ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA00-404

(Filed 5 June 2001)

1. Appeal and Error— record—extension of time to settle—not timely

A hearing held by a trial court to settle a record was not timely where plaintiff filed a notice of appeal on 9 November 1999; plaintiff served defendants with a proposed record on 5 January 2000, to which objections were filed; plaintiff served a request to settle the record on 2 February; plaintiff filed a notice of hearing on her request to settle the record on 3 March; the trial court judge signed an order purporting to extend time to settle the record on 17 March; it appears that a hearing was held on 17 March and that the court filed an order settling the record on 28 March; and the record was filed with the Court of Appeals on 12 April. The hearing to settle the record and the subsequent order were not timely and exceeded the authority of the trial court to grant extensions because the trial court may only consider motions to extend the time for the service of the proposed record on appeal, but plaintiff presented no such motion in this case. Nevertheless, the Rules of Appellate Procedure were suspended in this case to permit consideration of the appeal. N.C. R. App. P. 11(c).

2. Appeal and Error— assignments of error—not required—whether summary judgment properly granted

Assignments of error are not required where the question presented is whether summary judgment was properly granted.

3. Civil Procedure— summary judgment—notice—judgment on the pleadings

There was no error in the trial court granting summary judgment for a defendant in an action contesting the closing of a purported street where plaintiff contended that she had not received proper notice, but the record contained no affidavits, interrogatories or anything else other than the pleadings. The court's entry of judgment is deemed to have been made pursuant to a motion

for judgment on the pleadings under Rule 12(c), so that plaintiff was not entitled to the ten days' notice required for a motion for summary judgment.

4. Highways and Streets— closing—action to stop—statute of limitations

A motion for judgment on the pleadings for defendant was properly granted in an action seeking to stop the closing of a street where the action was filed more than thirty days after the adoption of an ordinance purporting to close the disputed strip of land and is barred by the statute of limitations of N.C.G.S. § 160A-299(b).

Appeal by plaintiff from orders entered 18 October 1999 and 26 October 1999 by Judge Zoro J. Guice, Jr. in Superior Court, Haywood County. Heard in the Court of Appeals 6 February 2001.

The Frue Law Firm, P.A., by William C. Frue, Jr. and Michael C. Frue, for the plaintiff-appellant.

McGuire, Wood & Bissette, P.A., by Grant B. Osborne, for the defendant-appellee Community Housing Corporation of Haywood County.

Brown, Queen, Patten & Jenkins, PA, by Frank G. Queen, and Brown, Ward & Haynes, P.A., by Michael L. Bonfoey, for the defendant-appellee Town of Waynesville.

WYNN, Judge.

The plaintiff brought this action under the North Carolina Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 et seq. (1996), to contest the validity of a proceeding to close a thirty-foot wide strip of land adjacent to her property located in Waynesville. The defendant Community Housing Corporation of Haywood County claims title to property adjacent to plaintiff's property, including a portion of the disputed thirty-foot wide strip of land.

The complaint filed on 13 November 1998 alleges that on 14 July 1997, defendant Town of Waynesville attempted to close a portion of said strip of land, a purported street, by passing an ordinance pursuant to N.C. Gen. Stat. § 160A-299 (1994). The complaint alleges that plaintiff has a property right amounting to a private easement in the strip of land, and that she was not provided the required notice of Waynesville's intent to close the property to which she was entitled

by law. The complaint further alleges that Waynesville acted improperly in purporting to close the strip of land, and in doing so Waynesville "purported to deprive Plaintiff of her right of access and use of the private easement adjoining her property" in a manner violative of plaintiff's property rights and her right to due process. The plaintiff further claims possession of a "permanent easement of right of way by estoppel" superior to the fee simple rights of the owner of the property.

Waynesville filed a Motion to Dismiss and Answer on 31 December 1998, wherein it asserted the complaint failed to state a claim upon which relief can be granted, and asserted the statute of limitations as an affirmative defense. Community Housing Corporation filed an answer in which it also asserted a Rule 12(b)(6) motion to dismiss for failure to state a claim. Community Housing Corporation subsequently filed a motion for summary judgment dated 28 September 1999, which motion was heard on 11 October 1999. The trial court entered an order of summary judgment on 18 October 1999 in favor of Community Housing Corporation. On 26 October 1999, the trial court entered an order purporting to grant summary judgment in favor of Waynesville. From these two orders, the plaintiff appeals.

[1] We first consider Community Housing Corporation's motion, filed 31 July 2000, to dismiss the plaintiff's appeal, based upon her failure to comply with our Rules of Appellate Procedure.

The plaintiff filed a notice of appeal on 9 November 1999. On 5 January 2000, plaintiff served defendants with a proposed record on appeal, to which Community Housing Corporation filed certain objections. The plaintiff, on 2 February 2000, timely served by mail a request to settle the record on appeal; this request was sent to both defendants and to Judge Zoro J. Guice, Jr., and was filed in the Superior Court, Haywood County on 2 February 2000.

Thirty days later, on 3 March 2000, plaintiff filed a notice of hearing on her request to settle the record on appeal, advising that the hearing to settle the record would be conducted on 17 March 2000. On 17 March 2000, Judge Guice signed an order purporting to extend the time to settle the record on appeal; no filing stamp appears on this order. It appears as though the trial court conducted a hearing to settle the record on appeal on 17 March 2000, following which the court, on 28 March 2000, filed an order settling the record on appeal. Fifteen days thereafter, on 12 April 2000, the record on appeal was filed with this Court.

The Rules of Appellate Procedure are mandatory, and failure to follow them will subject an appeal to dismissal. *See May v. City of Durham*, 136 N.C. App. 578, 525 S.E.2d 223 (2000); *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 519 S.E.2d 316 (1999); *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). "The rules are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Pollock v. Parnell*, 126 N.C. App. 358, 361, 484 S.E.2d 864, 866 (1997). Only those who properly appeal from judgments and orders of the trial court are entitled to relief in the appellate division. *See Craver v. Craver*, 298 N.C. 231, 258 S.E.2d 361 (1979). Furthermore, it is the appellant who "bears the burden of seeing that the record on appeal is properly settled and filed with this Court." *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988); *see Webb v. McKeel*, 132 N.C. App. 816, 817, 513 S.E.2d 596, 597 (1999).

N.C.R. App. P. 11 (2001) states that, following service upon the trial judge of a written request to settle the record on appeal:

> The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge.

N.C.R. App. P. 11(c). Here, the plaintiff served a request to settle the record upon Judge Guice on 2 February 2000; pursuant to Rule 11(c), a hearing to settle the record should have been held no later than 17 February 2000, and the record should have settled no later than 22 February 2000.

N.C.R. App. P. 27 (2001), which concerns the computation and extension of time under the Rules of Appellate Procedure, provides that, where service is effected by mail, the party required to act within a prescribed period after service thereon shall be allowed an additional three days within which to act. *See* N.C.R. App. P. 27(b). Accordingly, the hearing on the settling of the record should have occurred no later than 21 February 2000 (as 20 February was a Sunday), and the order settling the record must have been entered no later than 25 February 2000.

Additionally, Rule 11(f) provides for extensions of time pursuant to Rule 27(c). *See* N.C.R. App. P. 11(f); N.C.R. App. P. 27(c). Rule 27(c)

provides that the trial court may, upon motion and for good cause shown, extend any of the times prescribed by the Rules "for doing any act required or allowed" under the Rules. N.C.R. App. P. 27(c). However, the trial court may only consider motions to extend "the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal." N.C.R. App. P. 27(c)(1). All other motions for extensions of time "may only be made to the appellate court to which appeal has been taken." N.C.R. App. P. 27(c)(2).

In the instant case, the plaintiff presented no motion, either to the trial court or to this Court, seeking an extension of the time permitted under Rule 11(c) for holding a hearing to settle the record, and for entry of an order settling the record on appeal. Although the record indicates that no such request was ever made, the trial court nonetheless entered an order dated 17 March 2000, which does not appear to have been filed, purporting to extend the time for settling the record on appeal. We note that this order was not timely, and in any event is of no help to plaintiff because it exceeded the authority vested in the trial court to grant extensions. *See* N.C.R. App. P. 27(c)(2). As plaintiff failed to obtain a proper extension of time pursuant to Rule 27, the hearing held by the trial court to settle the record, and the order filed on 28 March 2000 settling the record, were not timely, and thus violated Rule 11(c). *See* N.C.R. App. P. 11(c).

Nonetheless, we exercise our discretion pursuant to Rule 2 to suspend the Rules, permitting us to consider the merits of plaintiff's appeal. *See* N.C.R. App. P. 2 (2001); *Onslow County v. Moore*, 127 N.C. App. 546, 491 S.E.2d 670 (1997), *disc. review allowed, decision vacated and remanded for consideration on the merits*, 347 N.C. 672, 500 S.E.2d 88 (1998). Accordingly, Community Housing Corporation's motion to dismiss the appeal is hereby denied.

[2] The plaintiff does not set forth any assignments of error in the record on appeal; however, such assignments are not required where the question presented is whether summary judgment was properly granted. *See* N.C.R. App. P. 10 (2001); *Vernon, Vernon, Wooten, Brown & Andrews v. Miller*, 73 N.C. App. 295, 326 S.E.2d 316 (1985); *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987). The issues presented to this Court are: (1) Whether there exists a genuine issue of material fact; and (2) Whether the moving party is entitled to judgment as a matter of law. *See Miller; Ellis*; *see also* N.C. Gen. Stat. § 1A-1, Rule 56 (2000). We therefore consider plaintiff's appeal as to the orders entered against her in favor of each defendant.

[3] As to Community Housing Corporation, plaintiff's complaint seeks a temporary injunction preventing construction on the disputed thirty-foot wide strip of land. The issuance of this injunction is contingent on the outcome of plaintiff's declaratory judgment action against Waynesville.

The trial court's 26 October 1999 order purporting to grant summary judgment in favor of Waynesville states in relevant part that it is based upon Waynesville's motion:

> raised in open court for dismissal based on [the Town of Waynesville's] motion to dismiss and affirmative defense. The plaintiff did not object to defendant Town of Waynesville's motion and the court treats the defendant Town of Waynesville's motion as a motion for summary judgment. It appears to the Court that there is no genuine issue as to any material fact and that the defendant, Town of Waynesville, is entitled to judgment as a matter of law.

The trial court therefore purports to grant summary judgment in favor of Waynesville, and states that "this action is dismissed with prejudice with the costs to be taxed to the plaintiff."

In its 18 October 1999 order of summary judgment in favor of Community Housing, the trial court states that it considered all submissions made by plaintiff and defendants, as well as arguments of counsel made in open court, and concluded that "there is no genuine issue as to any material fact as shown by the pleadings and the plaintiff's answers to interrogatories." We note that the record contains no interrogatories or responses thereto, nor has the appellant submitted a transcript of the 11 October 1999 hearing. Our review is therefore limited to the parties' pleadings as included in the record on appeal.

In her complaint, plaintiff sought the following relief:

> 1. That the Court declare that the rights of Plaintiff to the use and enjoyment of the Street purportedly closed by [the] Ordinance are superior to any rights acquired by the Defendant "Community Housing" by Deed recorded in Deed Book 467 at Page 1106, Haywood County, N.C. Registry.
>
> 2. That the Court declare that the Defendant "Town" failed to give Plaintiff notice of its intention to close the 30-foot street

adjacent to her property as required by law rendering the passage of Ordinance #9-97 purportedly closing such street unlawful and to declare same null and void having failed to comply with the notice requirements of N.C.G.S. 160-A-299.

3. That the Court declare that the description of the strip of land the Town purports to close in Ordinance #9-97 is ambiguous and uncertain and therefore void to give record notice as required by the laws of the State of North Carolina; that the Court declare said Ordinance to be a nullity.

4. That the Plaintiff has heretofore enjoyed a private easement by estoppel in said 30-foot strip known as New Street along with her predecessors in title for at least 80 years; that the public has never acquired an interest in said street nor used nor maintained same; that a municipality cannot utilize the provisions of N.C.G.S. 160A-299 et seq. to close streets or roadways in which the public has never held an interest; that Ordinance #9-97 is therefore a nullity as a matter of law.

5. That a temporary injunction issue against the Defendant "Community Housing" preventing the construction of any building on any portion of the 30-foot street located within the property described in Deed Book 467 at Page 1106, Haywood County, N.C. Registry.

Waynesville responded by filing a "Motion to Dismiss and Answer," wherein it admits that an ordinance was passed closing a portion of a street adjacent to plaintiff's property. However, Waynesville moved the court "pursuant to Rule 12(b) of the Rules of Civil Procedure to dismiss the . . . action for failure of the complaint to state a claim upon which relief can be granted," and alleged that plaintiff's actions are barred by the applicable statute of limitations. We agree.

In her brief on appeal, plaintiff argues that the trial court erred in granting Waynesville summary judgment, as no motion for summary judgment was properly before the court. The plaintiff contends that she did not receive the required ten days' notice pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (requiring a party moving for summary judgment to serve the motion "at least 10 days before the time fixed for the hearing" thereon). Because we conclude that the trial court's action constituted a judgment on the pleadings pursuant to Rule 12, rather than a summary judgment pursuant to Rule 56, we find no error.

The trial court denominated its order an "Order of Summary Judgment For The Town of Waynesville." However, where "the record on appeal contains no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base the decision, the court's entry of judgment will be deemed to have been made" pursuant to a motion to dismiss under Rule 12. *Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 460, 261 S.E.2d 260, 261, *appeal dismissed*, 300 N.C. 202, 282 S.E.2d 228 (1980) (*citing Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E.2d 68 (1974)); *see* N.C. Gen. Stat. § 1A-1, Rule 12 (2000); *Burton v. Kenyon*, 46 N.C. App. 309, 264 S.E.2d 808 (1980); *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); *Johnson v. Ruark Obstetrics and Gynecology Assocs.*, 327 N.C. 283, 395 S.E.2d 85 (1990).

Indeed, the trial court's order provides that the cause was heard "on motion of defendant, Town of Waynesville, raised in open court for dismissal based on the defendant's motion to dismiss and affirmative defense." Furthermore, the record on appeal contains no affidavits, answers to interrogatories, or transcripts of arguments by counsel. Accordingly, we treat the court's entry of judgment in favor of the Town as having been made pursuant to a Rule 12(c) motion for judgment on the pleadings. *See Burton; Johnson*. As such, the plaintiff was not entitled to the ten days' notice as required pursuant to Rule 56(c) on a motion for summary judgment.

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted must be made in the movant's responsive pleading, or by motion prior to filing a responsive pleading. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). A Rule 12(c) motion for judgment on the pleadings must be made "[a]fter the pleadings are closed but within such time as not to delay the trial." N.C. Gen. Stat. § 1A-1, Rule 12(c). Waynesville's Rule 12(b)(6) motion to dismiss was included in its responsive pleading; according to the trial court's order, Waynesville made an additional motion in open court "based on the [Town of Waynesville's] motion to dismiss and affirmative defense." The plaintiff does not contend that these Rule 12 motions were untimely.

[4] The question presented, therefore, is whether Waynesville's motion for judgment on the pleadings was properly granted by the trial court. A Rule 12(c) motion should be granted only when "the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of

law." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

> Judgment on the pleadings, pursuant to Rule 12(c), is appropriate " 'when all the material allegations of fact are admitted in the pleadings and only questions of law remain.' " [*Bladenboro*, 44 N.C. App. at 460, 261 S.E.2d at 261] (quoting *Ragsdale* [*v. Kennedy*], 286 N.C. [130,] 136-37, 209 S.E.2d [494,] 499 [(1974)]). The trial court must " 'view the facts and permissible inferences in the light most favorable to the non-moving party[],' " taking all well-pleaded factual allegations in the non-moving party's pleadings as true. *Id.* at 461, 261 S.E.2d at 262 (quoting *Ragsdale*, 286 N.C. at 136-37, 209 S.E.2d at 499).
>
> When ruling on a motion for judgment on the pleadings, the trial court "is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

Terrell v. Lawyers Mut. Liab. Ins. Co., 131 N.C. App. 655, 659-60, 507 S.E.2d 923, 926 (1998).

Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party. *Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981). "A judgment on the pleadings in favor of a defendant who asserts the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted." *Id.* at 87-88, 284 S.E.2d at 524. In such an instance, the plaintiff bears the burden of showing that her claim is not barred on the face of the complaint. *Id.* at 88, 284 S.E.2d at 524. A judgment on the pleadings may be appropriate in an action for declaratory relief, where the record shows there is no basis for such relief. *See Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E.2d 264, *disc. review denied*, 298 N.C. 297, 259 S.E.2d 300 (1979); N.C. Gen. Stat. § 1-253.

In the instant case, the complaint states that the ordinance purporting to close the thirty-foot strip of land was passed by Waynesville on 14 July 1997, having been adopted on 24 March 1997. The complaint seeking declaratory judgment was dated 13 November 1998. The statute under which Waynesville purported to close the street, N.C. Gen. Stat. § 160A-299, provides as follows:

> Any person aggrieved by the closing of any street or alley . . . may appeal the council's order to the General Court of Justice within 30 days of its adoption.
>
> . . .
>
> *No cause of action or defense founded upon the invalidity of any proceedings taken in closing any street or alley may be asserted, nor shall the validity of the order be open to question in any court upon any ground whatever, except in an action or proceeding begun within 30 days after the order is adopted.*

N.C. Gen. Stat. § 160A-299(b) (emphasis added). As the complaint was filed more than thirty days after the adoption of the ordinance purporting to close the disputed strip of land, plaintiff's action is barred by the statute of limitations. Accordingly, the trial court committed no error in dismissing plaintiff's cause of action against Waynesville with prejudice. Furthermore, as the trial court properly dismissed the cause of action against Waynesville, the court also committed no error in granting summary judgment to Community Housing Corporation, as plaintiff's cause of action against Community Housing Corporation was contingent upon her claim against Waynesville.

Affirmed.

Judges McGEE and BIGGS concur.

HORACE LEON WHALEY AND ROSALIND BAILEY WHALEY, PLAINTIFFS v. WHITE CONSOLIDATED INDUSTRIES, INC., T/B/A FRIGIDAIRE, DEFENDANT

No. COA00-630

(Filed 5 June 2001)

1. Damages and Remedies— punitive—damages—sufficiency of evidence—negligence action—directed verdict denied

The trial court did not err in a personal injury action arising from an electrical shock suffered by plaintiff during an expansion of an industrial plant by denying defendant's motion for a direct verdict , j.n.o.v., or a new trial on punitive damages where defendant's employee made the decision to energize a high voltage cable

over Thanksgiving weekend in spite of the fact that substations lacked equipment and were not operational; testified that he believed that plaintiff was aware that the line was energized and that he told others, although those people testified that they were never warned; padlocked switch handles, although these locks did not prevent exposure to potentially deadly electrical currents for those working inside the cabinet; and did not "tag" the substations as required by OSHA standards to notify other workers that the equipment was energized. The evidence was sufficient to go to the jury on the question of whether the employee's behavior demonstrated a reckless indifference to the rights of others.

2. Negligence— contributory—electrical injury—directed verdict denied

The trial court did not err by denying defendant's motions for directed verdict, j.n.o.v., or a new trial in a negligence action arising from an electrical injury suffered during expansion of an industrial plant where defendants contended that plaintiff was contributorily negligent. The evidence tends to show that defendant's employee was the only person who knew that the high voltage cable and unfinished substations were energized, plaintiff's company had contracted for the high voltage electrical work and had no reason to assume the lines would be energized prior to completion of the substations, and there was testimony that it was not reasonable to assume that plaintiff would have been aware that the line was energized; this evidence does not so clearly show that plaintiff failed to exercise ordinary care for his own safety as to compel the conclusion that he was contributorily negligence.

3. Negligence— contributory—instruction

The trial court did not err in a personal injury action in its instruction to the jury as to the standard of care required of plaintiff where the instruction given adequately informed the jury that plaintiff was required to use care commensurate with the circumstances. The court was not required to use the language requested by defendant.

4. Trials— mistrial denied—delay from flooding

The trial court did not abuse its discretion in a negligence action by refusing to declare a mistrial after the trial was interrupted by Hurricane Floyd flooding. Although the trial was delayed by extensive flooding under arguably trying circum-

stances, it affirmatively appears from the record that the trial court made inquiry as to the effect of the delay and reached a reasoned decision based upon the jurors' responses.

Appeal by defendant from judgment entered 31 January 2000 by Judge Carl L. Tilghman in Lenoir County Superior Court. Heard in the Court of Appeals 29 March 2001.

Moore & Van Allen, PLLC, by Lewis A. Cheek and Michael A. DeFranco, for plaintiff-appellees.

Mayer, Brown & Platt, by Robert B. Cordle and Mary K. Mandevilla; Walker, Clark, Allen, Herrin & Morano, L.L.P., by Jerry A. Allen, Jr., for defendant-appellant.

MARTIN, Judge.

Plaintiffs brought this action to recover damages for personal injuries to Horace Leon Whaley (hereinafter "Whaley") and loss of consortium by Rosalind Bailey Whaley following Whaley's injury by an electric shock sustained at defendant's manufacturing plant in Kinston, North Carolina. Plaintiffs alleged, *inter alia*, that Whaley's injuries were caused by negligence on the part of defendant White Consolidated Industries, Inc. (hereinafter "defendant White") and its employee, Bobby Patton. Defendant White filed its answer, denying negligence and asserting, as affirmative defenses, negligence on the part of Whaley and on the part of his employer, E & R, Inc., and co-worker, Hugh Sutton.

Briefly summarized to the extent necessary to an understanding of the issues raised on appeal, the evidence presented at trial tended to show that defendant White contracted to expand its plant to enable it to produce dishwasher racks. The expansion required the installation of electrical equipment, including substations, which would deliver power to the industrial equipment. R.N. Rouse & Co. ("Rouse") served as the general contractor for the expansion project; Rouse subcontracted all electrical work to Triple-R Electric, which in turn hired E & R, Inc., Whaley's employer, to perform the high voltage electrical work. E & R's responsibilities included the assembly and installation of three substations, the installation of the high voltage cables to the HVL switch, and the connection of the high voltage cables from the switch to the new substations. The target date for completion of the job was Thanksgiving weekend 1995. Because certain substation equipment was not delivered on time, E & R could not

finish its work by this date. Although the equipment was not fully assembled and thus not ready for operation, the evidence showed that Bobby Patton, defendant's manufacturing engineer and expansion project liaison, made the decision to move ahead with the original plan to energize the high voltage cable over the Thanksgiving weekend. Energizing the cable in turn energized the unfinished substations. William Hardy Rouse, Jr., Vice President of Triple-R Electric, testified that "anything to do with electricity, especially turning the circuits on and energizing equipment, is under our jurisdiction." Once the cable and substations were energized, Patton padlocked the HVL switch handles. Nevertheless, Patton did not "tag" the equipment. Certified Safety Professional Raymond Boylston testified that, according to OSHA standards, a danger tag must be placed on any piece of energized equipment "anytime you lock out a power circuit for electrical safety." Patton also did not barricade the area. Although Patton testified that he warned several people that the cable would be energized, including Whaley and his co-worker, Sutton, all these people testified that they were not warned. The equipment E & R needed to complete work on the substations arrived in early December, and Whaley and Sutton returned to finish the job on 14 December 1995. Patton testified that he knew the men would be working on the substations, but believed they would be working on the distribution panels and not in the cabinet containing the HVL switch. Shortly after starting work, while reaching inside the cabinet to insert a bolt, Whaley leaned against an energized metal bar and incurred a severe electric shock. He suffered serious burns and remained in the Burn Center at UNC Hospitals until 22 January 1996; he also lost most of the function in his right arm.

Defendant's motion for directed verdict at the close of all the evidence was denied. The jury returned a verdict finding defendant White negligent, that such conduct was willful and wanton, and that neither Whaley nor his employer was negligent. The jury awarded plaintiffs $1.27 million in compensatory damages and $2.1 million in punitive damages. Defendant's post-trial motions for judgment notwithstanding the verdict and, in the alternative, for a new trial, were denied. Defendant appeals.

I.

[1] Assigning error to the denial of its motions for directed verdict, judgment notwithstanding the verdict, and, alternatively, a new trial, as to plaintiffs' claim for punitive damages, defendant White argues

there was insufficient evidence to support a finding that the conduct of its employee, Patton, was willful or wanton. We disagree.

A motion for directed verdict pursuant to G.S. § 1A-1, Rule 50(a) tests the sufficiency of the evidence to support a verdict for the non-moving party. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). A motion for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50(b) is essentially a renewal of an earlier motion for directed verdict. *Bryant v. Nationwide Mutual Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). The same test is applied when ruling on either motion. *Id.* On a defendant's motion for a directed verdict or judgment notwithstanding the verdict, the plaintiff's evidence must be taken as true and considered in the light most favorable to him, and the motion should be denied only if, as a matter of law, such evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974).

> In considering any motion for directed verdict, the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant at 369, 329 S.E.2d at 337-38 (citation omitted).

While a motion for directed verdict or judgment notwithstanding the verdict raises an issue of law, a motion for a new trial pursuant to G.S. § 1A-1, Rule 59 is addressed to the trial court's discretion. *Bryant, supra.* In this case, defendant White assigns error to the denial of its motion for a new trial made upon the grounds contained in Rule 59(a)(7): "Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law." A motion made upon such grounds authorizes the trial court to appraise the evidence and to grant a new trial if, in the opinion of the court, the verdict is contrary to the greater weight of the credible evidence. *In re Will of Buck*, 350 N.C. 621, 628, 516 S.E.2d 858, 863 (1999). Appellate review of a trial court's ruling on a Rule 59(a)(7) motion raises no question of law, but presents only the question of whether the record affirmatively demonstrates an abuse of discretion, i.e., a probable " 'substantial miscarriage of justice' ", by the trial judge. *Id.* at 625, 516 S.E.2d at 861 (citations omitted).

To support an award of punitive damages, plaintiff must show that defendant's conduct went beyond negligence and was " 'done willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights.' " *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 383, 291 S.E.2d 897, 903, *affirmed*, 307 N.C. 267, 297 S.E.2d 397 (1982) (citation omitted). Punitive damages may be awarded only when

> the defendant commits the actionable legal wrong willfully (i.e., knowingly, intentionally and voluntarily), wantonly (i.e., in conscious and intentional disregard of and indifference to the rights and safety of the plaintiff), or maliciously (i.e., motivated by personal hatred, ill will or spite for the plaintiff).

Hornby v. Pennsylvania Nat'l. Mut. Cas. Ins. Co., 77 N.C. App. 475, 481, 335 S.E.2d 335, 339 (1985), *disc. review denied*, 316 N.C. 193, 341 S.E.2d 570 (1986) (citation omitted). " 'An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978) (citation omitted).

In the present case, Patton, acting as liaison for defendant White, made the decision to energize the high voltage cable over Thanksgiving weekend 1995, in spite of the fact that the substations lacked necessary equipment and were not operational. Patton energized the cable, which in turn energized the substations, knowing employees from E & R still had work to perform on the substations. Patton testified that he believed plaintiff and Sutton were aware the line was energized; he also claimed to have told three other people involved in the project that the line was energized, but those people testified that they were never warned. Although Patton padlocked the HVL switch handles, these locks did not prevent exposure to potentially deadly electrical currents for those working inside the cabinet. Finally, Patton did not "tag" the substations, as OSHA standards require, to notify other workers that the equipment was energized. Taken in a light most favorable to plaintiff, the evidence presented was sufficient to go to the jury on the question of whether Patton's behavior demonstrated a reckless indifference for the rights of others. Furthermore, in light of such evidence, we cannot say the trial court's discretionary ruling denying defendant White's alternative motion for a new trial pursuant to Rule 59(a)(7) on the issue of punitive damages amounted to a miscarriage of justice or an abuse of discretion. *See In re Will of Buck*, *supra*.

II.

[2] Defendant White next argues that the trial court erred in denying its motions for directed verdict, judgment notwithstanding the verdict, and, alternatively, a new trial, because Whaley was contributorily negligent as a matter of law. We disagree.

It is well established in North Carolina that a claimant's contributory negligence is a complete bar to recovery on a claim for damages sustained by reason of a defendant's negligent conduct. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). The doctrine of contributory negligence has been summarized by the North Carolina Supreme Court:

> "Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."

Id. at 673, 268 S.E.2d at 507 (citation omitted). "[A] plaintiff is contributorily negligent as a matter of law, thereby entitling a defendant to a directed verdict, when 'the evidence taken in the light most favorable to [the] plaintiff establishes [his] negligence so clearly that *no other reasonable inferences or conclusions may be drawn therefrom.*' " *Wolfe v. Wilmington Shipyard, Inc.*, 135 N.C. App. 661, 667, 522 S.E.2d 306, 311 (1999) (emphasis added) (quoting *Dunbar v. City of Lumberton*, 105 N.C. App. 701, 703, 414 S.E.2d 387, 388 (1992)).

The evidence tends to show that defendant White's employee, Patton, was the only individual who knew the high voltage cable and unfinished substations were energized on 14 December 1995. Further, E & R contracted to perform the high voltage electrical work and thus had no reason to assume the lines would be energized prior to the completion of the substations. William Rouse, of Triple-R Electric, the company which contracted with defendant to complete all the electrical work for the project, testified that he was not aware the cable was energized. Rouse further stated that it was not reasonable to assume plaintiff would have been aware the line was energized:

> Based on the condition of the equipment—I mean, they wrapped the equipment up. We put light bulbs in it to keep moisture out of it. There shouldn't have been any power on it. I wouldn't have asked myself. I would probably have done just like he did: went in there and gone back to work. I mean, that was his responsibility to do it. That's what they got paid for.

We hold the evidence, taken in the light most favorable to plaintiffs, does not so clearly show that Whaley failed to exercise ordinary care for his own safety as to compel the conclusion that he was contributorily negligent. *See Partin v. Carolina Power & Light Co.*, 40 N.C. App. 630, 253 S.E.2d 605, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979) (citation omitted). Therefore, defendant was not entitled to a directed verdict or judgment notwithstanding the verdict based on Whaley's contributory negligence. Similarly, the trial court did not abuse its discretion in denying defendant White's motion for a new trial on the grounds the verdict finding that Whaley was not contributorily negligent was against the greater weight of the evidence.

[3] In a related assignment of error, defendant White contends the trial court erred in instructing the jury as to the standard of care required of plaintiff Whaley to avoid injury to himself. The trial court instructed:

> [a] person is under a duty to use ordinary care to protect himself and others from injury. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury.

Defendant White contends the court should have instructed the jury, in accordance with its requested instruction, that Whaley was held to a heightened standard of care which required "utmost diligence and foresight" and which was "commensurate with the danger to be avoided." However, as our Supreme Court has observed, the standard of care does not vary.

> The standard is *always* the rule of the prudent man, or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions. The standard is due care, and due care means commensurate care under the circumstances. (citations omitted).

Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 559-60, 119 S.E.2d 767, 772 (1961). We believe the instruction given in this case adequately informed the jury that Whaley was required to use due care, that is, care commensurate with the circumstances. The trial court was not required to use the exact language requested by defendant White, as the charge given was correct and included in substance the requirement that Whaley exercise that same degree of care as a reasonable man would exercise commensurate with the circumstances. *See King v. Higgins*, 272 N.C. 367, 158 S.E.2d 67 (1967); *Williams v. Randolph*, 94 N.C. App. 413, 380 S.E.2d 553, *disc. review denied*, 325 N.C. 437, 384 S.E.2d 547 (1989).

III.

In its next assignment of error, defendant White contends it is entitled, pursuant to G.S. § 97-10.2(e), to a reduction in the damages awarded Whaley by the jury in the amount of the worker's compensation benefits which he received because the negligence of his employer, E & R, Inc., through Whaley's co-worker, Hugh Sutton, combined to produce the injury. As required by the statute, the issue of E & R's negligence was submitted to the jury; the jury determined that Whaley's injury was not caused by negligence on the part of E & R, Inc. Nevertheless, defendant White contends the trial court erred in denying its motion for a directed verdict and judgment notwithstanding the verdict, and alternatively, for a new trial, on the issue because the evidence showed that Sutton was negligent as a matter of law. We disagree.

There was evidence tending to show that Sutton arrived on the job-site before Whaley and, thus, had perhaps more time to observe the surroundings than did Whaley. Sutton admitted seeing the padlocks on the switch handles. Nevertheless, he testified that seeing the padlocks did not lead him to believe the substations were energized because no "lock-out tags" were found on the substations. In addition, electrical contractor Rouse admitted during the trial that, based on the look of the substations, "[t]here shouldn't have been any power on it. I wouldn't have asked myself." Finally, Sutton spoke with defendant White's project liaison on the morning of the accident, but Patton did not tell him that the line was energized. Thus, the issue of Sutton's negligence was properly submitted to the jury, and defendant White's motions were properly denied.

IV.

[4] In its final assignment of error, defendant White contends the trial court erred when it refused to declare a mistrial after the trial was interrupted due to flooding caused by Hurricane Floyd. The decision as to whether to declare a mistrial is within the discretion of the trial court; accordingly, " 'unless the ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.' " *State v. Parker*, 119 N.C. App. 328, 336, 459 S.E.2d 9, 13 (1995) (citation omitted). In its Memorandum Decision and Order, the trial court explained:

> the Court made inquiry of the jury regarding their ability to continue with the case and discharge their duty. All jurors, without hesitating, indicated that they could continue as jurors and complete the case despite the flood and its effect on them, and despite the two-week delay.

Although the trial was delayed by extensive flooding caused by Hurricane Floyd and was completed under arguably trying circumstances, it affirmatively appears from the record that the trial court made inquiry as to the effect of the delay and reached a reasoned decision based upon the jurors' responses. Hence, defendant White has failed to show a manifest abuse of discretion in the trial court's decision to deny defendant's motion for a mistrial and complete the trial following the two week delay. This assignment of error is overruled.

No error.

Judges BIGGS and JOHN concur.

THE ESTATE OF JOHN WATERS, SWANNIE TAYLOR WATERS, ADMINISTRATRIX, PLAINTIFF v. WAYNE THOMAS JARMAN; JOHN BERRY; KINSTON SURGICAL ASSOCIATES, P.A.; ROBERT WILLIAM BYNUM; EASTERN NEPHROLOGY ASSOCIATES, PLLC; LENOIR MEMORIAL HOSPITAL, INC. D/B/A LENOIR MEMORIAL HOSPITAL, DEFENDANTS

No. COA00-510

(Filed 5 June 2001)

Hospitals and Other Medical Facilities— negligence—granting of privileges—Rule 9(j) certification

The trial court erred in a medical malpractice action by dismissing claims against defendant hospital for negligently granting hospital privileges because those claims lacked the certification required by N.C.G.S. § 1A-1, Rule 9(j). Corporate negligence actions brought against a hospital which pertain to clinical patient care constitute medical malpractice actions; however, the claim is derived from ordinary negligence principles where it arises from policy, management or administrative decisions (such as granting or continuing hospital privileges). Only those claims which assert negligence arising from the provision of clinical patient care constitute medical malpractice actions and require certification.

Appeal by plaintiff from order entered on 7 February 2000 by Judge James D. Llewellyn in Lenoir County Superior Court. Heard in the Court of Appeals 15 March 2001.

Faison & Gillespie, by O. William Faison and John W. Jensen, for plaintiff-appellant.

Harris, Shields, Creech and Ward, P.A., by Robert S. Shields, Jr., for defendant-appellees.

MARTIN, Judge.

This action arises out of medical treatment provided by Drs. Wayne Jarman, Robert Bynum and John Berry to John Waters [hereinafter "decedent"] at Lenoir Memorial Hospital [hereinafter "defendant hospital"] from 8 June 1997 through 20 June 1997. Decedent was transferred to Pitt County Memorial Hospital on 20 June and died on 6 August 1997. The complaint alleges negligence on the part of the three physicians for failing to diagnose appendicitis and asserts claims against Kinston Surgical Associates and Eastern Nephrology

Associates, PLLC, under the theory of respondeat superior. The complaint also asserts claims against defendant hospital under the theories of respondeat superior and corporate negligence. The corporate negligence claims allege that defendant was negligent by failing to adequately assess the physicians' credentials before granting hospital privileges, by continuing the physicians' privileges at the hospital, by failing to monitor and oversee the physicians' performances, and by failing to follow its own procedures.

As required by G.S. § 1A-1, Rule 9(j), the complaint certified that "[t]he medical care in this action was reviewed by persons reasonably expected to qualify as expert witnesses pursuant to Rule 702 of the North Carolina Rules of Evidence" and that those persons "are willing to testify that the medical care did not comply with the applicable standard of care." The complaint then stated:

> This pleading, however, also alleges facts establishing breaches of common law duties for which certification of compliance with Rule 9(j) is not required. In particular, the claims against the Hospital—which do not allege "medical malpractice by a health care provider. . .in failing to comply with the applicable standard of care," but rather, allege respondeat superior and common law corporate negligence—fall outside the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure and, as such, compliance with Rule 9(j) with respect to these claims is not required.

In its answer, defendant sought dismissal because plaintiff failed to comply with Rule 9(j) as to its claims of corporate negligence. The trial court allowed the motion and dismissed the corporate negligence claim against defendant hospital. The trial court certified its order as a final judgment pursuant to G.S. § 1A-1, Rule 54(b). Plaintiff appeals.

The sole issue before this Court is whether Rule 9(j) certification is required when a plaintiff alleges corporate negligence claims against a hospital. G.S. § 1A-1, Rule 9(j) provides, in pertinent part:

> Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2000). Rule 9(j) was enacted in 1995, "in part, to protect defendants from having to defend frivolous medical malpractice actions by ensuring that before a complaint for medical malpractice is filed, a competent medical professional has reviewed the conduct of the defendants and concluded that the conduct did not meet the applicable standard of care." *Webb v. Nash Hospitals, Inc.*, 133 N.C. App. 636, 639-40, 516 S.E.2d 191, 194, *disc. review denied*, 351 N.C. 122, 541 S.E.2d 471 (1999).

The applicable standard of care in medical malpractice actions is governed by G.S. § 90-21.12, which was enacted in 1975 and provides:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities . . . .

Establishing the standard of care owed by a health care provider in a medical malpractice action generally requires "highly specialized knowledge" not within the common knowledge of a layperson. *Mazza v. Huffaker*, 61 N.C. App. 170, 175, 300 S.E.2d 833, 837, *disc. review denied*, 309 N.C. 192, 305 S.E.2d 734 (1983). Therefore, expert testimony is often required in medical malpractice actions. *Id.* Thus, resolution of this case depends upon whether corporate negligence claims asserted against a hospital constitute medical malpractice actions. If the claims are medical malpractice actions, Rule 9(j) requires certification of expert review in the pleading.

Our statute governing actions for medical malpractice defines "medical malpractice action" as:

> a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the

> performance of medical, dental, or other health care by a health care provider.

N.C. Gen. Stat. § 90-21.11 (1999). Pursuant to this section, a hospital constitutes a "health care provider." *Id.*

We have previously established that some negligence claims asserted against a health care provider do not fit within the statutory definition of medical malpractice. In *Lewis v. Setty*, 130 N.C. App. 606, 503 S.E.2d 673 (1998), the plaintiff alleged that the physician was negligent in failing to lower the examination table prior to transferring the plaintiff to his wheelchair. The action was dismissed by the trial court for failure to comply with Rule 9(j). *Id.* at 607, 503 S.E.2d at 673. On appeal, we held that compliance with Rule 9(j) was not required because the cause of action did not arise out of the "furnishing of *professional* services" and therefore did not fit the definition of a medical malpractice action. *Id.* at 608, 503 S.E.2d at 674. *See also Taylor v. Vencor*, 136 N.C. App. 528, 525 S.E.2d 201, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 884 (2000) (holding the claim was not a medical malpractice action where the plaintiff sued a nursing home for failure to adequately supervise her elderly mother while she smoked cigarettes).

It is undisputed that the claims asserted in this action involve the furnishing of professional services; however, the pertinent question here appears to be whether the claims arose "*in the performance of medical, dental, or other health care* by a health care provider." N.C. Gen. Stat. § 90-21.11 (emphasis added). A review of the case law involving corporate negligence claims asserted against a hospital reveals that there are fundamentally two kinds of claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital. The case law has treated the two types of claims differently.

Our courts have applied the medical malpractice statutory standard of care and required expert testimony where the corporate negligence claims arose out of clinical care provided by the hospital to the patient. In *Clark v. Perry*, 114 N.C. App. 297, 442 S.E.2d 57 (1994), the plaintiff sued a hospital for failing to obtain informed consent prior to performing a blood transfusion. The court noted that expert testimony is required to establish the standard of care regarding failure to obtain informed consent, and held that plaintiff failed to make out a

prima facie case because no evidence was produced about the standard of care utilized by health care facilities in similar communities when obtaining a patient's informed consent to a blood transfusion. *Id.* at 316, 442 S.E.2d at 67-68. In *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E.2d 407 (1980), the plaintiff alleged the hospital was negligent in failing to promptly report test results to her physician. This Court upheld a directed verdict in favor of defendant hospital, holding that the plaintiff failed to offer some evidence that the care of the defendant hospital was not in accordance with the standards of practice among other hospitals in the same or similar communities regarding the time necessary to report test results. *Id.* at 333, 271 S.E.2d at 409-10. Finally, in *Paris v. Kreitz*, 75 N.C. App. 365, 331 S.E.2d 234, *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985), the plaintiffs sued the hospital for negligence because the emergency room doctor failed to see the patient despite requests from the patient's daughter. This Court held "[t]here is no evidence of a standard by which the Hospital's handling of the case could be judged by a jury." *Id.* at 386, 331 S.E.2d at 248.

However, where the corporate negligence claims allege negligence on the part of the hospital for administrative or management deficiencies, the courts have instead applied the reasonably prudent person standard of care. In *Blanton v. Moses H. Cone Hosp., Inc.*, 319 N.C. 372, 354 S.E.2d 455 (1987), the plaintiff sued the hospital seeking damages for injuries sustained in a series of operations performed on its premises. The allegations against the hospital included that the hospital was negligent in granting privileges to plaintiff's physician to perform an operation for which he was not qualified and in failing to adequately monitor and oversee the physician. *Id.* at 373, 354 S.E.2d at 456. The Court stated that corporate negligence is merely the application of common law principles of negligence, and applied the reasonably prudent person standard to the plaintiff's claims. *Id.* at 375, 354 S.E.2d 457. Similarly, this Court applied the reasonably prudent person standard of care to a corporate negligence claim in *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391, *disc. review denied*, 300 N.C. 194, 269 S.E.2d 621 (1980), where the plaintiff alleged that the hospital was negligent in its selection and supervision of the physicians who performed the surgery. *See also Muse v. Charter Hospital*, 117 N.C. App. 468, 452 S.E.2d 589, *affirmed*, 342 N.C. 403, 464 S.E.2d 44 (1995) (applying the reasonably prudent person standard where the plaintiff alleged the hospital was negligent in its practice of discharging patients when their insurance expired).

Collectively, we believe these cases stand for the proposition that corporate negligence actions brought against a hospital which pertain to clinical patient care constitute medical malpractice actions; however, where the corporate negligence claim arises out of policy, management or administrative decisions, such as granting or continuing hospital privileges, failing to monitor or oversee performance of the physicians, credentialing, and failing to follow hospital policies, the claim is instead derived from ordinary negligence principles. This distinction is consistent with the statutory definition of medical malpractice actions, which requires that the claim arise of out services "in the performance of medical, dental or other health care." Accordingly, only those claims which assert negligence on the part of the hospital which arise out of the provision of clinical patient care constitute medical malpractice actions and require Rule 9(j) certification.

Finally, we address defendant's argument that the language of Rule 702(h) of the North Carolina Rules of Evidence demonstrates that claims against hospitals pertaining to administrative or nonclinical issues constitute medical malpractice actions. This section provides:

> Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 8C-1, Rule 702(h). However, Rule 702(h) is a rule of evidence, not one of substantive law. While we recognize that the language of this evidentiary rule may appear inconsistent with our holding in this case, we believe the substantive law is clear that the reasonably prudent person standard, and not the medical malpractice statutory standard of care, applies to corporate negligence actions involving claims related to administrative or nonclinical issues. Because principles of ordinary negligence have been applied to these types of claims even after the enactment of the statutory standard of

care in G.S. § 90-21.12, and because the legislature has not since articulated a change in the standard of care, we do not believe the language of Rule 702(h) applies to require Rule 9(j) certification. While we recognize the danger of artful pleading in these cases and the potential for erosion of the policy behind the enactment of Rule 9(j), this argument is for the legislature.

In the case before us, the claims against defendant hospital assert negligence in the continuation of hospital privileges, failure to follow hospital policies, failure to monitor and oversee the performance of the physicians, and failure to adequately assess the credentials of the physicians prior to granting privileges. Because these claims assert administrative and management deficiencies and do not arise out of the furnishing of professional services in the performance of medical, dental or other health care, they are not claims for medical malpractice. Accordingly, Rule 9(j) certification is not required and the court erred in dismissing these claims.

Reversed.

Judges TIMMONS-GOODSON and TYSON concur.

NICOLE ZENOBILE, PLAINTIFF v. BRENT McKECUEN, ALFRED SANDERLIN, JEANNIE YOUNG, AND OTHER PEOPLE, PRESENTLY UNKNOWN, DEFENDANTS

No. COA00-739

(Filed 5 June 2001)

1. Pleadings— amendment of complaint—relation back

The trial court erred in an emotional distress action in its alternate conclusion that any attempt by plaintiff to amend her complaint would be futile in that the amendment would not relate back to the original filing. The relevant date is the date of the filing of the motion for leave to amend, not the date the court rules on the motion; even assuming that this plaintiff's claim accrued at the earliest possible date, plaintiff's motion for leave to amend was filed prior to the running of the statute of limitations.

2. Pleadings— amendment—motion to dismiss—ruled upon first

The trial court erred in an emotional distress action in its alternate conclusion that there was no proper amendment of the complaint where the court ruled on a motion to dismiss before ruling on the motion for leave to amend.

3. Pleadings— leave to amend

Leave to amend a complaint for emotional distress to add defendants and claims should have been allowed where the claims arose from the same occurrence, plaintiff provided notice of the motion to existing parties, and there was no apparent reason to deny leave to amend.

4. Emotional Distress— claim for relief—sufficiently stated

The trial court erred by determining that a complaint failed to state a claim for which relief could be granted as to defendant Young where the complaint alleged causes of action for intentional and negligent infliction of emotional distress and civil conspiracy to deprive plaintiff of her rights as a woman under N.C.G.S. § 99D-1, and the alleged facts, taken as true, indicate that Young was responsible for mixing the drinks which rendered plaintiff physically helpless; that Young knew or should have known that plaintiff became physically helpless and later unconscious after drinking the drinks; that Young was present while plaintiff was stripped naked, filmed, carried to a sofa gasping for air, examined by a paramedic, and removed from the house by another defendant; that Young later sought to conceal her involvement in the incident despite knowing that it was the subject of a criminal investigation; and that Young acted upon a common scheme with other defendants to harass and discredit plaintiff, and to destroy evidence and obstruct justice.

Appeal by plaintiff from order entered 23 March 2000 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 18 April 2001.

McSurely & Osment, by Alan McSurely and Ashley Osment, for plaintiff-appellant.

Ward & Smith, P.A., by V. Stuart Couch and A. Charles Ellis, for defendant-appellee Jeannie Young.

HUDSON, Judge.

Nicole Zenobile (plaintiff) appeals the 23 March 2000 order of the trial court granting defendant Jeannie Young's motion to dismiss. We reverse and remand.

On 2 June 1999, plaintiff, a dispatcher for the Elizabeth City Police Department (ECPD), filed a complaint naming only one defendant, Brent McKecuen, an officer with the ECPD. The complaint generally alleges that while plaintiff was at McKecuen's parents' house for a social gathering in mid-September of 1996, plaintiff "became helpless" and McKecuen filmed plaintiff with a video camera after others had removed her bathing suit. The complaint further alleges that McKecuen displayed the video tape to people at the house that night, and to members of the ECPD and other individuals during the next few days. The complaint sets forth claims for intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED), and requests compensatory and punitive damages.

On 30 July 1999, McKecuen filed an answer denying the allegations and raising certain defenses. On 30 August 1999, plaintiff filed a "Motion for Leave to File Amended Complaint," requesting leave to add two additional defendants, to add two additional claims, and to add additional allegations to the original complaint. Plaintiff also attached and filed with the motion her proposed amended complaint. McKecuen was served with a copy of plaintiff's motion and a copy of the amended complaint. The two proposed additional defendants were each served with a summons and a copy of the amended complaint.

The proposed amended complaint names Alfred Sanderlin and Jeannie Young as defendants in addition to McKecuen. It alleges that the three defendants "singly and in concert" engaged in conduct constituting IIED and NIED, and that they "conspired to deprive [plaintiff] of her civil rights as a woman" in violation of N.C.G.S. § 99D-1 (1999), "Interference with Civil Rights." In addition, the amended complaint sets forth the alleged incident of mid-September of 1996 in further detail, including: that plaintiff was invited by Sanderlin to the house for a pool party; that Sanderlin asked Young to mix a drink for plaintiff; that Young mixed two drinks for plaintiff; that plaintiff drank as much as half of one drink although it "did not taste right"; that plaintiff was rendered "physically helpless" after ingesting the drink and became unconscious within thirty minutes; that Sanderlin said to

McKecuen, "Get the camcorder"; that Young said to Sanderlin, "It's all yours, Al" and, "I need to know which way you're going on this, because I've got money riding on it"; that at one point plaintiff was carried to the living room sofa while she was gasping for air; that a paramedic, who was a personal friend of McKecuen, was called to the house to examine plaintiff; that plaintiff regained consciousness the following morning in an apartment belonging to an officer of the ECPD; that when she regained consciousness Sanderlin's fingers were penetrating her vagina; that after plaintiff reported the incident, defendants met at Young's house and conspired to cover up the incident.

On 14 October 1999, before the trial court had ruled on plaintiff's motion for leave to amend, Young filed an answer to the proposed amended complaint, denying the allegations and raising certain defenses. Young's first defense requests the court to dismiss plaintiff's claim against Young for failure to state a claim upon which relief may be granted pursuant to N.C.R. Civ. P. 12(b)(6). On 29 October 1999, Young filed an amendment to her answer adding as a defense that plaintiff's claims were barred by the Statute of Limitations. Following a hearing on Young's motion to dismiss, the trial court entered an order on 23 March 2000 granting Young's motion to dismiss. This order states, in pertinent part:

> After reviewing the Complaint and Amended Complaint and hearing arguments of counsel, it appears to the Court that the Amended Complaint fails to state a claim for which relief can be granted against Defendant Jeannie Young; and, in the alternative, there has been no proper amendment of the Complaint alleging claims against Defendant Jeannie Young; and, in the alternative, any attempt by Plaintiff to seek amendment by the Court would be futile in that the amendment would not relate back to the original filing of the Complaint.

Plaintiff appeals from this order, assigning error to the trial court's conclusions that: (1) plaintiff's amended complaint fails to state a claim against Young upon which relief may be granted; (2) there was no proper amendment of the complaint; and (3) any attempt by plaintiff to seek amendment would be futile because the amendment would not relate back to the filing date of the original complaint.

We note that plaintiff's brief, containing two arguments, fails to comply with Rule 28(b)(5) of the Rules of Appellate Procedure, which requires that "[i]mmediately following each question shall be a refer-

ence 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). The Rules of Appellate Procedure are mandatory and a failure to follow the rules subjects an appeal to dismissal. *See, e.g., Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E.2d 566 (1984). However, in our discretion we deem it appropriate to consider plaintiff's three assignments of error because they correspond to the substance of the arguments in plaintiff's brief, and because we believe it is in the interest of justice to do so. *See* N.C.R. App. P. 2.

[1] Rule 15 of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> 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.R. Civ. P. 15(a). Here, plaintiff sought "leave of court" to amend her complaint. In its order, the trial court held, in part, that "any attempt by Plaintiff to seek amendment by the Court would be futile in that the amendment would not relate back to the original filing of the Complaint." However, the relation back principle "only applies where the complaint is amended outside the relevant statute of limitations. It need not be considered where a pleading is amended before the statute of limitations expires." *Simpson v. Hatteras Island Gallery Restaurant*, 109 N.C. App. 314, 324, 427 S.E.2d 131, 138, *disc. review denied*, 333 N.C. 792, 431 S.E.2d 27 (1993). Instead, the issue is whether plaintiff filed her motion for leave to amend within the applicable statute of limitations period. "The relevant date for measuring the statute of limitations where an amendment to a pleading is concerned . . . is the date of the *filing of the motion*, not the date the court rules on that motion." *Simpson*, 109 N.C. App. at 325, 427 S.E.2d at 138 (italics in original). Causes of action for emotional distress must be brought within three years from the date on which the action accrues. *See* N.C.G.S. § 1-52(5) (1999); *Russell v. Adams*, 125 N.C. App. 637, 640, 482 S.E.2d 30, 33 (1997). Here, the earliest date on which plaintiff's claim could have accrued is the date of the alleged incident, or mid-September of 1996. *See* N.C.G.S. § 1-52(16) (1999). Even assuming plaintiff's claim did accrue at the earliest possible date, plaintiff's motion for leave to amend, filed 30 August 1999, was

filed prior to the running of the three-year statute of limitations. Thus, the court erred in concluding that any attempt by plaintiff to amend her complaint would have been futile.

[2] We next address the trial court's conclusion that "there has been no proper amendment of the Complaint alleging claims against Defendant Jeannie Young." It appears from the record that the trial court failed to rule on plaintiff's motion for leave to amend. The trial court's decision to rule on Young's motion to dismiss before ruling on plaintiff's motion for leave to amend constitutes reversible error. "The Rules of Civil Procedure achieve their purpose of assuring a speedy trial by providing for and encouraging liberal amendments to the pleadings under Rule 15." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 714, 220 S.E.2d 806, 809 (1975), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976). "Failure to rule on a motion to amend contravenes this purpose by inviting piecemeal litigation and preventing consideration of the merits of the action on all the evidence available." *Carolina Builders v. Gelder & Associates*, 56 N.C. App. 638, 640, 289 S.E.2d 628, 629 (1982). The trial court should have declined to rule on Young's motion to dismiss until after ruling on plaintiff's motion.

[3] We further hold that plaintiff's motion for leave to amend should have been allowed here. As noted above, Rule 15(a) of the Rules of Civil Procedure states that leave to amend pleadings "shall be freely given when justice so requires." Where a plaintiff moves to amend a pleading in order to add a defendant to the lawsuit, there must be a claim asserted against the proposed defendant which "aris[es] out of the same transaction, occurrence, or series of transactions or occurrences" underlying the claim asserted against the original defendant. N.C. R. Civ. P. 20(a); *see Coffey v. Coffey*, 94 N.C. App. 717, 721, 381 S.E.2d 467, 470 (1989). In addition, the plaintiff must provide notice of the motion to the existing parties. *See Coffey*, 94 N.C. App. at 721, 381 S.E.2d at 470. These requirements were satisfied here. Even where these requirements are satisfied, however, leave to amend a pleading may be properly denied under certain circumstances, including but not limited to undue delay, bad faith on the part of the movant, or undue prejudice to the opposing party by virtue of allowance of the amendment. *See Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 678, 245 S.E.2d 782, 785 (1978). Here, we perceive no apparent reason why plaintiff's motion for leave to amend her complaint should be denied, particularly since plaintiff could have filed a separate action against Young and then moved to

consolidate that action with her original suit against McKecuen. Accordingly, we remand for the trial court to enter an order granting plaintiff's motion to amend.

[4] We turn now to the question of whether the trial court erred in determining that "the Amended Complaint fails to state a claim for which relief can be granted against Defendant Jeannie Young." Young asserts as a defense in her answer that plaintiff's complaint fails to state a claim upon which relief may be granted, and that plaintiff's action against Young should therefore be dismissed pursuant to Rule 12(b)(6). "The question presented by a motion to dismiss 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." *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 524, 430 S.E.2d 476, 480 (1993). Furthermore, in analyzing the sufficiency of a complaint to withstand a Rule 12(b)(6) motion, the complaint must be liberally construed and should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See id.*

With respect to Young, plaintiff's amended complaint alleges three causes of action: IIED, NIED, and civil conspiracy to deprive plaintiff of her civil rights as a woman in violation of G.S. § 99D-1. The essential elements of the tort of IIED are (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. *See Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). To state a claim for NIED, a plaintiff must allege (1) negligent conduct on the part of defendants, (2) which defendants should have reasonably foreseen would cause plaintiff severe emotional distress, and (3) that the conduct did actually cause plaintiff to suffer severe emotional distress. *See Andersen v. Baccus*, 335 N.C. 526, 531, 439 S.E.2d 136, 139 (1994). G.S. § 99D-1 provides a civil cause of action where two or more persons, motivated by gender, conspire to interfere with the exercise or enjoyment by any other person of a constitutional right, and where one or more persons engaged in the conspiracy, in order to commit any act in furtherance of the conspiracy, uses force, repeated harassment, violence, physical harm, or threats of physical harm. *See* N.C.G.S. § 99D-1.

The facts alleged in plaintiff's complaint and amended complaint, taken as true, indicate the following: that Young was responsible for mixing the drinks which rendered plaintiff physically helpless; that

Young knew or should have known that plaintiff became physically helpless, and later unconscious, after ingesting the drinks; that Young said to Sanderlin, "It's all yours, Al" and, "I need to know which way you're going on this, because I've got money riding on it"; that Young was present while plaintiff, physically helpless, was stripped naked, filmed, carried to the sofa gasping for air, examined by a paramedic, and removed from the house by Sanderlin; that Young later sought to conceal her involvement in the incident despite knowing that the incident was the subject of a potential criminal investigation; and that after plaintiff reported the incident, Young along with the other two defendants acted upon a common scheme to harass and discredit plaintiff, and to destroy evidence and obstruct justice, in furtherance of the common scheme to interfere with plaintiff's exercise and enjoyment of her civil rights as a woman. Furthermore, plaintiff's amended complaint specifically alleges that defendants' conduct was "committed with reckless disregard," was "intentional," and constituted "extreme and outrageous conduct exceeding all bounds of decency tolerated by society" and was "intended to cause and did cause emotional and mental distress" to plaintiff. Plaintiff also states in her amended complaint that she has suffered extreme emotional distress as a proximate cause of defendants' acts, including anxiety disorder, depression, and post-traumatic stress disorder.

Plaintiff's allegations, taken as true, are sufficient to state claims against Young for IIED, NIED, and a violation of G.S. § 99D-1, and it was error for the trial court to dismiss these claims. The trial court's order dismissing plaintiff's claims as to defendant Young is therefore reversed and we remand for further proceedings.

Reversed.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. LAUREEN MILLAR HOLT

No. COA99-1508

(Filed 5 June 2001)

1. Homicide— second-degree murder—Fair Sentencing Act—aggravating factor—serious and debilitating injuries

The trial court did not err by finding as an aggravating factor that the infant victim suffered serious injuries that were permanent and debilitating when resentencing defendant for second-degree murder under the Fair Sentencing Act. The State's evidence was sufficient to establish that the victim suffered serious and debilitating injuries in excess of that normally present in second-degree murder.

2. Sentencing— resentencing—greater sentence

The trial court erred by giving a greater sentence on resentencing where defendant was convicted of second-degree murder and sentenced under the Structured Sentencing Act to 196 to 245 months; the case was remanded for sentencing under the Fair Sentencing Act; and the trial court then sentenced defendant to life in prison. The sole exception to N.C.G.S. § 15A-1335, which prohibits greater sentences, is when the General Assembly's intent is clear as to the statutorily mandated sentence on resentencing. Life imprisonment is not a statutorily mandated sentence in this case.

Appeal by defendant from judgment entered 13 September 1999 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 12 February 2001.

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

Walen & McEniry, P.A., by James M. Walen, for defendant-appellant.

HUNTER, Judge.

Laureen Millar Holt ("defendant") appeals from the judgment and commitment imposed on resentencing. On appeal, defendant assigns error to (1) the trial court's finding as an aggravating factor that "[t]he victim suffered serious injuries that were permanent and debilitat-

ing," and (2) the trial court's imposition of a greater sentence on resentencing in violation of N.C. Gen. Stat. § 15A-1335 (1999). After a careful review of the record and briefs, we affirm the trial court as to the first assignment, and vacate and remand as to the second.

At trial, the State's evidence tended to show that while in defendant's care on 7 July 1994, Amber Hall ("Amber"), a six month old infant whom defendant provided day care for in her home, suffered a severe head trauma, as well as, significant brain damage, as the result of a "nonaccidental trauma or . . . shaken baby syndrome." After her initial injury, Amber survived for approximately twenty-two months. During those twenty-two months, Amber was in a vegetative state; she was blind; she suffered from cerebral palsy and seizures; she lost her circadian rhythm resulting in her inability to sleep; she was unable to chew or swallow; she could not learn to crawl, walk, or speak; her skull collapsed; and her head shrank. Then on 26 May 1996, Amber died of pneumonia related to her severe head trauma. Ultimately, defendant was convicted of the second degree murder of Amber.

At defendant's first sentencing hearing on 1 July 1998, the trial court found two aggravating and one mitigating factors. The court then determined that the aggravating factors outweighed the mitigating factor, and sentenced defendant in the aggravated range under the Structured Sentencing Act, N.C. Gen. Stat. § 15A-1340.10 *et seq.* (1999). Consequently, defendant was sentenced as a Class B2 felon (N.C. Gen. Stat. § 14-17 (1999)) to a term of imprisonment of 196 to 245 months (N.C. Gen. Stat. § 15A-1340.17(c), (e) (1999)). Defendant appealed.

On appeal, this Court found no error in the trial; however, we held that defendant was improperly sentenced under the Structured Sentencing Act. *State v. Holt,* 134 N.C. App. 499, 526 S.E.2d 509 (1999) (unpublished). Effective 1 October 1994, the Fair Sentencing Act, N.C. Gen. Stat. § 1340.1 *et seq.* (1988), was repealed and the Structured Sentencing Act became effective for offenses occurring on or after that date. As all the acts leading up to the charge of second degree murder occurred on 7 July 1994, we vacated defendant's sentence and remanded to the trial court with instructions that defendant be sentenced pursuant to the Fair Sentencing Act. *Id.*

On 13 September 1999, at defendant's resentencing hearing, the trial court found two aggravating factors—"[t]he victim was very

young" and "[t]he victim suffered serious injuries that were permanent and debilitating"—and five mitigating factors. Nevertheless, the trial court again determined that the aggravating factors outweighed the mitigating factors, and therefore sentenced defendant in the aggravated range. Specifically, the court sentenced defendant as a Class C felon (N.C. Gen. Stat. § 14-17 (1993) (amended 1994)) under the Fair Sentencing Act to a term of life imprisonment (N.C. Gen. Stat. § 14-1.1 (1993) (repealed 1994)). Defendant appeals.

[1] In her first assignment of error, defendant argues that the trial court erred in finding as an aggravating factor that "[t]he victim suffered serious injuries that were permanent and debilitating," and consequently sentencing her in the aggravated range. Particularly, defendant contends that a serious and debilitating injury is not a proper aggravating factor for a homicide case, because evidence of a serious and debilitating injury is used to prove malice, an essential element of second degree murder. We disagree.

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Clearly, a serious and debilitating injury is not an expressed element of second degree murder. However, defendant claims that the evidence of Amber's serious and debilitating injuries was evidence used to show malice.

We recognize that, "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." N.C. Gen. Stat. § 15A-1340.4(a)(1) (Cum. Supp. 1993) (repealed 1994) (now codified in § 15A-1340.16(d) (1999)). *See also State v. Hughes*, 136 N.C. App. 92, 99, 524 S.E.2d 63, 67 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000) ("[i]t is error for an aggravating factor to be based on circumstances which are part of the essence of a crime"). Nevertheless, the language "[t]he victim suffered serious injuries that were permanent and debilitating," "creates a distinction between the suffering of the victim at the time the serious injury is inflicted and any long-term or extended effects that arise due to that serious injury." *State v. Crisp*, 126 N.C. App. 30, 39, 483 S.E.2d 462, 468 (1997). The severe head trauma suffered by Amber resulted in serious injury at the time it was inflicted in July 1994. However, Amber's brain damage, blindness, cerebral palsy, seizures, loss of circadian rhythm, etc., were the long-term and extended effects that arose due to that serious debilitating injury. Thus, the same evidence

was not used to support both malice—an element of the offense, and an aggravating factor. Therefore, evidence necessary to prove second degree murder was not used to prove any factor in aggravation in the case *sub judice*.

Although N.C. Gen. Stat. § 15A-1340.4(a)(1) (Cum. Supp. 1993) (repealed 1994) did not expressly enumerate serious injury that is permanent and debilitating as an aggravating factor, this section did not limit a trial judge to the aggravating factors enumerated therein. *See State v. Church*, 99 N.C. App. 647, 656, 394 S.E.2d 468, 474 (1990). In fact,

> the statute lists several aggravating factors which the trial judge is required to consider and also authorizes him to consider any other aggravating factors "that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. . . ."

State v. Thompson, 310 N.C. 209, 220, 311 S.E.2d 866, 872 (1984), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Here, the State's evidence was sufficient to establish that Amber suffered serious and debilitating injuries in excess of that normally present in second degree murder. Thus, the trial court had the authority to find as an aggravating factor that Amber suffered serious injuries that were permanent and debilitating, as long as the court's finding was proved by a preponderance of the evidence and reasonably related to the purposes of sentencing. Such was the case here.

Moreover, we note that this Court has held in the past that a serious injury may be used as an aggravating factor. *See State v. Nichols*, 66 N.C. App. 318, 311 S.E.2d 38 (1984) (prior to the Structured Sentencing Act, serious injury could be used as a factor in aggravation); *see also State v. Crisp*, 126 N.C. App. 30, 483 S.E.2d 462 (in prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, aggravating factors may include that victim suffered permanent and debilitating serious injury). Additionally, under Structured Sentencing as it is presently in effect, serious injury that is permanent and debilitating is a listed aggravating factor for consideration pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(19) (1999). Therefore, we affirm the trial court's use of Amber's serious injuries that were permanent and debilitating as a factor in aggravation.

[2] In her second assignment of error, defendant argues that the trial court's imposition of a greater sentence on resentencing is in violation of N.C. Gen. Stat. § 15A-1335. We agree.

The statute on resentencing after appellate review states:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (1999). At defendant's first sentencing hearing, the trial court—after weighing the aggravating and mitigating factors, and finding that the aggravating factors outweighed the mitigating factors—sentenced defendant as a Class B2 felon (pursuant to N.C. Gen. Stat. § 14-17 (1999)) to a term of imprisonment of 196 to 245 months under the Structured Sentencing Act. Conversely, at defendant's resentencing hearing, the trial court—again, after weighing the aggravating and mitigating factors, and finding that the aggravating factors outweighed the mitigating factors—sentenced defendant as a Class C felon (pursuant to N.C. Gen. Stat. § 14-17 (1993) (amended 1994)) to a term of life imprisonment under the Fair Sentencing Act.

Clearly, § 15A-1335

> applies to the situation where the trial judge is weighing aggravating and mitigating factors on resentencing a defendant or on sentencing a defendant after a new trial. The statute prohibits the trial judge from imposing a more severe sentence because of reweighing aggravating factors, or because of new aggravating factors. . . .

State v. Williams, 74 N.C. App. 728, 730, 329 S.E.2d 709, 710 (1985). At bar, the trial court did weigh aggravating and mitigating factors on resentencing. Therefore, " '[i]n simple words, on resentencing, a trial judge cannot impose a term of years greater than the term of years imposed by the original sentence . . . .' " *State v. Hemby*, 333 N.C. 331, 335, 426 S.E.2d 77, 79 (1993) (quoting *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984)).

The sole exception to N.C. Gen. Stat. § 15A-1335, and the only circumstance in which a higher sentence will be allowed on resentenc-

ing, is when a statutorily mandated sentence is required by the General Assembly. *See State v. Kirkpatrick*, 89 N.C. App. 353, 355, 365 S.E.2d 640, 641 (1988) ("where the trial court is required by statute to impose a particular sentence (on resentencing) [] § 15A-1335 does not apply to prevent the imposition of a more severe sentence"). Thus, when the General Assembly's intent is clear as to the statutorily mandated sentence required on resentencing, § 15A-1335 does not apply.

At bar, defendant was sentenced under the Fair Sentencing Act. Pursuant to the Fair Sentencing Act, the presumptive sentence for a Class C felon was fifteen years (§ 15A-1340.4(f)(1) (Cum. Supp. 1993) (repealed 1994)); moreover, under N.C. Gen. Stat. § 14-1.1 (1993) (repealed 1994), a Class C felon could have "be[en] punish[ed] by imprisonment *up to* 50 years, or by life imprisonment, or a fine, or both imprisonment and fine." N.C. Gen. Stat. § 14-1.1(a)(3) (emphasis added). Significantly, life imprisonment was not a statutorily mandated sentence under this statute; hence, N.C. Gen. Stat. § 15A-1335 applies here. Therefore, we hold that defendant's life sentence on resentencing exceeds her original sentence of 196 to 245 months, and thus violates § 15A-1335. Accordingly, we vacate defendant's sentence of life imprisonment, and remand for a new sentencing hearing with instructions that defendant's sentence not exceed 245 months less the portion of the prior sentence previously served.

The State relies on both *State v. Williams*, 74 N.C. App. 728, 329 S.E.2d 709, and *State v. Kirkpatrick*, 89 N.C. App. 353, 365 S.E.2d 640, for its position that § 15A-1335 does not apply to the case at bar. However, both cases fit into the exception to § 15A-1335 discussed above, and consequently, they are distinguishable from the case at bar.

First, in *Williams*, 74 N.C. App. 728, 329 S.E.2d 709, the defendant was found guilty of armed robbery and sentenced to twelve years imprisonment. *Id.* Subsequently, this Court granted defendant's motion for appropriate relief and ordered a new trial. *Id.* On retrial, defendant was again found guilty of armed robbery and was resentenced to a term of fourteen years pursuant to N.C. Gen. Stat. § 14-87(d) (1981). *Id.* On appeal, this Court found that defendant's higher sentence of fourteen years was statutorily mandated by § 14-87(d), thus § 15A-1335 did not apply. *Id.* Accordingly, we upheld the higher sentence. *Id.*

Likewise in *Kirkpatrick*, 89 N.C. App. 353, 365 S.E.2d 640, the defendant was found guilty of felonious possession of stolen property

and of being an habitual felon. *Id.* As a result, the trial court sentenced the defendant to three years imprisonment for the possession of stolen property conviction and fifteen years imprisonment for his habitual felon status. *Id.* On appeal, this Court held that the defendant was improperly given a separate sentence for his habitual felon status, and we remanded for resentencing. *Id.* On remand, the trial court resentenced the defendant as an habitual felon to a single term of fifteen years for the felonious possession of stolen property conviction pursuant to N.C. Gen. Stat. § 14-7.6 (1986). *Id.* Specifically, under § 14-7.6, an habitual felon was required to be sentenced as a Class C felon; and pursuant to § 15A-1340.4(f)(1) (1983), the presumptive sentence for a Class C felon was fifteen years. *Id.* Since the trial court found no aggravating or mitigating factors, the sentence on resentencing was statutorily mandated. Furthermore, defendant did not actually receive a higher sentence on resentencing; rather, the trial court, in accordance with *State v. Thomas*, 82 N.C. App. 682, 347 S.E.2d 494 (1986), simply used defendant's habitual felon status on resentencing to enhance his possession of stolen property conviction. For the foregoing reasons, *Williams* and *Kirkpatrick* are distinguished.

In summary, we affirm the trial court's use of serious and debilitating injuries as an aggravating factor in this second degree murder case. However, we vacate the trial court's sentence on resentencing and remand with instructions that defendant's sentence not exceed 245 months less the portion of the prior sentence previously served.

Affirmed in part, vacated and remanded in part.

Chief Judge EAGLES and Judge CAMPBELL concur.

MABREY v. SMITH

[144 N.C. App. 119 (2001)]

GLEN RAEFORD MABREY, JR., ADMINISTRATOR OF THE ESTATE OF GLEN RAEFORD MABREY, SR., v. JAMES SMITH, M.D., MOHAMMAD AKTARUZZAMAN, M.D. (ALSO KNOWN AS MOHAMMAD ZAMAN, M.D., TERRY REES, M.D., GORDON LAVIN, M.D., HAROLD GLENN TART, R.N., JAMES MALLARD, R.N., PAT RAY, LPN, JOHN JONES, DORIS MILLS, R.N., SABBATH LUYANDO, R.N., JOSEPH CREECH, R.N., HAL B. FARTHING, III, R.N., AMY L. ORTIZ, R.N., MARIO A. RODRIGUEZ, R.N., ROSA SETTLE, R.N., LIZZIE T. SIMPSON, LPN, AND MARK LUCAS, LPN

No. COA00-470

(Filed 5 June 2001)

1. Appeal and Error— appealability—denial of dispositive motions—governmental immunity

The denial of dispositive motions that are grounded on governmental immunity affect a substantial right and are immediately appealable.

2. Pleadings— amendment denied—undue delay

The trial court did not err in a negligence action arising from the death of an inmate by denying defendants' motions to amend their pleadings to include an immunity defense more than one year after the complaint was filed and the court denied the motion because it would create undue delay.

3. Pleadings; Immunity— negligence action—motion for judgment on the pleadings—public official immunity

The trial court did not err in a negligence action arising from the death of an inmate by denying motions by defendants, healthcare providers at Central Prison, for judgment on the pleadings and to dismiss on the grounds of public official immunity where all of the essential elements of negligence were alleged; plaintiff intended to sue defendants in their individual capacities, as indicated by the complaint and the course of the proceedings; and defendants did not claim public official immunity because the court denied their motions to amend. Plaintiff, suing defendants in their individual capacities, alleged negligent conduct which defendants denied with factual issues still in dispute.

Appeal by defendants from judgment entered 15 October 1999 by Judge James Vosburg in Wake County Superior Court. Heard in the Court of Appeals 1 February 2001.

Pipkin, Knott, Clark & Berger, by Bruce W. Berger and Joe Thomas Knott, III for plaintiff-appellee.

Young, Moore & Henderson, by Dana H. Davis for defendant-appellants Smith, Tart, Mallard, Mills, Luyando & Creech.

Patterson, Dithey, Clay & Bryson, by Charles A. Madison for defendant-appellant Lavin.

Yates, McLamb & Weyher, by Renee B. Crawford for defendant-appellant Settle.

Vanwinkle, Buck, Wall, Starnes & Davis, by Carleton Metcalf for defendant-appellant Ortiz.

James Peeler Smith and Christine Ryan for defendant-appellants Farthing and Rodriguez.

Northrup & McConnell, by Elizabeth McConnell and Anna Hamrick for defendant-appellants Aktaruzzaman and Rees.

Dennis P. Myers, Asst. Attorney General, for defendant-appellant Simpson.

THOMAS, Judge.

Defendants appeal from an order denying their motions to amend, motions to dismiss on grounds of public official immunity and motions for judgment on the pleadings. Defendants set forth two assignments of error.

Plaintiff's father, Glen Raeford Mabrey, Sr., the decedent, was serving a prison term at Umstead Correctional Unit. On 21 February 1996, he was transferred to the Central Prison Mental Health Unit to receive treatment for acute psychosis. On 27 February 1996, he was diagnosed as suffering from severe dehydration and taken to the Central Prison Emergency Room. After being placed in a hospital room, his condition deteriorated and the next morning he was found unconscious. He was moved to Wake Medical Center, where he died on 29 February 1996.

Plaintiff, administrator of decedent's estate, brought a wrongful death action against seventeen doctors and nurses on 28 February 1998, alleging negligence in their medical treatment of his father. Notably, plaintiff did not name the State of North Carolina or any governmental entity as a defendant in the suit.

Defendants timely filed answers but did not plead as a defense either sovereign immunity or public official immunity. More than one year later, however, defendants attempted to assert those defenses for the first time in motions to amend their answers, to dismiss, for judgment on the pleadings and for summary judgment. They were heard on 15 October 1999 with the trial court denying all of the motions. Defendants timely filed notices of appeal.

[1] Before we consider defendants' arguments, we note the trial court's order would not normally be immediately appealable because it would be considered interlocutory. *State ex rel. Employment Security Commission v. IATSE Local 574*, 114 N.C. App. 662, 663, 442 S.E.2d 339, 340 (1994). A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). However, an interlocutory order may be heard in appellate courts if it affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (1999). This Court has held that denial of dispositive motions such as motions to dismiss, for judgment on the pleadings, and to amend pleadings that are grounded on governmental immunity affect a substantial right and are immediately appealable. *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996). Thus, defendants' appeal is properly before this Court.

[2] By defendants' first assignment of error, they argue the trial court erred in denying their motions to amend. We disagree.

A motion to amend the pleadings is addressed to the sound discretion of the trial court. *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E.2d 11, *cert. denied*, 295 N.C. 738, 248 S.E.2d 867 (1978); *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E.2d 588, *cert. denied*, 281 N.C. 758, 191 S.E.2d 356 (1972). The trial court's ruling upon a motion to amend pleadings is not reviewable absent a showing of an abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982). "A trial judge abuses his discretion when he refuses to allow an amendment unless justifying reasoning is shown." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), *review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976). Defendants in the instant case sought to amend their pleadings to include an immunity defense more than one year after the complaint was filed. The trial court denied the motions because it would cause "undue delay of prejudice" (sic) to plaintiff. This Court has held that undue delay and undue prejudice are valid reasons to deny a motion

to amend a pleading. *Patrick v. Ronald Williams, Prof. Assoc.*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991). Thus, justifiable reasons have been established for the trial court's ruling and defendants have failed to show an abuse of discretion. Accordingly, defendants are left with their original answers wherein they answered the allegations as individuals.

[3] By defendants' second assignment of error, they argue the trial court erred in failing to grant their motions to dismiss on grounds of public official immunity and motions for judgment on the pleadings. We disagree.

A motion to dismiss is proper when the complaint on its face reveals that no law supports the plaintiff's claim, that some fact essential to the plaintiff's claim is missing or when some fact disclosed in the complaint defeats the plaintiff's claim. *Schloss Outdoor Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E.2d 920 (1980). A wrongful death negligence claim must be based on actionable negligence under the general rules of tort liability. *Mann v. Henderson*, 261 N.C. 338, 134 S.E.2d 626 (1964). In the case at bar, plaintiff's claims are grounded in negligence in that all elements of negligence are alleged. The elements of negligence are: 1) legal duty; 2) breach of that duty; 3) actual and proximate causation; and 4) injury. *Tise v. Yates Constitution. Co., Inc.*, 345 N.C. 456, 480 S.E.2d 677 (1997). Plaintiff claims defendants breached a legal duty of care in the treatment of his father, resulting in his father's death. Therefore, all of the essential elements of negligence are alleged. We turn now to defendants' contentions of public official immunity.

First, we note that defendants sought to claim public official immunity in their motions. A public official may only be held personally liable when his tortious conduct falls within one of the immunity exceptions: 1) the conduct is malicious; 2) the conduct is corrupt; or 3) the conduct is outside the scope of official authority. *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 851-52, *review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). A public employee, on the other hand, is not entitled to such protection. *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). A public official is one whose position is created by the N.C. Constitution or the N.C. General Statutes and exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties. *Block v. County of Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000).

Defendants assert that public official immunity shields them from personal liability for any negligence occurring while decedent was under their care. Plaintiff claims he is suing defendants in their individual capacities, not their official capacities and therefore immunity does not attach. The ultimate issue of whether defendants are public officials entitled to immunity is not properly before us, however, as defendants have not asserted immunity as an affirmative defense in their pleadings. Nonetheless, there is an issue as to whether defendants are being sued in their individual or official capacities.

The caption of plaintiff's complaint does not specify whether plaintiff is suing defendants in their individual or official capacities. This Court has held that

> [i]f money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Reid, 137 N.C. App. at 171, 527 S.E.2d at 89 (quoting *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (quoting Anita Brown-Graham and Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*. 67 Loc. Gov't L. Bull., 7 (Inst. Of Gov't, Univ. of N.C. at Chapel Hill, Apr. 1995))). Here, there are several defendants, all of whom are health-care providers at either Central Prison Hospital or Central Prison Mental Health Unit. Both facilities are state-run entities. *Mullis v. Sechrest* stated that "it is appropriate for the court to either look to the allegations contained in the complaint to determine plaintiff's intentions *or* assume that the plaintiff meant to bring the action against the defendant in his or her official capacity." 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) (quoting Brown-Graham & Koeze, *supra*) (emphasis added). The *Mullis* court went on to analyze the course of proceedings and the allegations in the complaint to determine the capacity in which the plaintiff was suing the defendant. *See also Johnson v. York*, 134 N.C. App. 332, 517 S.E.2d 670 (1999); *Warren v. Guilford County*, 129 N.C. App. 836, 839, 500 S.E.2d 470, 472, *review denied*, 349 N.C. 379, 516 S.E.2d 610 (1998) (both holding that official capacity will only be assumed where a statement of capacity is not included in the caption, allegations, or the prayer for relief).

In the instant complaint, plaintiff never names the state, a state entity, or the hospitals as a defendant or adverse party, nor does plaintiff mention reaching the pockets of the state. Plaintiff asks in his prayer for relief that the trial court find *defendants* jointly and severally liable for their negligence. We note that unlike the instant case, governmental entities were included as parties in *Mullis* and *Reid*. We further note this Court has held that a physician who provided medical care to prisoners was a state agent and the state was answerable for the inmate's negligence allegations because his only access to medical care was through the state. *Medley v. North Carolina Dept. of Correction*, 99 N.C. App. 296, 393 S.E.2d 288 (1990), *affirmed*, 330 N.C. 837, 412 S.E.2d 654 (1992). However, in that case as well, the defendant directly sued the state agency. In the instant case, plaintiff does not even bring suit via the Torts Claims Act, as is necessary to reach the pockets of the state. *See* N.C. Gen. Stat. § 143-291 (1999). We therefore find that given the complaint and the course of proceedings, plaintiff intended to sue defendants in their individual capacities.

As discussed in the first issue, defendants were not allowed by the trial court to amend their answers to claim immunity. Official immunity is an affirmative defense that must be alleged in order to receive its protection. *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 468 S.E.2d 846 ((1996). *See also* N.C. Gen. Stat. § 1A-1, Rule 8(c) (1999). "If the defendant cannot meet this burden of production, 'he is not entitled to protection on account of his office, but is liable for his acts like any private individual.' " *Id.* at 205, 468 S.E.2d at 852 (quoting *Gurganious v. Simpson*, 213 N.C. 613, 616, 197 S.E. 163, 164 (1938)). Because the trial court denied the motions to amend their answers, defendants still have not actually claimed public official immunity. Therefore, defendants, if found liable, will be personally liable.

Additionally, a motion for judgment on the pleadings is properly granted when all material questions of fact are resolved in the pleadings, and only issues of law remain. *Cash v. State Farm Mut. Auto Ins. Co.*, 137 N.C. App. 192, 528 S.E.2d 372, *affirmed*, 353 N.C. 257, 538 S.E.2d 569 (2000). This motion is disfavored by the courts and the pleadings will be liberally construed in the light most favorable to the nonmovant. *Pipkin v. Lassiter*, 37 N.C. App. 36, 245 S.E.2d 105 (1978). When all factual issues are not resolved by the pleadings, judgment on the pleadings is inappropriate. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974). In the case at bar, plaintiff, suing

defendants in their individual capacities, has alleged negligent conduct. Defendants, in their respective answers, have all denied negligence with factual issues still in dispute. The trial court's denial of defendants' motions for judgment on the pleadings was therefore appropriate.

Accordingly, we find the trial court did not err in failing to grant defendants' motions to dismiss on grounds of public official immunity and defendants' motions for judgment on the pleadings. For the reasons stated herein, we affirm the trial court.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

AUDREY JOYNER GIBSON, PLAINTIFF v. IDAEL MENA AND CARRETA TRANSPORT, INC., DEFENDANTS

No. COA00-143

(Filed 5 June 2001)

Civil Procedure— Rule 60 motion for relief—default judgment

The trial court abused its discretion by allowing defendants' Rule 60 motion for relief from a default judgment where the record was devoid of any evidence excusing defendant Mena, defendant Carreta was aware of the pending litigation prior to the judgment, and defendant Caretta's insurance carrier knew that entry of default had been rendered, but failed to give defense of the lawsuit the attention usually given to important business in the exercise of ordinary prudence. N.C.G.S. § 1A-1, Rule 60(b).

Appeal by plaintiff from order entered 29 September 1999 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 10 January 2001.

George M. Anderson, G. Henry Temple, Jr. and Stephen W. Petersen, for plaintiff-appellant.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for defendant-appellees.

JOHN, Judge.

Plaintiff Audrey Joyner Gibson appeals the trial court's 29 September, 1999 order (the Order) setting aside a default judgment entered against defendants Idael Mena and Carreta Transport, Inc. (collectively "defendants"; individually Mena and Carreta) in favor of plaintiff. We reverse the trial court.

The instant action was instituted by complaint filed 18 November 1997. Plaintiff alleged defendants' negligence arising out of an automobile collision occurring 25 July 1996 on Interstate Highway 95 in Robeson County. Service upon defendants, out-of-state individuals or entities, was effected through the North Carolina Department of Motor vehicles pursuant to N.C.G.S. § 1-105 (1999). Specifically, copies of the summons and complaint were personally served upon Janice Faulkner, North Carolina Commissioner of Motor Vehicles (the Commissioner), who, through her agent, mailed notice of summons and complaint along with copies thereof to each defendant on 2 December 1997. The set of documents for Mena were mailed to an address in Syracuse, New York, but were returned to the Commissioner undelivered. Carreta's documents were directed to the care of Orlando Silva, statutory service agent, as well as to the "President of Carreta Transport, Inc." The documents sent to Carreta's president were delivered and received 5 December 1997. In addition, Notice of Service of Process by Publication on defendants appeared in The Robesonian, a newspaper published in Robeson County, on 14, 21 and 28 December, 1998. Defendants neither filed answer, nor requested an extension of time in which to answer, nor otherwise filed any other pleading in response to the complaint.

On 5 April 1999, plaintiff moved for entry of default and default judgment, and notice of hearing of the motions was mailed to Mena and Carreta on 25 and 26 March 1999 respectively. Following an 8 April 1999 entry of default, the trial court entered default judgment (the Judgment) against defendants on 3 May 1999 in the amount of $950,000.00 plus costs and interest.

Defendants thereafter filed a 29 July 1999 motion (defendants' motion) to set aside the Judgment on grounds defendants had acted with excusable neglect. However, defendants sought to contest only the issue of compensatory damages.

Attached to defendants' motion were affidavits from Evelio Prieto (Prieto), owner of Carreta, Michaele J. Grove (Grove), senior

claims supervisor for John Deere Transportation Services (John Deere), defendants' insurance carrier, and Anthony Thomas Foley (Foley), a certified adjuster retained by John Deere.

Inter alia, defendants' motion asserted as follows:

> 9. That neither the Defendants nor John Deere was aware of the Motion for Default Judgment (see attached Affidavits of Foley and Grove and supplementary Affidavit of Evelio Prieto);
>
> . . .
>
> 12. That the failure of Defendants and John Deere to retain defense counsel upon the filing and service of this action based on John Deere's desire to first evaluate the case to determine if it could be settled prior to proceeding with litigation, constituted excusable neglect[.]

After a hearing, both plaintiff and defendants submitted proposed orders to the trial court. Plaintiff's submission, entitled "Plaintiff's Proposed Findings of Fact and Conclusions of Law," included findings of fact. Subsequently, the trial court entered the Order, stating

> the failure of Defendants to file answer or otherwise plead or appear in this action was due to excusable neglect, and good cause exist [*sic.*] for setting aside the default judgment[.]

The Order included no supporting findings of fact. Plaintiff appeals.

Initially, we note the appealed Order set aside the Judgment and that orders setting aside default judgments are interlocutory and ordinarily not appealable. *Bailey v. Gooding*, 301 N.C. 205, 208-09, 270 S.E.2d 431, 433 (1980). Notwithstanding, we elect in our discretion to treat plaintiff's purported appeal as a petition for certiorari pursuant to North Carolina Rule of Appellate Procedure 21, and to grant the writ and address the merits. *See* N.C.G.S. § 7A-32(c) (1999) (Court of Appeals has jurisdiction to issue writ of certiorari "in aid of its own jurisdiction"; N.C.R. App. P. 21(a)(1) ("writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of . . . orders of trial tribunals when . . . no right of appeal from an interlocutory order exists); and *Munn v. Munn*, 112 N.C. App. 151, 154, 435 S.E.2d 74, 76 (1993) (it is "within [the] prerogative" of this Court to treat an "appeal as a petition for writ of certiorari and grant the writ").

Plaintiff first contends the trial court erred by failing to set out findings of fact in the Order. Plaintiff also maintains the trial court abused its discretion in setting aside the Judgment because the evidence was insufficient to support the court's ruling. We consider plaintiff's arguments *ad seriatim*.

N.C.G.S. § 1A-1, Rule 60(b) (1999) allows a party, on motion to the trial court, to seek relief from a final judgment on the grounds of mistake, inadvertence, surprise or excusable neglect. A Rule 60(b) motion is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of that discretion. *Vuncannon v. Vuncannon*, 82 N.C. App. 255, 258, 346 S.E.2d 274, 276 (1986). Rendition of findings of fact is not required of the trial court in ruling upon a Rule 60(b) motion absent the request of a party, "although it is the better practice to do so." *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992); *see also* N.C.G.S. § 1A-1, Rule 52(a)(2) (1999).

In the case *sub judice*, the trial court entered no findings of fact upon which to base its legal conclusion of excusable neglect. Plaintiff asserts its proposed order contained a request for findings of fact as follows:

> Plaintiff, Audrey Joyner Gibson, respectfully submits to the Court pursuant to Rule 52 of the North Carolina Rules of Civil Procedure and hereby moves that Findings of fact and Conclusions of Law be included in its Order on Defendants' Motion to Set Aside Judgment heard by Honorable Robert F. Floyd, Jr., on August 16, 1999, as follows:
>
> . . . .

Subsequently, twenty-three findings of fact and nine conclusions of law were delineated. [Petition for Writ of Certiorari].

Although plaintiff's proposed order arguably might be construed, as she contends, as a generalized Rule 52 request for findings of fact in support of the court's subsequent Order as opposed to requested specific findings, we are unable to resolve this question conclusively in plaintiff's favor. The Order therefore is not subject to being vacated due to the absence of findings of fact.

However, a Rule 60(b) order without findings of fact must be reversed unless there is evidence in the record sustaining findings

which the trial court could have made to support such order. *See Grant*, 106 N.C. App. at 125, 415 S.E.2d at 380 (where trial court renders no findings of fact in order denying Rule 60(b) motion, "the question on appeal is 'whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion' " (citation omitted)).

In short, the issue before us is whether, given the evidence presented to the trial court, that court could have made findings of fact sufficient to support its legal conclusion that excusable neglect had been shown. *See id.*

> While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. Excusable neglect must have occurred at or before entry of judgment and must be the cause of the default judgment being entered.

Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986) (citations omitted).

In materials presented to the trial court, defendants explained the failure to retain counsel as being based upon their insurance carrier's "desire to first evaluate the case to determine if it could be settled prior to proceeding with litigation[.]" In his affidavit dated 30 July 1999, for example, Prieto stated,

> [a]lthough I was aware of the lawsuit prior to April of 1999, I assumed that my company's insurance carrier, John Deere Transportation Services, was handling this matter.
>
> . . . .
>
> [p]rior to several weeks ago, I have never received nor been made aware of any Motions for Default or Default Judgments being entered against my company.

Grove's affidavit related that, in his capacity as senior claims adjuster for John Deere, he became aware of the 1996 accident within one week thereafter, that he assigned the case to an adjuster who attempted to resolve plaintiff's bodily injury claim, and that the

adjuster could not obtain all pertinent medical bills and records and closed plaintiff's file in January, 1997. Grove stated he had notified plaintiff's attorney that John Deere would like to settle plaintiff's claim. Grove also expressed his April, 1998 understanding that entry of default had been directed against defendants as to liability only, but that no default judgment had been entered.

Foley submitted an affidavit stating John Deere had accepted liability for the collision involving plaintiff and had authorized him to attempt to settle all viable claims. After plaintiff had resolved her daughter's claim and the property damage claim, Foley continued, he requested plaintiff's medical bills in January, 1997. When Foley received no response from plaintiff, he closed her file in April, 1997.

Upon careful review, we hold the foregoing evidence before the trial court was insufficient as a matter of law to show excusable neglect. Defendant Carreta was aware of the pending litigation prior to the Judgment, and John Deere, Caretta's insurance carrier, knew in April, 1998, that entry of default had been rendered against Caretta, yet failed to give defense of the lawsuit that attention usually given to important business in the exercise of ordinary prudence. *See Financial Corp. v. Mann*, 36 N.C. App. 346, 350, 243 S.E.2d 904, 907 (1978) (no excusable neglect where "defendant simply did not give to his defense the attention which a man of ordinary prudence usually gives his important business"). Further, the record is devoid of any evidence excusing defendant Mena.

In sum, the trial court abused its discretion in allowing defendants' motion for relief from default judgment, and the Order setting aside the Judgment is therefore reversed. *See id.* ("[b]ecause defendant presented insufficient evidence to support the trial court's conclusion of excusable neglect, the order setting aside the judgment" must be reversed).

Reversed.

Judges WYNN and McGEE concur.

JANE DOE, PLAINTIFF v. RODNEY EDWARD JENKINS AND ORANGE COUNTY, DEFENDANTS

No. COA00-629

(Filed 5 June 2001)

1. Cities and Towns— public duty doctrine—courthouse security

The trial court erred by granting defendant-county's motion for judgment on the pleadings based on the public duty doctrine in an action arising from an assault in a courthouse restroom. The county was not acting in its law enforcement capacity in providing security at the county courthouse.

2. Immunity— governmental—insurance exclusion

The trial court correctly granted summary judgment for defendant-county in an action arising from an assault in a courthouse restroom because the plain language of the county's insurance policy excluded coverage for the negligent acts alleged by plaintiff where it stated that "coverage does not apply to . . . any liability for . . . neglect or breach of duty . . . arising out of the discharge of duties as a political subdivision."

Appeal by plaintiff from order entered 15 March 2000 by Judge Steve A. Balog in Orange County Superior Court. Heard in the Court of Appeals 29 March 2001.

Pulley, Watson, King & Lischer, P.A., by Tracy K. Lischer and F. Edward Kirby, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Burley B. Mitchell, Jr., Robert H. Sasser, III, and Mark A. Davis, for defendant-appellee Orange County.

MARTIN, Judge.

Plaintiff brought this action seeking damages for physical and emotional injuries sustained after she was brutally attacked and raped in a restroom at the Orange County Courthouse in Hillsborough, North Carolina on 14 September 1998. In her complaint, plaintiff alleged that defendant Rodney Jenkins followed her into a women's restroom at the courthouse, locked the door from the inside and, armed with a small knife, repeatedly raped, stabbed, and beat

her. Plaintiff alleged claims against Jenkins for assault and battery and false imprisonment; as to defendant Orange County ("defendant County"), plaintiff alleged a breach of duty to use reasonable care to protect lawful visitors against the reasonably foreseeable criminal acts of third parties while on the courthouse premises. The complaint also alleged defendant County had waived its governmental immunity through the purchase of liability insurance. Due to the nature of the case, and with defendant County's consent, plaintiff was permitted to proceed through the use of a pseudonym. Defendant County filed an answer in which it denied negligence and asserted, as an affirmative defense, governmental immunity "[t]o the extent that Orange County has not waived its sovereign immunity through the purchase of liability insurance."

Defendant County moved for judgment on the pleadings, based upon the public duty doctrine, and for summary judgment, based on the defense of governmental immunity. The motion for summary judgment was supported by the affidavit from the County's Director of Purchasing and Central Services, attached to which was a copy of the liability insurance coverage contract issued to defendant County by the North Carolina Counties Liability and Property Insurance Pool, which was in effect on the date of the occurrence. The policy contained the following exclusion:

> E. Exclusions Applicable to General Liability
>
> This coverage does not apply to any of the following:
>
> . . .
>
> 15. Errors and Omissions
>
> to any liability for any actual or alleged error, misstatement, or misleading statement, act, or omission, or neglect or breach of duty by the Participant, or by any other person for whose acts the Participant is legally responsible arising out of the discharge of duties as a political subdivision or a duly elected or appointed member or official thereof.

In response, plaintiff submitted, *inter alia*, affidavits from two experts in insurance-related issues in which the affiants stated their opinions that the exclusion was inapplicable to plaintiff's claim.

The trial court granted defendant County's motions for judgment on the pleadings and for summary judgment based on sovereign immunity and dismissed plaintiff's claims against defendant County.

The trial court certified its order as a final judgment pursuant to G.S. § 1A-1, Rule 54(b). Plaintiff appeals.

Plaintiff contends the trial court erred in granting defendant County's motions for judgment on the pleadings and for summary judgment. She argues that the basis of her claim against defendant County is premises liability, rather than the public duty of providing police protection, so that judgment on the pleadings based upon application of the public duty doctrine was error. In addition, she contends defendant County's purchase of liability insurance coverage waived the County's sovereign immunity, so that summary judgment on the basis of immunity was also error.

[1] With respect to plaintiff's first argument, this Court has recently addressed the issue of the applicability of the public duty doctrine to a county's duty to provide security at premises which it owns and maintains. In *Wood v. Guilford County*, 143 N.C. App. 507, 546 S.E.2d 641 (2001) we held that because the defendant county was not acting in its law enforcement capacity in providing security at the county courthouse, but rather was acting as the owner and operator of the premises, the county could not invoke the public duty doctrine as a defense against charges that it failed to protect the plaintiff from an attempted sexual assault at the courthouse. Accordingly, judgment on the pleadings in the instant case, based on the defense of the public duty doctrine, was error. *Id.*

[2] With respect, however, to plaintiff's argument that defendant County has waived its sovereign immunity, we conclude the plain language of the insurance policy excludes coverage for the negligent acts alleged by plaintiff so that defendant County's purchase of insurance did not operate to waive its sovereign immunity for the claim asserted by plaintiff. We must, therefore, affirm the trial court's grant of summary judgment based on sovereign immunity.

This case involves no novel principles of law; it is determined by application of well-established rules of law in North Carolina. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Meares v. Jernigan*, 138 N.C. App. 318, 320, 530 S.E.2d 883, 885 (2000); N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). The moving party has the burden of establishing that no genuine issue of material fact

exists, and can meet the burden by proving that the opposing party " 'cannot surmount an affirmative defense which would bar the claim.' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989)).

Sovereign immunity bars claims brought against the state or its counties, "where the entity sued is being sued for the performance of a governmental, rather than a proprietary, function." *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) (citing *Robinson v. Nash County*, 43 N.C. App. 33, 35, 257 S.E.2d 679, 680 (1979)). A county may, however, waive such immunity through the purchase of liability insurance. N.C. Gen. Stat. § 153A-435 ("Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function"). But "[i]mmunity is waived only to the extent that the [county] is indemnified by the insurance contract for the acts alleged." *Davis v. Messer*, 119 N.C. App. 44, 61-62, 457 S.E.2d 902, 913, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995) (citation omitted). Defendant County acknowledges its purchase of liability insurance in this case, but contends it does not provide coverage for the claim asserted by plaintiff due to the exclusion contained in the coverages contract.

"Counties, like cities, exist solely as political subdivisions of the State and are creatures of statute." *Davidson County v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987). The obligation of a county in this State to provide and maintain courthouses for the conducting of judicial proceedings is a duty imposed by statute. N.C. Gen. Stat. § 7A-302. Our Supreme Court has determined that "activities held to be governmental functions . . . are those historically performed by the government, and which are not ordinarily engaged in by private corporations." *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975) (citation omitted). Thus, the operation of the Orange County Courthouse must be viewed as a governmental function of defendant County acting in its role as a political subdivision. Accordingly, sovereign immunity would apply to bar plaintiff's claim in the absence of a waiver by defendant.

If an insurance policy is not ambiguous, "then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 492, 467 S.E.2d 34, 40 (1996) (citing

Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). The language of the exclusion in the present case unambiguously limits the coverage provided by the coverages contract. Relevant to plaintiff's complaint, the exclusion states explicitly that "coverage does not apply to . . . any liability for . . . neglect or breach of duty . . . arising out of the discharge of duties as a political subdivision . . . ." Plaintiff contends the heading "Errors and Omissions" has a technical meaning connoting a specific type of coverage which does not apply to exclude coverage in the instant case. Although our courts have not addressed this precise issue, other courts have stated that "[a]n insured is not entitled to read only the heading and ignore the operative language of the provision itself." *Town of Wallingford v. Hartford Acc. and Indem. Co.*, 649 A.2d 530, 533 (fn. 4) (Conn. 1994) (citation omitted). In this case the language of the applicable provision of the coverage contract relied upon by defendant County excludes coverage for the conduct of which plaintiff complains and we are bound to read, and give effect to, each word in the insurance policy. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). Accordingly, because the insurance policy does not indemnify defendant against the negligent acts alleged in plaintiff's complaint, defendant has not waived its sovereign immunity and the trial court's grant of summary judgment must be affirmed.

Judgment on the pleadings is reversed.

Summary judgment is affirmed.

Judges BIGGS and JOHN concur.

STATE OF NORTH CAROLINA, *EX REL.* ROBERT J. BARKER, SR., PLAINTIFF v. JOHN W. ELLIS, III, DEFENDANT

No. COA00-719

(Filed 5 June 2001)

1. Elections— quo warranto action—service not timely

The trial court correctly concluded that a summons and complaint had not been effectively served within 90 days of defendant taking office in a contested mayoral election where defendant

was sworn in as mayor on 21 December 1999 and the complaint and summons were served on 23 March 2000. Although plaintiff contends that the statute of limitations was tolled because he complied with N.C.G.S. § 1A-1, Rules 3 and 4, and that Rule 6(b) provides authority for the trial court to extend the time for service, the deadline for a quo warranto action is prescribed by N.C.G.S. § 1-522, the language of which is not ambiguous and requires no construction.

2. Elections— quo warranto action—time for service—due process

Plaintiff was not denied due process by the required time for service of a quo warranto action. The ninety-day service requirement is reasonable because of the importance of quickly resolving election disputes; here, plaintiff petitioned both the County and State Boards of Elections, filed administrative appeals, brought action in superior court and delayed the time for his opponent to take office for several weeks; waited until 15 February to request permission for a private quo warranto action; the Attorney General granted that permission on 1 March, giving plaintiff nearly three weeks to bring the action and obtain service; and plaintiff waited until 17 March to bring the action and did not serve the complaint until 23 March. Plaintiff had ample opportunity to be heard and was not denied due process.

Appeal by plaintiff from judgment entered 18 April 2000 by Judge Henry V. Barnette in Superior Court, Wake County. Heard in the Court of Appeals 18 April 2001.

Akins Hunt & Fearson, P.L.L.C., by Donald G. Hunt, Jr., for plaintiff-appellant.

Tharrington Smith, by Michael Crowell for defendant-appellee.

WYNN, Judge.

In November 1999, John Ellis defeated Robert Barker in the election for mayor of Fuquay-Varina by sixteen votes. Mr. Barker issued a verbal and written request for a recount on 5 November 1999. The Wake County Board of Elections denied his request and Mr. Barker filed an appeal to the North Carolina Board of Elections. After a hearing, the State Board dismissed Mr. Barker's appeal.

Shortly thereafter, Mr. Barker filed a petition in Wake County Superior Court. On 10 December 1999, at the petition hearing, the trial judge ordered that Barker's case be remanded to the State Board, and denied Barker's request for a stay of certification. Mr. Barker filed a notice of appeal to this Court and filed motions for a temporary stay and writ of supersedeas. This Court granted the motion for temporary stay; however, on 21 December 1999, this Court dissolved the stay and Mr. Ellis was sworn in as mayor.

Thereafter, Mr. Barker brought the subject *quo warranto* action on 17 March 2000; however, the complaint and summons were not served upon Mr. Ellis until 23 March 2000. The trial court dismissed the action because the complaint and summons were not served on Mr. Ellis within ninety days of his taking office as required by N.C. Gen. Stat. § 1-522. Mr. Barker appealed to this Court.

[1] First, Mr. Barker contends that the trial court erred in concluding that the summons and complaint had not been effectively served within ninety days of Mr. Ellis taking office. He argues that because he complied with N.C. Gen. Stat. § 1A-1, Rules 3 and 4, the statute of limitations in this action tolled and the service of summons and complaint on 23 March 2000 relates back to the date the summons was issued 17 March 2000. We disagree.

Quo warranto, which was a writ used to try title to an office, has been abolished, and replaced by a statutory action under N.C. Gen. Stat. § 1-515 (1999). Section 1-515 embodies the substance of the writ and provides that:

> An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:
>
> (1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,
>
> (2) When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

N.C. Gen. Stat. § 1-515 (1999). N.C. Gen. Stat. § 1-522 limits the time a *quo warranto* action can be brought by private citizen.

> All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff.

N.C. Gen. Stat. § 1-522 (1999).

In this case, the record shows that Mr. Ellis was sworn in as mayor on 21 December 1999 and the complaint and summons were served on Mr. Ellis on 23 March 2000, which was 93 days after he took office. The language of N.C. Gen. Stat. § 1-522 is clear and unambiguous and it requires no construction. *See State ex rel. Long v. Smitherman*, 251 N.C. 682, 684, 111 S.E.2d 834, 836 (1960). "When the language of a statute is plain and free from ambiguity, expressing a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." *Id.* (*citing School Comrs. v. Alderman*, 158 N.C. 191, 73 S.E. 905 (1912)).

Mr. Barker further argues that the *Long* decision predates the enactment of the Rules of Civil Procedure, and that the rules override N.C. Gen. Stat. § 1-522. However, the Rules of Civil Procedure expressly refute that contention: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*" N.C. Gen. Stat. § 1A-1, Rule 1 (emphasis supplied). Indeed, the deadline for service in a *quo warranto* action is prescribed by statute, N.C. Gen. Stat. § 1-522, not the Rules of Civil Procedure.

Mr. Barker next argues that N.C.R. Civ. P. 6(b) provides authority for the trial court to extend the time for service of the complaint and summons in a private *quo warranto* action. However, this argument fails because the trial court's authority to extend the time for service exists under Rule 6(b) only when the deadline is set "by these rules or by a notice given thereunder or by order of court." N.C. Gen. Stat. § 1A, 6(b). The requirement that the complaint and summons in a private *quo warranto* action be served within ninety days is not set by

the Rules of Civil Procedure, but rather by a statute enacted by the General Assembly, N.C. Gen. Stat. § 1-522.

[2] In his final argument, Mr. Barker contends that he has been denied due process because he did not have control over the service of the complaint and summons within the ninety days required by statute. This contention, too, is without merit.

"Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved." *In re Anne M. Lamm*, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994). "At its minimum, then, due process requires that every individual forced by the State to resolve claims of right, duty and liability through the judicial process be afforded a meaningful opportunity to be heard." *Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 651, 281 S.E.2d 765, 767 (1981).

The ninety day service requirement for a *quo warranto* action is reasonable because of the importance of quickly resolving election disputes. A *quo warranto* action is an expedited proceeding because it affects title to office. *See* N.C. Gen. Stat. § 1-521. "It is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal." N.C. Gen. Stat. § 1-521. The plain language of N.C. Gen. Stat. § 1-522 provides explicit notice that the complaint had to be served within 90 days.

Here, the record shows that upon learning of the election returns, Mr. Barker initiated actions to overturn the results. He petitioned both the County and State Boards of Elections, filed administrative appeals, and brought actions in superior court. After those direct actions failed, he undertook steps to bring the present *quo warranto* action. Significantly, before seeking permission from the Attorney General, Mr. Barker was able to delay for several weeks the time in which Mr. Ellis took office. Yet, he waited until 15 February 2000 to request permission from the Attorney General to institute a private *quo warranto* action. Even so, the Attorney General granted that permission on 1 March 2000 giving him nearly three weeks to bring the action and serve Mr. Ellis. Instead, he waited until 17 March 2000 to bring the action and did not serve the complaint on Mr. Ellis until 23 March 2000. In light of these facts, Mr. Barker had ample opportunity to be heard. We therefore hold that Mr. Barker was not denied due process in this case.

Affirmed.

Judges TIMMONS-GOODSON and JOHN concur.

IN THE MATTER OF: JASON MATTHEW POWERS

No. COA00-820

(Filed 5 June 2001)

Juveniles— delinquency hearing—right of parents to be heard

A juvenile's parents were not denied their right to present evidence at a dispositional hearing where the juvenile's parents were tendered for any questions the court might have, but the court did not question them. The record contains no evidence that the parents attempted to offer evidence or advise the court during the dispositional hearing and the court had no affirmative duty to question them. N.C.G.S. § 7B-2501(b).

Appeal by respondent parents from order filed 10 March 2000 by Judge Martin J. Gottholm in Davidson County District Court. Heard in the Court of Appeals 8 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Diane Martin Pomper, for the State.

Jon C. Michael for respondent-appellants.

GREENE, Judge.

Kathy Powers and Charles Powers (Respondents) appeal from a juvenile disposition and commitment order filed 10 March 2000 committing Respondents' minor child Jason Matthew Powers (the Juvenile) "to the Office of Juvenile Justice for placement in one of the residential facilities operated by the Division, for . . . an indefinite term for a minimum of 6 months and not to exceed the [J]uvenile's eighteenth birthday."

The record shows the Juvenile, a fifteen year old, was charged in juvenile court as being a delinquent juvenile as defined by N.C. Gen.

Stat. § 7A-517(12),[1] in that he "unlawfully, willfully and feloniously did steal, take and carry away a 1989 Honda Civic" in violation of N.C. Gen. Stat. § 14-72(a). At the adjudication hearing, the Juvenile admitted to the acts alleged in the petition and the trial court adjudicated the Juvenile delinquent. The trial court subsequently held a dispositional hearing, at which the Juvenile, the Juvenile's attorney, and Respondents were present. At the hearing, the Juvenile's attorney made brief remarks. He then stated to the trial court, "I would tender [Respondents] to the Court for any questions you may have of [them]." The trial court responded, "I don't have anything else" and the hearing was concluded. Respondents did not request an opportunity to present evidence or to address the trial court at the dispositional hearing.

The dispositive issue is whether the trial court denied Respondents their right to "present evidence" and "advise the court concerning the disposition they believe to be in the best interests of the juvenile" pursuant to N.C. Gen. Stat. § 7B-2501(b) when, after Respondents were tendered to the trial court, the trial court did not question Respondents.[2]

Respondents argue they "were not given the opportunity to present evidence or to be heard regarding disposition," in violation of section 7B-2501(b). We disagree.

Section 7B-2501(b) provides that at a dispositional hearing, "the juvenile's parent[s] . . . shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile." N.C.G.S. § 7B-2501(b) (1999).

In this case, the Juvenile's attorney stated to the trial court, "I would tender [Respondents] to the Court for any questions you may have of [them]." The trial court responded that it did not "have any-

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1. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1501(7) (1999).

2. We note that the parents of a juvenile have a statutory right to appeal from "any final order of the court" relating to undisciplined and/or delinquent juveniles. N.C.G.S. § 7B-2602 (1999); N.C.G.S. § 7B-2604 (1999). In this case, Respondents, the parents, appeal based on the alleged violation of a right provided *directly to them* by the North Carolina Juvenile Code. Thus, because Respondents argue they were prejudiced by a denial of *their* rights, we need not address the issue of whether a parent would have standing to challenge on appeal the alleged denial of a right of the juvenile or to challenge an alleged error during the adjudicatory or dispositional proceedings that did not affect the rights of the parent.

thing else," and the hearing was concluded. The trial court's decision not to question Respondents did not constitute a refusal to allow Respondents to present evidence or to advise the trial court regarding the appropriate disposition, as section 7B-2501(b) places no affirmative duty on the trial court to question the parents of a juvenile. Additionally, the record contains no evidence Respondents attempted to offer evidence or to advise the trial court during the dispositional hearing. Accordingly, Respondents were not denied the right to present evidence and advise the trial court under section 7B-2501(b).[3]

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

3. Additionally, Respondents argue their alleged denial of the opportunity to present evidence at the dispositional hearing violated their right to due process under the United States Constitution. As the North Carolina Legislature has provided parents with the statutory right to present evidence and to be heard at a dispositional hearing and Respondents were not denied that statutory right in this case, we need not address whether the failure to provide parents with this right is a violation of the parents' right to due process.

FRANKLIN R. DEWITT, PLAINTIFF v. EVEREADY BATTERY CO., INC., DEFENDANT

No. COA00-695

(Filed 19 June 2001)

1. Products Liability— manufacture of batteries—implied warranty of merchantability—defective product

The trial court erred by granting summary judgment in favor of defendant corporation based on its conclusion that defendant did not breach the implied warranty of merchantability by manufacturing defective batteries that plaintiff purchased which caused his injuries, because the evidence viewed in the light most favorable to plaintiff reveals that: (1) a reasonable person could find plaintiff properly placed the batteries into a lantern and was putting the batteries to their ordinary use when he was injured; (2) a reasonable person could find the leakage of fluid from the batteries was a malfunction of the batteries based on plaintiff properly placing the batteries into the lantern; and (3) plaintiff was not contributorily negligent as a matter of law when an ordinary prudent person under the circumstances may not have been aware that he had come into contact with battery fluid, may not have known that the moisture on his sock came from fluid leaking from the battery, and may not have taken prompt action to remove the fluid from his skin.

2. Products Liability— manufacture of batteries—implied warranty of merchantability—adequacy of warning

The trial court did not err by granting summary judgment in favor of defendant corporation based on its conclusion that defendant did not breach the implied warranty of merchantability by manufacturing batteries with an alleged inadequate warning, because: (1) the record does not contain substantial evidence that any inadequacy in the warning proximately caused plaintiff's injuries; and (2) plaintiff's injuries would have occurred even if the warnings on the batteries had been more prominent and conspicuous, and contained information regarding injuries resulting from potassium hydroxide exposure as well as appropriate medical treatment.

3. Products Liability— manufacture of batteries—safer alternative design

The trial court did not err by granting summary judgment in favor of defendant corporation based on its conclusion that defendant did not unreasonably fail to adopt a safer design for its batteries that plaintiff purchased which caused his injuries when defendant did not add an indicator dye to the potassium hydroxide contained in the batteries, because the record does not contain any evidence that: (1) plaintiff's proposed alternative design was practical, feasible, and otherwise could have reasonably been adopted by defendant at the time the batteries were manufactured; (2) this alternative design would render the batteries a safer product; and (3) this alternative design would have prevented or substantially eliminated the harm caused by exposure to potassium hydroxide. N.C.G.S. § 99B-6.

4. Products Liability— manufacture of batteries—negligence—adequacy of warnings

The trial court did not err by granting summary judgment in favor of defendant corporation based on its conclusion that defendant was not negligent in its manufacture of the batteries purchased by plaintiff which caused his injuries, because: (1) the record does not contain evidence that any inadequate warning on the batteries proximately caused plaintiff's injuries; and (2) it is not permissible to infer manufacturer negligence from a product defect which has been inferred from a product malfunction. N.C.G.S. § 99B-5.

Judge CAMPBELL dissenting.

Appeal by plaintiff from order filed 7 March 2000 by Judge Richard L. Doughton in Iredell County Superior Court. Heard in the Court of Appeals 17 April 2001.

Homesley, Jones, Gaines, Homesley & Dudley, by Clifton W. Homesley and Andrew J. Wingo, for plaintiff-appellant.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Erik A. Schwanz, for defendant-appellee.

GREENE, Judge.

Franklin R. DeWitt (Plaintiff) appeals an order filed 7 March 2000 granting summary judgment in favor of Eveready Battery Co., Inc. (Defendant).

In a complaint filed 10 September 1997, Plaintiff alleged products liability claims against Defendant based on theories of negligence and breach of warranty. Plaintiff's pleadings and deposition testimony allege the following: On 10 December 1995, Plaintiff purchased a battery-operated Coleman lantern and eight Eveready "Energizer" D cell batteries from a Wal-Mart in Mooresville, North Carolina. The batteries, which were purchased in four separate packages each containing two batteries, were manufactured by Defendant. After making the purchase, Plaintiff took the lantern and the batteries home and followed instructions that came with the lantern regarding how to install the batteries into the lantern. Plaintiff did not see any safety warnings on the batteries or battery packages, and he testified, "I can't really say I looked at the battery packages because they're just batteries. I took [the batteries] out of the container and knew what I was going to do with them—what I wanted them for." Plaintiff did not recall whether the lantern package contained any safety warnings. Plaintiff did not notice whether he placed the batteries into the lantern in the proper direction; however, Plaintiff testified he was familiar with installing batteries and he assumed he had installed the batteries properly. Plaintiff "knew it could be dangerous" to place batteries into an object in the wrong direction.

After Plaintiff installed the batteries in the lantern, the lantern did provide some light; however, Plaintiff was not satisfied with the "[b]rightness" of the lantern. On the following day, Plaintiff decided to remove the batteries from the lantern and return the lantern to Wal-Mart. As Plaintiff placed the lantern between his ankles and began removing the batteries, he noticed fluid on at least one of the batteries. Plaintiff described the fluid as "slimy feeling," and he testified: "I didn't think anything of it at the time. Shortly thereafter, I felt a little tingle on my ankle. I didn't give that any thought at all at the time. I just figured it felt like something nipped me, like a . . . spider bite or something like that." Plaintiff "pulled down his sock and noticed a slightly red area . . . [and] also noticed that his sock was moist"; however, Plaintiff did not experience any "serious discomfort" and "didn't really give it a second thought."[1] Additionally,

1. We note that Plaintiff made contradictory statements in his deposition regarding whether he noticed the moisture on his sock before or after he returned the lantern to Wal-Mart. Plaintiff, however, is bound by his statement in his verified complaint that he noticed moisture on his sock and a "tingling on his ankle" upon removing the batteries from the lantern and prior to the time that he left his home to return the lantern to Wal-Mart. *See Western Enterprises, Inc. v. Selective Insurance Company*, 125 N.C. App. 36, 41, 479 S.E.2d 243, 247 (1997) ("parties are bound by admissions and allegations within their pleadings unless withdrawn, amended[,] or otherwise altered pursuant to N.C.R. Civ. P. 15").

Plaintiff noticed the base of the lantern was "a little moist" and had a "slimy feeling." Plaintiff washed his hands because he "didn't know what [the fluid] was" and he thought it might have been either "condensation" or "perspiration." Plaintiff stated "[t]he last place [he] would have thought [the moisture] came from was the batteries." Plaintiff then drove to Wal-Mart to return the lantern. As Plaintiff was driving home from Wal-Mart, he felt a "[w]arm feeling almost like a burning" on his foot. When he arrived home, approximately ten minutes after leaving Wal-Mart, he removed his sock and discovered "the whole heel of [his] foot was black." Plaintiff immediately drove himself to a hospital, where he was diagnosed as having "third and fourth degree alkaline chemical burns to his right ankle." While at the hospital, Plaintiff discovered the burns were caused by potassium hydroxide, a chemical contained in the batteries. As a result of the burns, Plaintiff "suffered permanent disfiguring and debilitating injuries to his ankle." Plaintiff testified that at the time he purchased the batteries, he knew that the substance contained in batteries could "[b]urn your skin" and could cause serious injury.

In an affidavit filed 1 October 1999, Plaintiff made the following pertinent statements: "I was aware at the time of my injury that aged batteries could in some way be dangerous"; "at the time of my injury, I did not know that newly purchased batteries could leak within 30 hours after taking them out of the package"; "at the time of my injury, I did not know that the substance from the inside of an Energizer D cell battery could soak through my clothes without burning or discoloring the cloth"; "at the time of my injury, I did not know that the substance from the inside of an Energizer D cell battery could cause the 3rd and 4th degree burns that I received when the substance soaked through my sock and came into contact with my skin"; and "though I did not particularly look for warnings on the package or the batteries themselves, the warnings were so inconspicuous that they did nothing to draw my attention to them."

Joseph Crawford Hubbell, Jr. (Hubbell), a chemist and bacteriologist, testified in his deposition that he performed tests to determine the alkalinity of an Energizer D cell battery and a sock sent to him by Plaintiff. The battery had an alkalinity reading of 10.6 and the sock had an alkalinity reading of 7.10. Hubbell testified based on the alkalinity readings that the materials tested "ha[d] a high alkalinity." If materials with such alkalinity readings came into contact with a person's skin "[i]t would be very corrosive." In an affidavit dated 30 September 1999, Hubbell made the following statements: "in my opin-

ion, an indicator type dye, such as phenolphthalein, could be added to the solution of Potassium Hydroxide that is contained in Energizer D cell batteries"; "in my opinion, the addition of such substance would not adversely affect the composition or function of Energizer D cell batteries"; and "[t]he addition of this dye would allow the user to see the alkaline substance if it leaked out of the battery."

Terrance Telzrow (Telzrow), the manager of standards, product safety, and environmental affairs for Defendant, gave deposition testimony regarding how Energizer D cell batteries function and the methods used by Defendant to test such batteries for leaks during the manufacturing process. Telzrow also testified regarding a safety device called a "Belville fail-safe device," which serves as a venting mechanism that allows gases to escape from a battery if pressure in the battery reaches a certain level. Telzrow stated that when pressure builds inside a battery, the nylon inside the battery expands. When such expansion occurs, spurs in the venting mechanism "cut the nylon and relieve the pressure" by allowing gas to escape from the battery and, as a result of the holes created by the spurs, fluid also escapes from the battery. If this venting mechanism were not in place, a battery containing built-up pressure would explode. Telzrow stated four occurrences that can cause pressure to build up in a battery are: "[re]charging [the battery]," "putting [a battery] in backwards," "gross contamination [in the battery]," and mixing old and new batteries.

Subsequent to Plaintiff's injury, Telzrow and his work assistant conducted tests on the batteries Plaintiff used in the lantern. The tests included weighing the batteries and taking X-rays of the batteries. Based on the low weights of two of the batteries, Telzrow concluded two of the batteries had leaked. The batteries that leaked had a "bulge," which resulted from "internal pressure built up in the batter[ies]." Based on the X-rays, Telzrow concluded the Belville fail-safe device had activated in the batteries that leaked. Additionally, Telzrow concluded the activation of this venting mechanism was caused by the batteries being "charged," and this charge in the batteries was not caused by the batteries being "driven into reverse," which results from old batteries being mixed with new batteries, or by "gross contamination."

Telzrow testified that a warning is placed on the back packaging for D cell batteries manufactured by Defendant. The warning, which is approximately 3/4 of an inch by 1/2 an inch in size, states: "Do not dispose in fire, recharge, put in backwards, mix with used or other

battery types[;] may explode, leak and cause personal injury." The warning does not contain any instructions regarding what action a person should take if he or she is exposed to potassium hydroxide or the types of injuries that can result from exposure to potassium hydroxide. Telzrow stated potassium hydroxide is a colorless substance, and Defendant has never examined whether adding color to the mixture of potassium hydroxide would result in a safer product.

William Wayne Beaver (Beaver), a witness for Plaintiff, gave deposition testimony that he is an electrical engineer who has worked in the field of research and development of product designs and has investigated the causes of product failures. Beaver's work experience did not specifically involve batteries and he was not trained in the manufacturing or engineering of batteries. Beaver testified that in connection with Plaintiff's case, he performed research specifically relating to batteries. Beaver stated in regard to the use of a venting mechanism in batteries that he did not "have any criticism of [the] use of a venting mechanism" and that a venting mechanism is a "proper design" for alkaline batteries such as the ones purchased by Plaintiff. Beaver concluded that the batteries at issue did leak alkaline materials and the leakage may have been caused by a "manufacturing defect." Beaver stated possible manufacturing defects are " 'a small hole in the positive metal case or negative metal top' " or "a gap or tear in the non-metallic insulating seal between the positive metal case and the negative metal top"; however, Beaver was unable to state whether either of these defects were present in the batteries purchased by Plaintiff. Beaver acknowledged the possibility that another expert might be able to examine X-rays of the batteries to determine whether they leaked as a result of a properly functioning venting mechanism or as a result of a manufacturing defect; however, Beaver was unable to make that determination. Additionally, in Beaver's opinion, if it were shown that the venting mechanism had been initiated, it would be "strong evidence" the batteries had functioned properly. Beaver was unable to state whether the batteries contained any defects that may have caused the venting system to malfunction.

On 2 September 1999, Defendant filed a motion for summary judgment on the ground "there is no genuine issue as to any material fact . . . and [Defendant] is entitled to judgment as a matter of law." In an order filed 7 March 2000, the trial court granted summary judgment in favor of Defendant on all of Plaintiff's claims.

The issues are whether: (I) the record contains substantial evidence Defendant breached the implied warranty of merchantability by (A) manufacturing defective batteries and/or (B) manufacturing batteries with inadequate warnings; (II) the record contains substantial evidence Defendant unreasonably failed to adopt a safer design for Energizer D cell batteries by failing to add an indicator dye to the potassium hydroxide contained in the batteries; and (III) the record contains substantial evidence Defendant was negligent in its manufacture of the batteries purchased by Plaintiff.

"Summary judgment is proper when there is no genuine issue as to any material fact." *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 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.

I

Implied Warranty of Merchantability

Plaintiff argues the record contains substantial evidence Defendant breached the implied warranty of merchantability by manufacturing a defective product and by manufacturing a product containing an inadequate warning.

A products liability claim may be premised on the contract principles of warranty. *Red Hill Hosiery Mill, Inc. v. MagneTek Inc.*, 138 N.C. App. 70, 75, 530 S.E.2d 321, 325-26 (2000); N.C.G.S. § 99B-1.2 (1999). N.C. Gen. Stat. § 25-2-314, which establishes the implied warranty of merchantability, states in pertinent part:

> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> . . . .
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> . . . .
>
> (e) are adequately contained, packaged, and labeled as the agreement may require[.]

N.C.G.S. § 25-2-314(2) (1999). A products liability claim based on a defendant's alleged manufacture of unmerchantable goods under section 25-2-314 requires a plaintiff to prove:

> (1) the defendant warranted the product (express or implied) to plaintiff, (2) there was a breach of that warranty in that the product was defective [or was in some other condition rendering it unmerchantable] at the time it left the control of the defendant, and (3) the defect [or other condition] proximately caused plaintiff damage.

Red Hill, 138 N.C. App. at 75, 530 S.E.2d at 326; *Reid v. Eckerds Drugs*, 40 N.C. App. 476, 480, 253 S.E.2d 344, 347, *disc. review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

"[C]ontributory negligence . . . bars a products liability claim against a manufacturer or seller based on breach of implied warranty." *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 773, 488 S.E.2d 240, 244 (1997); N.C.G.S. § 99-4 (1999). "A plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury." *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 564, 467 S.E.2d 58, 65 (1996). Additionally, "[a] plaintiff, who is aware of a known danger, but fails to avoid it, is contributorily negligent." *Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 225, 542 S.E.2d 303, 309 (2001). The granting of summary judgment based on a plaintiff's contributory negligence is appropriate "[o]nly where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached." *Nicholson*, 346 N.C. at 774, 488 S.E.2d at 244.

A

Defective Product

[1] Plaintiff first argues the record contains substantial evidence Defendant breached the implied warranty of merchantability by manufacturing defective batteries. We agree.

A product defect may be shown by evidence a specific defect existed in a product. Additionally, when a plaintiff does not produce evidence of a specific defect, a product defect may be inferred from evidence the product was put to its ordinary use and the product malfunctioned. *Red Hill*, 138 N.C. App. at 76-77, 530 S.E.2d at 327.

ordinary use

In this case, viewing the evidence in the light most favorable to Plaintiff, the record shows Plaintiff followed the instructions that came with the lantern regarding how to install the batteries; Plaintiff "knew it could be dangerous" to improperly install batteries; Plaintiff was familiar with how to properly install batteries; and, though Plaintiff did not specifically notice whether the batteries were properly installed, he assumed he had installed the batteries properly. Based on this evidence, a reasonable person could find Plaintiff properly placed the batteries into the lantern and, thus, a reasonable person could find Plaintiff was putting the batteries to their ordinary use when he was injured.

malfunction

In this case, the evidence shows the batteries purchased by Plaintiff are designed to leak when an increase in pressure activates the venting mechanism. Thus, a properly functioning battery will leak under certain conditions that cause an increase in pressure. Telzrow testified these conditions, in which leakage is not a malfunction, include: "[re]charging [the battery]," "putting [a battery] in backwards," "gross contamination [in the battery]," and mixing old batteries with new batteries. The undisputed evidence shows two of the batteries purchased by Plaintiff leaked a potassium hydroxide solution, and this leakage occurred because of increased pressure inside the batteries that activated the venting mechanism. Telzrow was able to conclude pressure did not build in the batteries purchased by Plaintiff as a result of gross contamination or as a result of placing old batteries with new batteries. Additionally, there is no evidence in the record that Plaintiff recharged the batteries. Based on this evidence and because the evidence could support a jury conclusion that Plaintiff properly placed the batteries into the lantern, a reasonable person could find that the leakage of fluid from the batteries was a malfunction of the batteries. Accordingly, the evidence is sufficient to raise a genuine issue of material fact regarding whether the batteries were defective.[2] *See Red Hill*, 138 N.C. App. at 77-78, 530 S.E.2d at 327 (evidence from which a jury could find that a portion of a light fixture malfunctioned is sufficient to raise a genuine issue of material fact regarding whether the light fixture was defective even

2. Defendant does not argue in its brief to this Court that Defendant did not warrant the batteries or that any defect in the batteries was not the proximate cause of Plaintiff's injuries. We, therefore, do not address these issues. N.C.R. App. P. 28(b)(5).

though the record also contained evidence the light fixture did not malfunction).[3]

contributory negligence

Defendant argues in its brief to this Court that, even assuming the record contains substantial evidence the batteries were defective, Defendant was entitled to summary judgment on this claim because Plaintiff was contributorily negligent as a matter of law. We disagree.

In this case, viewing the evidence in the light most favorable to Plaintiff, the record shows Plaintiff noticed a "slimy" fluid on at least one of the batteries and on the base of the lantern; after removing the lantern from between his ankles, Plaintiff felt "a little tingle on [his] ankle"; Plaintiff "pulled down his sock and noticed a slightly red area . . . [and] also noticed that his sock was moist"; Plaintiff washed his hands because he "didn't know what [the fluid] was"; and "[t]he last place [Plaintiff] would have thought [the moisture] came from was the batteries." The record does not contain any evidence that Plaintiff knew the moisture on his sock came from the batteries. We cannot say, as a matter of law, that an ordinarily prudent person under the circumstances would be aware he had come into contact with battery fluid. Furthermore, even assuming an ordinarily prudent person would have known the moisture was fluid that had leaked from the batteries, we cannot say as a matter of law that an ordinarily prudent person under the circumstances would have taken prompt action to remove the fluid from his skin. Whether Plaintiff was contributorily negligent is therefore an issue to be determined by the jury. Accordingly, because the record contains substantial evidence Defendant breached the implied warranty of merchantability by manufacturing a defective product, the trial court's 7 March 2000 order granting summary judgment in favor of Defendant on this claim is reversed.

B

Inadequate Warning

[2] Plaintiff argues the record contains substantial evidence Defendant breached the implied warranty of merchantability by manufacturing a product containing an inadequate warning; thus, the trial

3. We note that Plaintiff does not argue in his brief to this Court and the record does not contain any evidence of a specific defect in the batteries; rather, Plaintiff's sole argument is that a defect can be inferred from the evidence.

court erred by granting summary judgment in favor of Defendant on this claim. Specifically, Plaintiff contends the warning was inadequate because it did not provide information regarding the types of injuries that may be caused by exposure to potassium hydroxide or appropriate treatment for exposure to potassium hydroxide, and the warning was neither sufficiently "prominent" nor "conspicuous."

The failure of a manufacturer to provide adequate warnings of a product's dangerous propensities may render a product unmerchantable under section 25-2-314. *Reid*, 40 N.C. App. at 482, 253 S.E.2d at 348-49. A manufacturer, however, may not be held liable for a claim based on inadequate warnings unless the failure to provide adequate warnings was a proximate cause of the plaintiff's injuries. *Red Hill*, 138 N.C. App. at 75, 530 S.E.2d at 326. "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injures, and without which the injuries would not have occurred[.]" *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984).

In this case, evidence regarding the severe physical injury that can be caused by contact with potassium hydroxide, in conjunction with evidence the batteries are designed with venting mechanisms that may cause potassium hydroxide to leak from them, is sufficient evidence to raise a jury question regarding whether the warning, which did not contain any information regarding treatment for exposure to potassium hydroxide, was inadequate. Nevertheless, assuming without deciding that the warning on the battery package was inadequate and rendered the batteries unmerchantable, Plaintiff must produce substantial evidence the inadequate warning proximately caused his injury. As noted in Section I(A) of this opinion, the record does not contain any evidence that Plaintiff knew at the time he removed the batteries from the lantern that his ankle had been exposed to battery fluid. Rather, it was not until after Plaintiff sought treatment at the hospital that he discovered the moisture was caused by a substance coming from the batteries. As Plaintiff was not aware that he had been exposed to battery fluid, Plaintiff's injuries would have occurred even if the warnings on the batteries had been more "prominent" and "conspicuous" and contained information regarding injuries resulting from potassium hydroxide exposure as well as appropriate medical treatment for such exposure. Accordingly, because the record does not contain substantial evidence that any inadequacy in the warning proximately caused Plaintiff's injuries, the

trial court properly granted summary judgment in favor of Defendant on this claim.[4]

II

Inadequate Design

[3] Plaintiff argues he "has offered evidence of a safer, practical, feasible[,] and otherwise alternative design or formulation that could have been reasonably adopted" by Defendant which could have prevented Plaintiff's injury; therefore, summary judgment should not have been granted in favor of Defendant on Plaintiff's inadequate design claim. We disagree.

To establish a products liability claim based on inadequate design or formulation pursuant to N.C. Gen. Stat. § 99B-6, a plaintiff must prove "that at the time of its manufacture[,] the manufacturer acted unreasonably in designing or formulating the product" and "that this conduct was a proximate cause of the harm for which damages are sought." N.C.G.S. § 99B-6(a) (1999). Additionally, a plaintiff must prove one of the following:

(1) At the time the product left the control of the manufacturer, the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the product.

(2) At the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.

Id. N.C. Gen. Stat. § 99B-6(b) provides a list of seven non-exclusive factors to be considered when determining whether a manufacturer

4. Additionally, Plaintiff alleges in his complaint that Defendant breached the implied warranty of fitness for a particular purpose, pursuant to N.C. Gen. Stat. § 25-2-315. The record, however, does not contain any evidence Plaintiff used the batteries for a "particular purpose" under section 25-2-315 rather than for an "ordinary purpose." *See* N.C.G.S. § 25-2-315 official commentary (1999) (noting goods are used for a "particular purpose" when they are used for a purpose peculiar to the particular buyer, in contrast to goods a buyer uses for an "ordinary purpose" for which such goods are used). Additionally, Plaintiff makes no argument in his brief to this Court regarding his claim under section 25-2-315. We, therefore, do not address this claim. *See* N.C.R. App. P. 28(b)(5).

acted "unreasonably" under section 99B-6(a). N.C.G.S. § 99B-6(b) (1999). A plaintiff is not required to present evidence on all of these factors in order to meet his burden of proving a defective design claim, as some of these factors may not be relevant to a particular plaintiff's claim. For example, factor (3), "[t]he extent to which the design or formulation conformed to any applicable government standard," may not be relevant to a particular product; and factor (7), "risks associated with the alternative design or formulation," would not be relevant to an inadequate design claim that was not based on the showing of an alternative design or formulation. Nevertheless, the plaintiff must present substantial evidence the manufacturer "unreasonably failed" to adopt an alternative design or formulation under section 99B-6(a)(1) or manufactured a product with a design or formulation "so unreasonable that a reasonable person" would not use or consume the product under section 99B-6(a)(2). A showing that a defendant acted unreasonably under section 99B-6(a)(1) requires evidence the proposed alternative design or formulation was "a safer, practical, feasible, and otherwise reasonable" design or formulation; that the alternative design or formulation "could then have been reasonably adopted"; the alternative design or formulation "would have prevented or substantially reduced the risk of harm" complained of; and the alternative design or formulation would not have "substantially impaired the usefulness, practicality, or desirability of the product." N.C.G.S. § 99B-6(a)(1).

In this case, the evidence shows potassium hydroxide is a colorless solution that can cause burning when it comes into contact with a person's skin. Plaintiff presented evidence, in the form of an affidavit of Hubbell, a chemist and bacteriologist, that phenolphthalein "could be added to the solution of Potassium Hydroxide that is contained in Energizer D cell batteries." Hubbell gave the following opinions in his affidavit regarding this alternative design: "the addition of [an indicator dye] would not adversely affect the composition or function of Energizer D cell batteries"; and "[t]he addition of this dye would allow the user to see the alkaline substance if it leaked out of the battery." The record, however, does not contain any evidence this alternative design was practical, feasible, and otherwise could have reasonably been adopted by Defendant at the time the batteries were manufactured; the record does not contain any evidence this alternative design would render the batteries a safer product; and the record does not contain any evidence this alternative design would have prevented or substantially eliminated the harm caused by exposure to potassium hydroxide. Hubbell's mere statement that composition and

function of the battery would not be affected by the addition of indicator dye is not sufficient evidence from which a jury could find Defendant was unreasonable in failing to adopt an alternative design containing indicator dye under section 99B-6(a)(1). Accordingly, the trial court properly granted Defendant's motion for summary judgment as to this claim.[5]

III

Negligence

[4] Plaintiff also asserted products liability claims against Defendant based in negligence. First, Plaintiff alleged Defendant was negligent by placing inadequate warnings on the batteries. As noted in section I(B) of this opinion, the record does not contain evidence that any inadequate warning on the batteries proximately caused Plaintiff's injuries.[6] Thus, the trial court properly granted summary judgment in favor of Defendant on this claim.

Additionally, Plaintiff alleged Defendant was negligent by manufacturing a defective product. As noted in section I(A) of this opinion, the record contains substantial evidence from which a reasonable person could infer, based on evidence the batteries were put to their ordinary use and malfunctioned, that the batteries were defective. Nevertheless, "[i]t is not . . . permissible to infer manufacturer negligence from a product defect which has been inferred from a product malfunction." *Red Hill*, 138 N.C. App. at 77 n.7, 530 S.E.2d at 327 n.7. As the record does not contain any evidence Defendant was negligent in the manufacture of the batteries, the trial court properly granted summary judgment in favor of Defendant on this claim.

In summary, we reverse and remand the portion of the trial court's 7 March 2000 order granting summary judgment in favor of Defendant on Plaintiff's claim for breach of implied warranty of mer-

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5. Plaintiff states in his brief to this Court that Defendant manufactured a product with an inadequate design because "Defendant has failed to make improvements to the product[']s[] safety device" since at least 1985. The record contains no evidence the design of the Belville fail-safe device was inadequate. We, therefore, do not address this issue.

6. In contrast to Plaintiff's warranty claim based on inadequate warnings, Plaintiff's negligence claim for inadequate warnings is governed by N.C. Gen. Stat. § 99B-5. N.C.G.S. §§ 99B-1.2, -5 (1999). Nevertheless, as with Plaintiff's claim in warranty, a negligence claim based on inadequate warnings requires Plaintiff to present substantial evidence the alleged inadequate warning proximately caused Plaintiff's injuries. N.C.G.S. § 99B-5(a) (1999).

chantability based on the manufacture of a defective product. Otherwise, the trial court's 7 March 2000 order is affirmed.

Affirmed in part, and reversed and remanded in part.

Judge McGEE concurs.

Judge CAMPBELL dissents.

CAMPBELL, Judge, dissenting.

I respectfully dissent from the holding in part I of the majority opinion regarding the implied warranty of merchantability because I believe plaintiff has not shown substantial evidence of the product's defect, and therefore cannot survive a motion for summary judgment.

A motion for summary judgment is proper where there is no genuine issue of material fact. *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 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). As the majority has stated, "[a]n issue is genuine where it is supported by substantial evidence." *Johnson*, 139 N.C. App. at 681, 535 S.E.2d at 361. In turn, substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference.' " *In re Appeal by McCrary*, 112 N.C. App. 161, 168, 435 S.E.2d 359, 364 (1993 (quoting *Wiggins v. N.C. Dep't of Human Res.*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992)).

The majority holds that summary judgment in favor of defendant was improper because it finds there was substantial evidence that defendant breached the implied warranty of merchantability by manufacturing a defective product. In doing so, the majority relies heavily on *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 530 S.E.2d 321 (2000).

Red Hill involved a products liability claim resulting from an alleged defect in a flourescent light which started a fire that destroyed the Red Hill's greige manufacturing mill. The evidence tended to show that it was a defective ballast (which dissipates heat generated in the normal operation of the light), inside the flourescent light that had overheated, igniting some lint that was on top of the

light in the process. Red Hill sued the manufacturer of the ballast, MagneTek, Inc. (MagneTek), on a breach of warranty theory.

Summary judgment in favor of MagneTek was granted at the trial court level. However, this Court reversed that ruling after finding that Red Hill had produced substantial evidence of a genuine issue of material fact, and that therefore, summary judgment in favor of MagneTek was not proper.

The evidence provided by Red Hill tended to show that the Hickory Fire Marshall, the Hickory Fire Inspector, and two North Carolina State Bureau of Investigation agents had done a cause and origin investigation, and based on the fire pattern, had determined that the area of origin of the fire was a particular flourescent light fixture, that the light fixture was discolored on top, indicating a specific area of heating, and that this specific area was in the area where the ballast was located. The investigators excluded all other possible sources of the fire, including the mill's electrical and mechanical systems. In addition, an expert for Red Hill whose expertise was in electrical engineering, physics, and fire investigation, reviewed the fire scene and the light fixture. The expert came to the same conclusion as the investigators—that the ballast had malfunctioned and that it overheated causing the fire. Even after considering all other possible sources of the fire, the expert concluded that no other cause was reasonable. Furthermore, although Red Hill could not point to a specific defect, the light fixture in question had been put only to its ordinary use. Thus, the Court held that "in a products liability action, based on tort or warranty, a product defect may be inferred from evidence of the product's malfunction, if there is evidence the product had been put to its ordinary use." *Red Hill*, 138 N.C. App. at 76-77, 530 S.E.2d at 327.

Red Hill, however, is distinguishable from the facts of the case at hand. Here, there was no evidence that the batteries malfunctioned, in fact, every indication was that they operated properly by activating the safety "venting" mechanism when pressure began to build in the batteries. An expert for defendant testified that the batteries were designed to leak in order to prevent them from exploding under certain conditions, namely their improper use by: (1) recharging the batteries; (2) mixing old batteries with new batteries; or (3) putting a battery in backwards. They would also leak if there were gross contamination in a battery. The expert was then able to rule out the possibilities of gross contamination or mixing old and new batteries.

Further, as noted by the majority, there is no evidence that plaintiff recharged the battery. The only remaining possibilities then, are that (1) the plaintiff put the batteries in backwards, causing them to leak as they were designed to do for safety precautions, or (2) the batteries malfunctioned.

The majority contends that based on this evidence, and based on the plaintiff's assumption that he properly placed the batteries in the lantern,[7] that under our holding in Red Hill, plaintiff should be allowed to infer that the product was defective, and that this constitutes sufficient evidence to defeat the summary judgment motion.

I disagree with this reasoning. While it is true that "our courts have permitted an inference of a product defect upon a showing the product malfunctioned after the product had been put to ordinary use," *Red Hill*, 138 N.C. App. at 76, 530 S.E.2d at 326, the *only* evidence that the product malfunctioned instead of properly venting, is the plaintiff's *assumption* that he properly placed the batteries in the lantern. This does not, in my belief, constitute the "substantial evidence" which is necessary to defeat a motion for summary judgment. Nor did plaintiff present expert testimony or other evidence to indicate the product was defective.[8]

Because I do not find that plaintiff has presented substantial evidence of any defect in the product, I would uphold the trial court's ruling in favor of summary judgment for defendant.

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7. Plaintiff in his deposition responded to questions from defendant's attorney as follows:

Mr. Raynor: Notice that you had all the batteries in the right way[?]

Plaintiff: I don't even think I really looked to notice, to say honestly.

Mr. Raynor: Just assume you'd done it right?

Plaintiff: Yeah, yeah, I've put so many batteries in and out of things over the years with raising kids and everything.

8. It should be noted that although plaintiff did present an expert witness (William Wayne Beaver) who gave testimony regarding the venting mechanism and who opined that the leaking might be caused by a manufacturing defect, the expert was not able to definitively state whether the batteries in question here were defective.

In fact as pointed out by the majority, Beaver testified that in his opinion "if it were shown that the venting mechanism had been initiated, it would be 'strong evidence' the batteries had functioned properly," and that "Beaver was unable to state whether the batteries contained any defects that may have caused the venting system to malfunction."

ALFRED R. GROOMS, PETITIONER v. STATE OF N.C. DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RESPONDENT

No. COA00-614

(Filed 19 June 2001)

Pensions and Retirement— local government employee—alternate benefit—election by survivor

The trial court erred by affirming a Local Government Retirement System decision that petitioner (Grooms) was not entitled to the Survivor's Alternate Benefit under N.C.G.S. § 128-27(m) where Robinson was employed by Wake County, with Grooms designated to receive a return of accumulated contributions and the death benefit; Robinson elected to receive the maximum allowance with no survivor benefit when he retired; Grooms was designated as the beneficiary for the guaranteed refund pursuant to section (g1); Robinson died within 180 days of his last day of service and was therefore considered to have died while in service for purposes of subsection (l); the Retirement System paid Grooms the death benefit pursuant to subsection (l) and acknowledged that Grooms was entitled to the lump sum guaranteed refund as set forth in subsection (g1); and the System denied Grooms' request to receive the Survivor's Alternate Benefit (a monthly allowance) under subsection (m) in lieu of the guaranteed refund. Under the System's interpretation of the statute, the beneficiary of a member who quit or who was fired and then died within 180 days would be entitled to elect a valuable benefit, while the beneficiary of a member who retired, chose the maximum allowance, and then died within 180 days would not. This result would be both illogical and inequitable. A beneficiary who has become entitled to the lump sum death benefit provided in subsection (g1) may choose to elect the SAB alternative in subsection (m) if the retired member died within 180 days of the last day of actual service and if the three conditions in subsection (m) are satisfied.

Judge TIMMONS-GOODSON dissenting.

Appeal by petitioner from order entered 23 February 2000 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 28 March 2001.

Kilpatrick Stockton, L.L.P., by James B. Trachtman, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for respondent-appellee.

HUDSON, Judge.

Petitioner appeals from the 23 February 2000 order of the trial court, which affirmed the Final Agency Decision of the Board of Trustees of the Local Governmental Employees' Retirement System (the Board of Trustees) determining that petitioner is not entitled to the Survivor's Alternate Benefit set forth in subsection (m) of N.C.G.S. § 128-27 (1999). We reverse the order of the trial court.

This case involves a dispute over the correct interpretation of a complex statutory scheme as it applies to a particular set of facts, which facts are not in dispute. For this reason, we first undertake to review the statutory scheme before setting forth the facts of the case.

The statutory scheme at issue is the North Carolina Governmental Employees' Retirement System (the retirement system) in which members contribute a portion of their monthly salary while employed with the objective that, upon retirement, they will be entitled to receive certain benefits. When a member retires, he is allowed to choose the form in which he will receive his benefits from among seven different options. The default option, commonly referred to as the "maximum allowance" option, allows the member to receive his benefits in a retirement allowance payable throughout his life in monthly installments. *See* G.S. § 128-27(b) to (b17). The other six options, set forth in G.S. § 128-27(g), allow a member to choose to receive a reduced monthly allowance upon retirement for the duration of his life, in return for some form of a "survivorship benefit," which generally entails a continuing monthly allowance after the member's death paid to a designated survivor for the life of the survivor. The only one of these six options relevant here is "Option two," which provides a reduced allowance to a retired member for his life, and then a continuing reduced monthly allowance to a designated survivor for the survivor's life.

Of course, in many cases members do not reach retirement because before they are able to reach retirement they voluntarily quit, they are fired, or they die. The statutory scheme seeks to address each of these three situations in which a member might fail to reach

retirement, as well as the results in each situation. If a member's employment ends for any reason other than for the reasons of retirement or death (i.e., quitting or being fired), he is entitled to a "return" of his total accumulated contributions (and, under certain circumstances, the accumulated interest). *See* G.S. § 128-27(f). If a member's employment ends as a result of his "death prior to retirement," the member's designated beneficiary (who is chosen by the member upon enrollment in the retirement system in a "Notice of Enrollment" form) has, potentially, two options. The beneficiary will always be entitled to receive a lump sum payment equal to the amount of the member's accumulated contributions at the time of the member's death. *See id.* In the alternative, the beneficiary may elect to receive what is called a "Survivor's Alternate Benefit" (SAB). This second option is set forth in G.S. § 128-27(m):

> (m) Survivor's Alternate Benefit.—Upon the death of a member in service, the principal beneficiary designated to receive a return of accumulated contributions shall have the right to elect to receive in lieu thereof the reduced retirement allowance provided by Option two of subsection (g) above computed by assuming that the member had retired on the first day of the month following the date of his death, provided that all three of the following conditions apply:
>
> (1) a. The member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance, or
>
> b. The member had obtained 20 years of creditable service . . . .
>
> (2) The member had designated as the principal beneficiary to receive a return of his accumulated contributions one and only one person who is living at the time of his death.
>
> (3) The member had not instructed the Board of Trustees in writing that he did not wish the provisions of this subsection apply.
>
> For the purpose of this benefit, a member is considered to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service. The last day of actual service shall be determined as provided in subsection (l) of this section.

G.S. § 128-27(m). In other words, where a member dies "in service" and satisfies the three requirements in subsection (m), the benefi-

ciary who is entitled to receive a return of accumulated contributions may choose to receive, instead of a lump sum payment of the accumulated contributions, a reduced monthly allowance for life. If the beneficiary chooses the SAB, the situation is treated *as if* the member had retired (as of the first day of the month following the date on which he, in fact, died) and had chosen Option two of subsection (g) as the form in which he would receive his retirement benefits. Furthermore, for purposes of the SAB, a member is deemed to have died "in service" if he died while he was employed, or within 180 days of his last day of actual employment. As discussed in more detail below, this "180-day clause" in subsection (m) is at the core of the present dispute.

There are two other elements to the retirement system which are relevant here. First, when a retired member who is receiving a monthly retirement allowance dies, a "death benefit" is paid to a designated beneficiary, which benefit is "equal to the excess, if any, of the accumulated contributions of the retiree at the date of retirement [reduced by] the total of the retirement allowances paid prior to the death of the retiree." G.S. § 128-27(g1). In other words, if a member retires and begins to receive a monthly retirement allowance but dies before the total payments made equal the total amount he actually contributed while employed, a designated beneficiary receives the difference in a lump sum payment. This death benefit has been referred to by the agency as the "guaranteed refund," apparently to distinguish it from the "death benefit" set forth in G.S. § 128-27(l), which is the final provision relevant to this case. Pursuant to subsection (l), if a member dies while in service or within 180 days of his last day of actual service, a "death benefit" is paid to a designated beneficiary in an amount equal to the member's yearly salary, with a maximum amount of $20,000.00 (provided the employer has chosen to participate in the Group Life Insurance Plan).

As stated earlier, the facts here are not in dispute. Ronald Robinson (Robinson) was employed by the Wake County Department of Social Services. While Robinson was employed, the beneficiary designated to receive a return of accumulated contributions if he died pursuant to subsection (f), and a death benefit pursuant to subsection (l), was Alfred R. Grooms (petitioner). Robinson retired on 1 March 1998, at which time he had over twenty years of creditable service as a member of the retirement system. Upon retirement, Robinson completed an "Election of Benefits" form. On this form, Robinson elected to receive the "maximum allowance" with no survivorship benefit. On

this same form, Robinson also designated petitioner as the beneficiary for the "guaranteed refund" pursuant to subsection (g1). Robinson subsequently died on 12 June 1998, within 180 days of his last day of service.

Following Robinson's death, the North Carolina Department of State Treasurer, Retirement Systems Division (respondent), without objection, paid petitioner a $20,000.00 "death benefit" pursuant to subsection (l) because Robinson had died within 180 days of his last day of actual service and was therefore considered to have died while in service for purposes of subsection (l). Respondent also acknowledged that petitioner was entitled to the "guaranteed refund" as set forth in subsection (g1). However, respondent denied petitioner's request to receive the SAB pursuant to subsection (m) in lieu of the "guaranteed refund." Petitioner challenged respondent's denial of his request for the SAB, and the dispute came before an Administrative Law Judge (ALJ). The ALJ concluded that respondent had erroneously denied petitioner the SAB, and recommended that summary judgment be granted in favor of petitioner. Respondent appealed that decision and the Board of Trustees reversed the ALJ and affirmed respondent's original decision to deny petitioner the SAB. Petitioner appealed from the "Final Agency Decision" to the Wake County Superior Court. The trial court affirmed the decision of the Board of Trustees, and petitioner timely appealed.

On appeal, petitioner contends that the final agency decision was affected by a legal error, namely the misinterpretation of the meaning of the statute. Thus, the appropriate standard of review for this Court is *de novo* review. *See, e.g., Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). Pursuant to the fundamental principles of statutory construction, we must first seek to interpret the intent of the legislature, and in seeking to ascertain the legislative intent the language of the statute should be construed contextually. *See Powell v. State Retirement System*, 3 N.C. App. 39, 41, 164 S.E.2d 80, 81 (1968). In addition, we give consideration to the effect of possible interpretations of the statute, "since a construction that leads to an anomalous or illogical result probably was not intended by the legislature." *Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 348-49, 201 S.E.2d 508, 509, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). In construing the meaning of a statute, it is presumed that the legislature acted with care and deliberation. *See State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970).

Respondent sets forth a number of arguments in support of its interpretation of the statute, all of which essentially address the relationship between subsection (m) and the rest of the statutory scheme. First, respondent notes that subsection (m) expressly states that it provides an alternative to "a return of accumulated contributions," and that this language correlates precisely with the title of subsection (f) ("Return of Accumulated Contributions"). Similarly, respondent notes that subsection (f) expressly references subsection (m), while subsection (g1) does not. Respondent argues that these links between subsection (f) and subsection (m) reveal that subsection (m) was intended to work in conjunction with subsection (f) only and not with subsection (g1) or any other subsection. Here, there is no dispute that petitioner is entitled to a "death benefit" (the "guaranteed refund") pursuant to subsection (g1). There is also no dispute that petitioner is not entitled to the benefit provided in subsection (f).[1] Because subsection (m) works only in conjunction with subsection (f) and not with subsection (g1), respondent contends, subsection (m) does not apply to petitioner.

Second, respondent argues that, in a practical sense, once a member retires, there is no longer a discrete sum of money that can accurately be characterized as his "accumulated contributions," since the funds in a member's individual annuity savings fund account are transferred from that account to a general annuity reserve fund when the member retires. *See* N.C.G.S. § 128-30(b)(3) (1999). Third, respondent notes that where a beneficiary chooses the SAB, the reduced allowance to which the beneficiary is entitled is "computed by assuming that the member had retired on the first day of the month following the date of his death." G.S. § 128-27(m). Respondent contends that the inclusion of a fictitious retirement date for the SAB demonstrates that subsection (m) was intended to apply only to members who had not yet retired, since the only situations in which it would be necessary to establish a fictitious retirement date are situations in which the member did not actually retire prior to his death.

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1. Subsection (f) addresses only two situations in which a "return of accumulated contributions" may be paid: (1) where a member withdraws from service prior to retirement, in which case the member may receive the return of accumulated contributions; and (2) where a member dies "prior to retirement," in which case the member's beneficiary may receive the return of accumulated contributions. Thus, under no circumstances is the "return of accumulated contributions" under subsection (f) available *following* a member's retirement. Because Robinson did retire, it is clear that petitioner is not entitled to the benefit provided in subsection (f).

Respondent's fourth and perhaps strongest argument is that petitioner's interpretation of the statute would allow petitioner, under these circumstances, to elect a retirement benefit plan that directly contravenes the choice that was actually made by the member upon his retirement. For example, here Robinson elected to receive the maximum allowance and specifically declined Option two or any other survivorship option that would have provided a reduced allowance to himself for life and then to a designated survivor, such as petitioner, for life. Under petitioner's interpretation of subsection (m), petitioner would be entitled to elect the SAB rather than the benefit provided in subsection (g1), which election would have the effect of treating the situation as if Robinson, upon retirement, had selected Option two and named petitioner as his survivor. Respondent argues that by electing the maximum allowance, it can only be assumed that Robinson affirmatively chose not to leave petitioner such a benefit, and that it would be manifestly unfair to allow the beneficiary to alter the election made by the member himself after the member's death.

Petitioner likewise sets forth a number of persuasive arguments in his brief. First, petitioner notes that subsection (m) expressly applies where a member who meets the three listed conditions dies while "in service," and that subsection (m) states: "For the purpose of this benefit, a member is considered to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service." G.S. § 128-27(m). Thus, petitioner argues, because there is no dispute that Robinson died within 180 days from his last day of service, subsection (m) on its face applies to these facts. Second, petitioner argues that the language in subsection (m) stating that the SAB is available to the principal beneficiary designated to receive a "return of accumulated contributions" does not, as respondent argues, demonstrate that the SAB was intended to apply only in conjunction with subsection (f). Rather, petitioner argues, subsection (m) was also intended to work in conjunction with subsection (g1) because the beneficiary entitled to receive the benefit in subsection (g1) (equal to the accumulated contributions less the retirement payments made prior to the member's death) is a "beneficiary designated to receive a return of accumulated contributions" under subsection (m). Finally, petitioner argues that the underlying purpose of the statutory scheme in question is to "give state and local employees and their beneficiaries maximum security," and that respondent's position is counter to this policy.

Having considered all of the aforementioned arguments, and having carefully reviewed the statutory scheme in question, we must agree with petitioner's interpretation. As explained in further detail below, under petitioner's interpretation of subsection (m), the SAB would be available to the beneficiary of a member who dies within 180 days of leaving his employment for any reason, including retirement. Under respondent's interpretation of subsection (m), on the other hand, the SAB would only be available to the beneficiary of a member who dies within 180 days of leaving his employment as a result of quitting or being fired, and not as a result of retirement. Thus, respondent is placed in the difficult position of attempting to explain why we should interpret the statutory scheme as providing more preferential treatment to the beneficiary of a member who has quit or has been fired than to the beneficiary of a member who has retired. We believe respondent has failed to provide such an explanation.

The 180-day clause provides that a member will be considered as having been in service at the date of his death if his death occurs within 180 days from the last day of his actual service. Thus, by definition, the 180-day clause only applies where a member's employment has ended for some reason, and where the member subsequently dies within 180 days. Assuming for the sake of argument that, as respondent contends, subsection (m) does not apply where a member has died after retirement, the 180-day clause would apply only where a member's employment has ended for some reason other than death or retirement, such as quitting or being fired. According to respondent's interpretation, then, where a member quits or is fired and dies within 180 days, his subsection (f) beneficiary (entitled to a "return of accumulated contributions") could elect the SAB (provided the three conditions are met); but, where a member retires, chooses the maximum allowance without a survivorship benefit, and dies within 180 days, his subsection (g1) beneficiary (entitled to the accumulated contributions less the retirement payments already made) could not elect the SAB. In other words, the beneficiary of a member who quits or is fired and then dies within 180 days would be entitled to elect a valuable benefit, while the beneficiary of a member who retires and chooses the maximum allowance and then dies within 180 days would not be entitled to such a benefit. Respondent's interpretation would thus provide more preferential treatment to the beneficiary of a retirement-eligible member who has quit or has been fired than to the beneficiary of a retirement-eligible member who chooses to retire after many years of service. We believe this result would be both illog-

ical and inequitable, and we therefore decline to adopt respondent's interpretation.

Furthermore, if the legislature had not intended for subsection (m) to apply where a member retires and then dies within 180 days, such a limitation would easily have been effectuated by inserting a few words into the statute. In the absence of such an express limitation in the statute, we are compelled to assume such a limitation was not intended. Moreover, we believe that this interpretation is consistent with the overall policy of the retirement, disability and death benefit scheme, which "is not to exclude, but to include state employees under an umbrella of protections designed to provide maximum security in their work environment and to afford 'a measure of freedom from apprehension of old age and disability.' " *Stanley v. Retirement and Health Benefits Division*, 55 N.C. App. 588, 591, 286 S.E.2d 643, 645, *disc. review denied*, 305 N.C. 587, 292 S.E.2d 571 (1982) (quoting *Bridges v. Charlotte*, 221 N.C. 472, 477, 20 S.E.2d 825, 829 (1942)). The existence of the 180-day clause in subsection (m), as well as in other subsections of the statute, evidences an intent to provide some leniency under circumstances in which, by an unfortunate and chance sequence of events, a member or a beneficiary is deprived of a valuable benefit by a matter of a few months.[2]

In response to respondent's argument that a beneficiary should not be permitted to alter the retirement election made by the member himself after the member's death, we note that in any case in which a member does not desire for his beneficiary to have the option of electing the SAB, the member may prevent that possibility by instructing the Board of Trustees in writing that he does not wish the provisions of subsection (m) to apply. *See* G.S. § 128-27(m). We also note that in this case, petitioner's "Prehearing Statement" indicates that he was prepared to offer evidence to show that Robinson relied upon the interpretation of the statute argued by petitioner in making his retirement payment selection, intending for petitioner to have the option of electing the SAB if Robinson died within 180 days after his retirement.

Finally, we note that respondent has argued that petitioner's interpretation could lead to "absurd consequences" in certain situa-

2. Here, had Robinson died on 1 March 1998 (prior to retirement), petitioner would have been entitled to elect the SAB and thereby receive a monthly payment for life. Contrary to the suggestion of the dissent, petitioner's interpretation of the 180-day clause serves the very significant purpose of allowing petitioner to elect this valuable benefit even though Robinson died on 12 June 1998 (just over three months later).

tions. For example, respondent describes a situation in which a member, while employed, designates A as the subsection (f) beneficiary entitled to a return of accumulated contributions, then retires, chooses Option two, and designates B as the survivor entitled to a reduced monthly allowance for life at the member's death. Respondent contends that if the member then died within 180 days of his last day of service, under petitioner's interpretation of the statute A would be entitled to elect the SAB and receive a monthly allowance for life, while at the same time B would be entitled to receive a monthly allowance for life. This scenario indicates that respondent believes petitioner is arguing that he is entitled to the SAB because of his status as Robinson's subsection (f) beneficiary while Robinson was employed. However, petitioner's right to choose the SAB as an alternative benefit is not based on petitioner's status as having been the subsection (f) beneficiary while Robinson was employed. Rather, it is based on petitioner's status as the subsection (g1) beneficiary who is now entitled to the death benefit under subsection (g1) because the retirement payments made to Robinson before his death were less than his total accumulated contributions. Thus, our holding is that a subsection (g1) beneficiary who has become entitled under the terms of the statute to the death benefit provided in subsection (g1) may choose to elect the SAB alternative in lieu of the lump sum payment provided in subsection (g1) if the retired member dies within 180 days of his last day of actual service, and if the three conditions in subsection (m) are satisfied.

We note that the result of our holding simply allows petitioner to receive the benefit to which he would have been entitled if Robinson had died prior to 1 March 1998 (instead of approximately three months later), or if Robinson had quit or had been fired on 1 March 1998 (instead of retiring). Moreover, we believe allowing petitioner to elect the SAB comports with the overall policy and intent of the statutory retirement scheme which "is not to exclude, but to include state employees under an umbrella of protections designed to provide maximum security in their work environment." *Stanley*, 55 N.C. App. at 591, 286 S.E.2d at 645.

Reversed and remanded.

Judge WYNN concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

I disagree with the majority that the General Assembly intended section 128-27(m) of our General Statutes to apply to beneficiaries of state employees whose death occurs after their retirement. Therefore, I respectfully dissent.

Subsection (f) entitled "Return of Accumulated Contributions," expressly states the following:

> Upon receipt of proof satisfactory to the Board of Trustees of *the death, prior to retirement, of a member or former member* there shall be paid to such person or persons as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, . . . the amount of his accumulated contributions at the time of his death, unless the beneficiary elects to receive the alternate benefit under the provisions of (m) below.

N.C. Gen. Stat. § 128-27(f) (1999) (emphasis added). Subsection (m) specifies that the beneficiary "designated to receive a *return of accumulated contributions*" has the right to elect the SAB and that the right to receive the SAB is further "in lieu []of" the return of accumulated contributions. N.C. Gen. Stat. § 128-27(m) (1999) (emphasis added). Subsection (m) expressly refers to the beneficiary entitled to "a return of accumulated contributions," does not refer to the beneficiary who, under subsection (g1), is entitled to receive accumulated contributions adjusted for previously disbursed retirement allowances, nor does it state that the SAB is "in lieu of" benefits under that subsection. Furthermore, unlike section (f), subsection (g1) does not reference subsection (m).

Construing the plain language of the statutory scheme in *pari materia*, *see In re Jackson*, 84 N.C. App. 167, 174, 352 S.E.2d 449, 454 (1987) ("statutes which deal with the same subject matter must be construed in *pari materia* and be harmonized, if possible, to give effect to each"), I agree with the respondent's interpretation that the right to elect the SAB belongs only to the beneficiary of a member who dies in service or a former member who dies within 180 days after leaving state service.

The majority concludes that aforementioned interpretation of the statutory scheme is illogical. The majority ignores respondent's well-reasoned and plausible explanation in its brief and at oral argument that the SAB provision was intended to provide a benefit only to the

survivors of members and former members dying within 180 days, who die or leave state service after obtaining eligibility for, but prior to, retirement. By its express language, subsection (m) is available *only* to the beneficiaries of those members and former members, who have "attained such age and/or creditable service" to be eligible for retirement, or who have, after twenty years of creditable service, met other specified qualifications. N.C. Gen. Stat. § 128-27(m). These employees continue to work beyond retirement and die in actual service, or within 180 days after discontinuing state employment, and therefore, fail, for whatever reason, to take advantage of their retirement eligibility. Subsection (m) thus provides some security to those employees that their survivors may recover benefits to which the employees would have been entitled had they retired.

Furthermore, respondent's contention that subsection (m) operates as a type of failsafe for retirement eligible employees who choose to continue working, is perhaps more logical, considering the value society places on wisdom gained through years of state service. Statutory provisions like subsection (m) rightfully encourage people's choice to work beyond retirement eligibility. In so doing, it provides not only "maximum security" but also " 'a measure of freedom from apprehension of old age[.]' " *Stanley v. Retirement and Health Benefits Division*, 55 N.C. App. 588, 591, 286 S.E.2d 643, 645 (1982) (quoting *Bridges v. Charlotte*, 221 N.C. 472, 477, 20 S.E.2d 825, 829 (1942)).

More importantly, the application of subsection (m) only to those retirement eligible employees who die "in service" would not contravene Robinson's election of benefits pursuit to subsection (g). *See* N.C. Gen. Stat. § 128-27(g) (1999). By electing option one, rather than option two, Robinson received the maximum retirement benefits, with the understanding that his beneficiary, petitioner, would receive nothing more than the "guaranteed refund" death benefit if Robinson died prior to receiving a retirement benefit equal to his accumulated contribution. *See* N.C. Gen. Stat. § 128-27(g1) (1999). Allowing petitioner to now elect the SAB would directly contradict Robinson's clear choice.

The majority also rejects respondent's contention that the "180-day clause" was not intended to bring retired employees under the purview of subsection (m), because the statute would operate to provide "more preferential treatment to the beneficiary of a member who has quit or has been fired than to the beneficiary of a member who has retired." I agree that inequitable results may arise in some cases. However, these inequities are not necessarily illogical or unfair, given

that the options already available to those employees, like Robinson, who choose to retire, are not available to those who continue to work beyond retirement eligibility. Simply stated, retiring employees have choices; those who intend that their beneficiaries receive more than the "guaranteed refund" death benefit are afforded an opportunity to elect an option reflecting that intent. Given this opportunity, applying the "180-day clause" to allow a beneficiary of a retired employee to choose the SAB serves no purpose. Instead, such an application of the statute unfairly offers the beneficiary a second bite at the proverbial apple. Furthermore, affording the beneficiary such a choice runs the risk of contradicting the retiree's original intent, as in the case *sub judice*. Therefore, by enacting the "180-day clause," the General Assembly intended to assure retirement eligible employees, in absence of the choice afforded retirees, that their beneficiaries would receive the intended benefit of contributions to the State's pension plan, even if an unforeseen death occurred after they become eligible for retirement and within six months after they are fired or quit.

Construing subsections (f) and (m) in *para materia* and given the intended application of subsection (m), I would conclude that petitioner was not in that class of persons who the legislature intended receive a benefit under section 128-27(m). Accordingly, respondent did not err in denying petitioner's request to receive the SAB in lieu of the "guaranteed refund" death benefit. For the foregoing reasons, I would affirm the decision of the Superior Court.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY NOLEN

No. COA00-855

(Filed 19 June 2001)

1. Criminal Law— mistrial denied—Fifth Amendment privilege asserted

The trial court did not err in a prosecution for first-degree murder and armed robbery by not granting a mistrial where a witness was allowed to assert a blanket Fifth Amendment privilege to all questions asked by defense counsel. The defense questions could have been links in the chain of evidence against the witness and could have harmed him in a subsequent trial; moreover, any error regarding the privilege was harmless beyond a reasonable

doubt because there was overwhelming evidence of defendant's guilt and because the testimony was cumulative at best.

2. Jury— summoning of additional jurors—statute facially constitutional

There was no error in a first-degree murder and robbery prosecution where the court ordered the sheriff to summon additional jurors but all of those supplemental jurors were eventually excused. Although there is a possibility of abuse in the jury selection process under N.C.G.S. § 9-11, it is also important to give the sheriff discretion so that he may carry out his duties and the statute is constitutional on its face.

3. Discovery— trigger pull test—no notice

The trial court did not abuse its discretion in a first-degree murder and armed robbery prosecution by admitting evidence of a trigger pull test conducted by an S.B.I. agent where defendant contended that he was not notified that the agent would testify about trigger pull tests. The prosecutor fulfilled his duty by providing defendant with a copy of the agent's report, even though it did not contain the trigger pull information. Moreover, even if the prosecutor's actions constituted a discovery violation, the court retained discretion to determine whether sanctions were appropriate, defendant never made a motion for discovery of test results but relied on the State's "open file" policy, and there was no unfair surprise or bad faith.

4. Evidence— defendant's appearance on the night of the crimes—other evidence admitted

There was no prejudice in a prosecution for first-degree murder and armed robbery where defendant contended that the court erred by sustaining the State's objections to questions eliciting information about whether defendant appeared drunk and irrational on the night of the crime, but defendant elicited testimony from other witnesses who saw him consume drugs and alcohol throughout the day before the commission of the crimes.

5. Homicide— short-form murder indictment—constitutional

The short-form murder indictment is constitutional.

Appeal by defendant from judgment entered 2 September 1999 by Judge B. Craig Ellis in Bladen County Superior Court. Heard in the Court of Appeals 16 May 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

Lisa Miles for defendant appellant.

McCULLOUGH, Judge.

Defendant Michael Nolen was tried before a jury at the August 1999 Session of Bladen County Superior Court. Evidence for the State showed that on 24 July 1998, defendant went to a party in Dublin, North Carolina, arriving between 5:30 p.m. and 6:00 p.m. Soon thereafter, defendant began drinking hard liquor with some of the partygoers. Defendant went to the party with his friend David Wilkins and a woman; once there, he met Jeffrey Hunt for the first time. The party was at the home of Hunt's grandmother, Juanita Jones.

Defendant, Wilkins, and Hunt decided to go to a nightclub later that evening. Wilkins first drove the three men to Tar Heel, North Carolina, to collect $50.00 a man owed him. When they discovered that the individual was not at home, Hunt drove the Toyota truck to the Scotchman convenience store to buy gasoline. By this time, it was almost 7:00 p.m. and getting dark.

Defendant pumped gasoline and talked to Wilkins. According to Hunt, defendant told Wilkins to "[g]o ahead now, while there's nobody around." Hunt testified that he asked, "Do what?" but neither Wilkins nor defendant would answer him. At that point, Hunt noticed that Wilkins had a handgun. Hunt offered to pay for the gasoline, so defendant and Wilkins would not go into the convenience store, but Wilkins handed defendant the gun and forced Hunt into the truck at defendant's request. Wilkins drove the truck around to the front of the store while defendant went inside; Hunt sat on the front seat next to him. Wilkins and Hunt heard a shot while defendant was inside the store; defendant then emerged, got into the passenger side of the truck, and said, "Go, go, go!" The three men drove away toward Bladenboro on Highway 301.

Hunt testified that defendant was yelling, vomiting, and shooting the gun outside the truck's window while Wilkins drove. Defendant also punched the windshield with his fist. According to Hunt, Wilkins asked defendant if he had gotten any money; defendant told him to "[j]ust keep driving." Soon thereafter, the three men noticed a police car following them, with its blue lights flashing. Defendant took the money he had stolen from the Scotchman, threw some at Wilkins and stuffed some bills into Hunt's pants pocket because he

believed the police would not be able to trace the money if people other than himself had possession of it. Wilkins drove on, and the police continued to follow the truck for several miles. Hunt stated that defendant threw his Chicago Bulls t-shirt, the gun, and a Jim Beam bourbon bottle out of the truck window while the police car followed closely.

Bladen County Sheriff's Deputy Rodney Hester testified that he saw objects being thrown from the vehicle before it was stopped. As soon as the police stopped the truck, Wilkins emerged with his hands up. Deputy Hester patted him down and placed him in the patrol car. By that time, two other law enforcement officers arrived on the scene and Hunt and defendant got out of the truck on their own. Hunt immediately told the officers he would give a complete statement.

Hunt recounted the day's events and told the police that he had been drinking and smoking marijuana at his grandmother's party. He also stated that defendant and Wilkins consumed a large quantity of Jim Beam liquor from a half-gallon bottle, and that he saw Wilkins with the gun at the party earlier that evening; however, he did not become concerned because he had known Wilkins since childhood.

Hunt then related what happened after he, Wilkins and defendant arrived at the Scotchman convenience store. Hunt told police that other customers were around the gas pumps, but that he did not try to get away or ask for help after he realized that defendant and Wilkins intended to rob the store. He told the police that while defendant was in the store, he heard a gunshot, and further explained that he later asked defendant if anyone had been shot, to which defendant replied, "Nobody." When defendant took the witness stand at trial, he maintained that the gun simply went off. However, the store's surveillance camera revealed that defendant shot the cashier, Ms. Dorothy Jordan, once in the shoulder. He also got away with a quantity of paper money from the register. Though a customer soon found Ms. Jordan and called an ambulance, Ms. Jordan ultimately died of the gunshot wound inflicted by defendant.

A number of individuals testified during trial. The State's witnesses included gun experts, law enforcement officers who assisted at the crime scene and took defendant into custody, and medical experts. Defendant presented evidence from witnesses who testified that he had consumed a large amount of alcohol, cocaine, Valium, and marijuana during the day in question. Defendant also presented med-

ical experts, psychologists, and gun experts. Defendant testified on his own behalf and stated that he did not recall any of the events leading to the robbery of the Scotchman convenience store or Ms. Jordan's death, though he conceded that he was the man caught on the store's surveillance videotape.

The jury considered a charge of first-degree murder and superseding charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The jury found defendant guilty of all three offenses. Upon the jury's recommendation, the trial court sentenced defendant to life in prison without parole for the first-degree murder conviction and to a consecutive term of 34 to 50 months' imprisonment for conspiracy to commit robbery with a dangerous weapon. The trial court arrested judgment for the robbery with a dangerous weapon charge. Defendant appealed.

Defendant asserts that the trial court erred by (I) allowing codefendant David Wilkins' blanket assertion of his Fifth Amendment privilege and denying defendant's motion for a mistrial; (II) overruling defendant's objection to juror selection under N.C. Gen. Stat. § 9-11 (1999); (III) allowing testimony from S.B.I. Agent Tom Trochum regarding results of "trigger pull" tests conducted on the alleged murder weapon; (IV) sustaining the State's objection to questions tending to elicit evidence of defendant's degree of intoxication; and (V) entering judgment against defendant for first-degree murder using the short-form murder indictment. For the reasons stated below, we disagree with defendant's assertions and affirm the trial court's actions in all respects.

Codefendant's Assertion of Fifth Amendment Privilege

[1] Defendant argues that the trial court erred in allowing David Wilkins to assert a blanket Fifth Amendment privilege to all questions asked by defense counsel. At trial, defendant called Wilkins to the witness stand in hopes of uncovering exculpatory information. Wilkins took the stand, accompanied by his attorney, where the following colloquy took place:

> Q. Good morning, Mr. Wilkins.
>
> Sir, I'd like you to begin by stating for His Honor and the members of the jury your full name.
>
> A. David Earl Wilkins.
>
> Q. How old are you, sir?

MR. WILLIS [Wilkins' attorney]: Your Honor, at this time, pursuant to the provisions of the Fifth Amendment of the United States Constitution and Article 1, Section 23 of North Carolina Constitution, my client desires to invoke his right against self-incrimination by not testifying any further and I would advise him not to answer any further questions that may be propounded to him by counsel for the Defendant.

Both attorneys approached the bench and defendant's counsel asked the trial court to order Wilkins to answer all questions which the trial court deemed non-incriminating, in effect challenging Wilkins' previous assertion of his Fifth Amendment privilege. Defendant's attorney also asked the trial court to consider each question's potential for incrimination on a question-by-question basis. After considering the matter, the trial court stated:

THE COURT: I'm going to decline to do that. I don't think that I have the authority to order him to answer something that I may not think would be incriminating, but he and his attorney think are incriminating. The Fifth Amendment gives him the right to refuse to answer.

And I note your exception to that.

The trial court allowed a continuing objection throughout every question and allowed defendant's attorney to ask several of his questions, though Wilkins' attorney invoked Wilkins' Fifth Amendment privilege for each question. Defendant moved for a mistrial and, in the alternative, asked the trial court to reopen the evidence so that he could elicit non-incriminating evidence. The trial court denied both of defendant's proposals and allowed the case to continue.

When a witness invokes his Fifth Amendment privilege, the trial court must decide whether one can reasonably infer from the question that the answer may incriminate the witness. *State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 167 (1997). If the trial court determines that the witness' answer will not be self-incriminating, "the trial court may compel the individual to answer the question." *State v. Eason*, 328 N.C. 409, 419, 402 S.E.2d 809, 813 (1991). A witness may invoke his Fifth Amendment privilege if the evidence can be used against him in a criminal prosecution, or if the evidence can furnish a "link in the chain" of evidence needed to prosecute that witness. *Pickens*, 346 N.C. at 637, 488 S.E.2d at 167. Invocations of one's Fifth Amendment privilege are to be liberally construed. *Id.*

In this case, defendant's questions would have placed Wilkins at the crime scene and would have allowed Wilkins to be cross-examined regarding conversations he had with defendant. It is also likely that defendant's counsel would have uncovered the fact that Wilkins gave defendant the gun used in the robbery of the Scotchman convenience store and in the subsequent murder of Ms. Jordan. The defense's questions could have been "links in the chain" of evidence against Wilkins and could have harmed Wilkins at a subsequent trial. *See State v. Ray*, 336 N.C. 463, 444 S.E.2d 918 (1994) (explaining that an accomplice who invokes his Fifth Amendment privilege cannot testify about part of a criminal transaction and remain silent about the other events).

Defendant argues that the trial court's failure to grant his motion for a mistrial constitutes reversible error. Defendant points to N.C. Gen. Stat. § 15A-1061 (1999), which states that

> [u]pon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not make or join in the motion.

Our standard of review is dictated by N.C. Gen. Stat. § 15A-1443(b) (1999), which explains that

> [a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

" '[A] mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict.' " *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (quoting *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990)); *see also* N.C. Gen. Stat. § 15A-1061. Thus, even if the trial court errs, the error must be harmful beyond a reasonable doubt for a mistrial to be properly granted. *Pickens*, 346 N.C. at 640, 488 S.E.2d at 168-69. In defendant's case, any error regarding Wilkins' Fifth Amendment privilege was harmless

beyond a reasonable doubt, given the overwhelming evidence of defendant's guilt. Defendant hoped to elicit from Wilkins' testimony to bolster his defense that he was in an alcohol and drug induced blackout when the robbery and murder took place. However, defendant's argument overlooks the point that he successfully presented a great deal of evidence of his alcohol and drug consumption, corroborated by several witnesses. Wilkins' testimony added no new information, and was corroborative and cumulative at best. Even if Wilkins answered all the questions in the manner defendant wanted, there would still have been ample evidence to support the jury's guilty verdict.

The trial court has sole discretion to decide whether to grant a mistrial in a particular case. As defendant cannot show an abuse of discretion by the trial court, its ruling cannot be disturbed on appeal. Defendant's first assignment of error is overruled.

Summoning of Additional Jurors

[2] Defendant next argues that the trial court erred in ordering the sheriff to summon additional jurors pursuant to N.C. Gen. Stat. § 9-11(a) (1999). The statute provides that

> [i]f necessary, the court may . . . order the sheriff to summon from day to day additional jurors to supplement the original venire. . . . If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors.

The shortage of eligible jurors in defendant's case was partly due to the fact that the case was highly publicized. The robbery and murder occurred in the small town of Tar Heel, where many people knew the victim, and the crime generated a great deal of news coverage. These factors significantly reduced the number of eligible jurors, thereby creating a situation in which N.C. Gen. Stat. § 9-11 was needed. When it became evident that the jury pool was too small to supply a sufficient venire, the trial court told the Sheriff to "go out and bring in 15 more people for in the morning." Defendant objected at that time, and also filed a written objection to the trial court's use of N.C. Gen. Stat. § 9-11. The trial court heard arguments from both sides, then determined that the statute was constitutional and denied defendant's motion to dismiss the eleven supplemental jurors who were summoned by the Sheriff of Bladen County.

All defendants are entitled to an impartial jury under both the United States and the North Carolina Constitutions. U.S. Const. Amends. V, VI, XIV; N.C. Const., Article I, §§ 19, 23, 24, and 35. *See also Irvin v. Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751 (1961). A sheriff acting pursuant to N.C. Gen. Stat. § 9-11 has " '[a] right and duty to use his best judgment in securing men of intelligence, courage, and good moral character, but he must act with entire impartiality.' " *State v. White*, 6 N.C. App. 425, 428, 169 S.E.2d 895, 897 (1969) (quoting 50 C.J.S., Juries, § 186 p. 921)). A challenge to jury selection under N.C. Gen. Stat. § 9-11 is sustainable when " 'there is a partiality or misconduct in the sheriff, or some irregularity in making out the list.' " *State v. Dixon*, 215 N.C. 438, 440, 2 S.E.2d 371, 372 (1939) (quoting *State v. Speaks*, 94 N.C. 865, 873 (1886)).

Defendant maintains that the actions of the Bladen County Sheriff and his deputies were improper under N.C. Gen. Stat. § 9-11. When Bladen County Sheriff Bunn was asked how he found eligible jurors, he explained that

> [t]wo members of my senior staff and I sat down and just started a list of names of people that we knew that it wouldn't cause a financial hardship for and from various parts of the county, and we provided that list to them as potentials, you know, to check with these people and see if they are able to serve or not, and if they haven't served in the past two years, and so on, all the various qualifications of jurors.
>
> We gave them that list and said, you know, "Check with these people. If they're available, do them. If you can't find them and you see someone else that meets these criteria, then summons those also."

Defendant strongly urges this Court to find that the sheriff's practices pursuant to N.C. Gen. Stat. § 9-11 constitute prejudice *per se*. He argues that such prejudice manifested itself in several respects. First, the lead detective on the case, Detective Rodney Warwick, works for the Bladen County Sheriff; defendant maintains that this fact created an appearance of impropriety. Further, defendant points out that the Sheriff and the deputies who served the eleven summonses for additional jurors personally knew some of the potential jurors, again creating an appearance of impropriety. Defendant also raises concerns about the potential for abuse and argues that N.C. Gen. Stat. § 9-11 gives very little guidance about how sheriffs are to find potential jurors.

We do not find defendant's arguments persuasive. Our Supreme Court has stated that "[a] sheriff is not disqualified from summoning supplemental jurors because he or a member of the sheriff's office is testifying in the case." *State v. Barnard*, 346 N.C. 95, 102, 484 S.E.2d 382, 386 (1997). Absent proof that a sheriff "violated the discretionary trust placed in him [by N.C. Gen. Stat. § 9-11], he should remain free to use his best judgment in carrying out the orders of the court." *State v. White*, 6 N.C. App. 425, 428, 169 S.E.2d 895, 897 (1969). Furthermore, this Court has stated that

> [d]eputy sheriffs testify in many cases. We do not believe the legislature intended to disqualify sheriffs from summoning extra jurors in all of them. If this were so, we believe the legislature would have designated some other official to summon extra jurors.

State v. Yancey, 58 N.C. App. 52, 60, 293 S.E.2d 298, 303 (1982). While we agree with defendant that there is a possibility for abuse in the jury selection process, we also recognize the importance of giving a sheriff discretion so that he may carry out his duties pursuant to N.C. Gen. Stat. § 9-11. Our Court has stated that

> [n]owhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplates a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications and are still subject to the same challenges as are regular jurors and may be examined by both parties on *voir dire*. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area, and to restrict the discretion placed in the summoning official, without proven cause, is to presume he is not worthy of the office he holds. Such should not be the case.

White, 6 N.C. App. at 428, 169 S.E.2d at 897. *See also State v. Shaw*, 284 N.C. 366, 369, 200 S.E.2d 585, 587 (1973).

The trial court made detailed findings of fact and conclusions of law before denying defendant's motions. We will not disturb the actions of the trial court on appeal unless there was an abuse of discretion. "[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). The eleven supplemental jurors were called to serve only as alternate jurors; alternate jurors are not members of the jury until one of the jurors dies or is discharged and the trial court substitutes the alternate in his place. *See State v. Bindyke*, 288 N.C. 608, 622-23, 220 S.E.2d 521, 530 (1975). Defendant's objection became moot when none of the supplemental jurors were seated as alternate jurors for defendant's trial. All eleven supplemental jurors were excused, and the two alternate jurors ultimately were selected from the original jury pool. Since the jurors who ultimately sat for defendant's trial were chosen in the ordinary course, there was no error. Even if jurors selected under N.C. Gen. Stat. § 9-11 ultimately had been seated for defendant's trial, we find that the statute is constitutional on its face. We expressly decline to adopt defendant's prejudice *per se* argument, and overrule this assignment of error.

The Trigger Pull Test

[3] Defendant next maintains that the trial court erred in admitting the State's evidence of a trigger pull test conducted on the murder weapon by a firearms expert. At trial, S.B.I. Agent Tom Trochum was qualified as an expert in toolmark and firearm identification. Agent Trochum is trained to compare toolmarks and to determine from what weapon certain rounds of ammunition were fired. Agent Trochum testified that the murder weapon was the same one that defendant had thrown from the truck window before he was arrested. The State then asked Agent Trochum about the results of trigger pull tests conducted on the murder weapon. Such tests determine the amount of pressure needed to discharge a gun in both single action and double action mode. This information in turn helps determine whether a gun could accidentally misfire, or if the person handling the gun had to actually go through the motions of firing before the gun could go off.

When the State began questioning Agent Trochum about the results of the trigger pull tests, defendant objected, stating he was not

notified Agent Trochum would testify about trigger pull tests. Defendant further asserted that the State's disclosure document indicated that Agent Trochum would only testify about toolmark identification and firearms identification. The trial court heard arguments from both attorneys as follows:

> **MR. POPE** [Defendant's Attorney]: I have a copy of his report, but it doesn't indicate any testing or results of any trigger pull. We object to testimony regarding that.
>
> **MR. BOLLINGER** [Prosecutor]: He's had notes that the witness was going to testify, he's had access to talk to him. It's a test they always perform and they never put in their reports.
>
> **MR. POPE** [Defendant's Attorney]: We got results of an examination; doesn't mention anything about such tests.
>
> **THE COURT**: Well, I'll permit him to testify. I'll note your exception.

Defendant contends this testimony shows that the prosecutor knew that the trigger pull tests were routinely done, and failed to make it clear to defendant that those results were routinely left out of the reports. Defendant argues that such behavior is misleading and constitutes a violation of statutory discovery requirements.

Defendant states that none of the State's five "Discovery Disclosure Certificates" mentioned the trigger pull tests. The Discovery Disclosure Certificates signed by the prosecutor

> certif[ied] that [the prosecutor] provided discovery in the following manner to the defendant of matters required under N.C.G.S. 15A-903 et. seq:
>
> A. By providing the attorney for the defendant with a copy of the State's investigative file, reports of evidence examinations and the criminal history of the Defendant as received by this office.

While defendant is correct that the prosecutor has both an ethical and a statutory duty to disclose information, we do not find that the prosecutor breached those duties here. The trial court found that the trigger pull test was "just standard procedure to see that the gun is operating properly." Agent Trochum's report was made available to defendant by the prosecutor. Though the report did not contain the

trigger pull information, the prosecutor fulfilled his duty by providing defendant with a copy of that report in its entirety.

Even if the prosecutor's actions constituted a discovery violation, the trial judge still retained broad discretion to determine if sanctions were appropriate under N.C. Gen. Stat. § 15A-910 (1999). Unless the trial court abused that discretion, the decision will not be reversed. "The choice of which sanction, *if any*, to impose is left to the sound discretion of the trial court. A trial court will not be reversed on appeal absent a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Banks*, 322 N.C. 753, 761, 370 S.E.2d 398, 404 (1988) (citation omitted). Additionally, "discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986).

The State correctly points out that defendant never made a motion under N.C. Gen. Stat. § 15A-903(e) for discovery of test results; instead, defendant relied on the State's "open file" discovery policy. Defendant knew that Agent Trochum examined the murder weapon, prepared a report and was scheduled to testify at trial. Defendant had ample opportunity to examine the report and inquire as to whether any trigger pull tests were conducted.

Moreover, the trial court's ruling was not arbitrary. The trial court noted that the trigger pull test was a routine part of the firearms testing procedure for any weapon undergoing ballistics study. Indeed, defendant's own firearms expert, Mr. Forrest Bell, indicated that trigger pull tests were routinely done whenever a gun was cleaned and inspected. Keeping in mind that the purpose of discovery under N.C. Gen. Stat. § 15A-903 is to avoid unfair surprise at trial, we find there was no unfair surprise or bad faith on the part of the State. The trial court's ruling was not arbitrary, and defendant's assignment of error is overruled.

Defendant's Appearance on the Night of the Crimes

[4] Defendant next argues that the trial court erred in sustaining the State's objections to questions eliciting information about whether defendant appeared drunk and irrational on 24 July 1998, because the effect was to deprive him of " 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683,

690, 90 L. Ed. 2d 636, 645 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 419 (1984)). During the trial, defendant maintained that he was too incapacitated by drugs and alcohol to form the requisite criminal intent to commit the crimes of robbery and first-degree murder. Defendant and two medical witnesses testified to that effect, explaining that defendant was in an alcohol and drug induced blackout when the crimes were committed. Despite this testimony, defendant sought further corroboration of the alcohol and drug induced blackout by asking the questions that the State objected to. Defendant's eyewitness, David Wilkins, was unavailable because he asserted his Fifth Amendment privilege. Defendant contends that the State's sustained objections caused him to lose three other corroborating witnesses as well.

We find that defendant successfully elicited testimony from other witnesses who saw him consume drugs and alcohol throughout the day, prior to the commission of the crimes. Even before the State's objections were sustained, defendant presented evidence that corroborated his testimony about his substance abuse. "[T]he scope of cross examination rests largely within the discretion of the trial court. Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review." *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202-03, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), *cert. denied*, 502 U.S. 1110, 117 L. Ed. 2d 450 (1992); and *State v. Sams*, 317 N.C. 230, 240, 345 S.E.2d 179, 185 (1986).

The State objected to the form of defendant's questions because they called for speculation by the individual witnesses as to defendant's state of mind. *See State v. Richmond*, 23 N.C. App. 683, 685, 209 S.E.2d 535, 536 (1974) (explaining that "[w]hile a cross-examiner has wide latitude in his examination, the court does have discretion to limit argumentative questioning—particularly about matters of which the witness can have only a speculative opinion"). Defendant, not the other witnesses, provided the best evidence as to his state of mind on 24 July 1998. Defendant cannot show that the trial court's rulings affected the outcome of the trial; therefore, this assignment of error is overruled.

The Short-Form Murder Indictment—N.C. Gen. Stat. § 15-144

[5] Finally, defendant argues that the trial court erred in entering judgment against him using the short-form murder indictment authorized by N.C. Gen. Stat. § 15-144 (1999) because the short-form indict-

ment violates the constitutional requirements of first charging the elements of the offense in the indictment, submitting them to the jury, and then making the State prove the elements beyond a reasonable doubt. *See Jones v. United States*, 526 U.S. 227, 232, 143 L. Ed. 2d 311, 319 (1999). Defendant contends that the short-form indictment is constitutionally defective in three ways: (1) the indictment does not allege any of the elements of first-degree murder that distinguish it from second-degree murder; (2) the indictment does not indicate the theory of first-degree murder the grand jury found based on the evidence; and (3) the indictment violates the Equal Protection Clause of the Fourteenth Amendment because it fails to give defendant notice of the elements of the charge against him. Defendant also urges us to examine the short-form indictment using a strict scrutiny analysis because this is a fundamental right. We disagree with defendant's characterization of the short-form indictment, and find it constitutionally sound.

The indictment charged that defendant "unlawfully, willfully and feloniously did of malice aforethought kill and murder Dorothy Jordan" in violation of N.C. Gen. Stat. § 14-17 (1999). Defendant's constitutional arguments were expressly rejected in *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001); and *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). As we are bound by the decisions of the Supreme Court, we overrule this assignment of error.

We therefore find that defendant received a fair trial, free of prejudicial error. In that trial, we find

No error.

Judges WALKER and THOMAS concur.

IN RE ECKARD

[144 N.C. App. 187 (2001)]

IN THE MATTER OF: PATRICIA ECKARD, A MINOR CHILD

No. COA00-655

(Filed 19 June 2001)

Termination of Parental Rights— permanency planning hearing—error to cease reunification efforts

The trial court erred in a permanency planning hearing by directing the Department of Social Services (DSS) to cease reunification efforts between respondent mother and her minor child, because: (1) every witness at the hearing testified that respondent had done everything she was required to do by the court and DSS to be reunited with her child including attending every class, paying child support, attending scheduled visits with her child, acknowledging her responsibilities, recognizing her errors, and appearing to learn from her mistakes; (2) there is no evidence that the trial court ever found that respondent inflicted the injuries which lead to her child's removal from the home; (3) with the exception of the guardian ad litem, every person whom the court assigned to assess respondent concluded that respondent had made substantial progress towards turning her life around; and (4) DSS recommended that it was in the child's best interest that the goal remain reunification of mother and daughter.

Respondent-mother appeals from order entered 17 December 1999 by Judge Nancy L. Einstein in Catawba County District Court. Heard in the Court of Appeals 28 March 2001.

M. Victoria Jayne for Petitioner-Appellee Guardian Ad Litem.

Nathaniel J. Poovey for Respondent-Appellant Angela B. Eckard.

TYSON, Judge.

Angela Eckard ("respondent" or "mother") appeals from a "permanency planning order" ("order") ceasing reunification efforts between her and her daughter, Patricia Eckard ("Patricia" or "Tricia"). For the reasons discussed herein, we reverse the order of the trial court.

Facts

On 14 April 1999, respondent went to the grocery store to purchase food for dinner, leaving Patricia, then 22 months old, with her

boyfriend, Dale Hart. Upon returning, respondent noticed bruises and cuts on Patricia, and blood on Mr. Hart. Mr. Hart explained that Patricia had fallen and hit her head on a dresser. Respondent took Patricia to Catawba Memorial Hospital. Doctors diagnosed Patricia as having suffered skull fractures and numerous bruises all over her body. Medical personnel at the hospital concluded that the injuries suffered by Patricia "could not have been caused by accidental means." Respondent consistently maintained that Patricia's injuries were suffered while under Mr. Hart's supervision.

On 21 April 1999, a nonsecure custody order was entered removing Patricia from respondent's home, and placing her in the foster home of Harry and Paulette Sigmon. On 22 April 1999, Catawba County Department of Social Services ("DSS") filed a petition alleging that Patricia was an abused, neglected, and dependent juvenile. On 26 April 1999, respondent entered into a "Memorandum of Agreement and Order" agreeing to the continuation of the nonsecure custody order until adjudication. The Agreement stated that "reasonable efforts will be made to return the child to her home." The agreement was signed by respondent, DSS, the Guardian Ad Litem's Office, and the Honorable Gregory R. Hayes.

On 25 May 1999, the juvenile petition came on for adjudication before the Honorable Nancy L. Einstein. At this hearing, respondent, through her counsel, consented to an adjudication which found that Patricia was an abused, neglected and dependent juvenile. The trial court ordered:

> 1. The custody of the minor child shall be with the Catawba County Department of Social Services with placement in its discretion; current placement in the Catawba County Foster/Adopt home is specifically approved.
>
> 2. That the placement and care of the minor child shall be the responsibility of the Catawba County Department of Social Services and the Catawba County Department of Social Services shall provide for or arrange for the foster care or other placement of the minor child.
>
> 3. That [the] Catawba County Department of Social Services shall make a reasonable effort to return the minor child to her own home.
>
> 4. That visitation between the minor child and the mother shall occur weekly and shall be supervised by the Department of

Social Services at a time and place to be determined by the Agency.

5. That the minor child shall be offered all available support services, including but not limited to foster care, physical and developmental examinations and evaluations.

6. That the mother shall comply with all aspects and terms of the Family Services Case Plan, Part A.

7. That the mother shall attend and participate in Agency-approved parenting classes, and be able to demonstrate appropriate nurturing interaction and empathy toward the minor child, and an understanding of appropriate child developmental stages as a result of such classes.

8. That the mother shall complete an assessment at Mental Health to determine her need for counseling and the need for a full psychological evaluation of the mother. The mother shall pay for the assessment and any recommended counseling. If a full psychological evaluation is necessary, the Agency shall pay for such evaluation.

9. That the mother shall cooperate fully with the Child Support Enforcement unit to determine the paternity of the minor child. The mother shall enter into a child support agreement establishing her own support payment schedule for the minor child.

10. That the identity of the minor child's father shall be determined by paternity testing. That the mother and the putative fathers shall cooperate with Child Support Enforcement Unit in arranging and participation in the paternity testing.

11. That this matter shall come on for review, without further notice to the parties, on the 17th day of August 1999.

The trial court also found that the respondent "is aware that she has a short period of time in which to turn her life around."

A review hearing was held on 24 August 1999 before Judge Einstein. At this hearing, DSS informed the court that respondent "has done everything requested by the Department of Social Services," and "the permanent plan for Patricia Eckard is reunification with her mother, Angela Eckard." DSS recommended to the trial court:

> that the mother be permitted to have weekly unsupervised visits, starting with one hour unsupervised visits at the Department of Social Services, slowly progressing to unsupervised home visits, and eventually to overnight visitation dependent upon the success of the unsupervised visits as they progress to longer periods of unsupervised visitation.

The trial court made findings of fact that "the minor child continues to demonstrate a strong bond to her mother," and "[t]he child's face lights up when she sees the mother and she cries for her mother as the visit is ending." The trial court further found that:

> the mother continues to cooperate with the Department of Social Services and is actively addressing the goals and objectives set forth in her Family Services Case Plan, Part A. Specifically, she is attending Mental Health counseling, Nurturing classes, regularly paying child support, has established an independent residence, and visits regularly with the child.

The court ordered, *inter alia*, that "visitation between the mother and minor child shall be unsupervised . . . [and] conducted at the Department of Social Services weekly." Finally, the court ordered "[t]hat this matter shall come on for permanency planning, without further notice to the parties, on the 16th day of November 1999."

On 16 November 1999, the matter was continued until 14 December 1999 due to the recent discovery of the identity of Patricia's natural father, Mr. Willard Sanford, Jr. At the 14 December 1999 permanency planning hearing the court heard testimony from several witnesses. The first witness was Patricia's foster mother, Mrs. Paulette Sigmon. Mrs. Sigmon testified that Patricia "had a lot of bruises" and was "very shy" when she first arrived at the Sigmon home. According to Mrs. Sigmon, Patricia did not eat or sleep well at first. Mrs. Sigmon testified that it took Patricia several months to gain the trust of her foster family, and that in time, Patricia began eating and sleeping better. Mrs. Sigmon stated that Patricia calls her "momma" or "momma Paulette," and Mr. Sigmon "daddy."

The foster father, Mr. Harry Sigmon, testified that Patricia was scared of men at first. Mr. Sigmon stated that Patricia gradually became affectionate towards him, and Patricia eventually "bloomed out like a flower." Both Mr. and Mrs. Sigmon testified that they expected to be able to adopt Patricia, despite DSS's stated goal of reunifying Patricia with respondent.

The court next heard testimony from Ms. Anne Smith, a psychologist with Catawba County Mental Health Counseling Services. Ms. Smith performed a court-ordered psychological evaluation of respondent on 20 September 1999. Ms. Smith concluded that, despite respondent's low I.Q. level, she had "no severe mental health issues that would significantly interfere with her ability to parent her child," and that "reunification between Ms. Eckard and her child should be considered." Ms. Smith testified that:

> The results that I came up with were, are based mainly on the fact that [respondent] was not the person herself who hurt the child. She has been cooperating with everything that's been asked of her. She's, it was reported to me by DSS that she's keeping all of her appointments, she's been very cooperative, she's gone to classes. She's keeping her Mental Health appointments. She expresses a real desire and motivation to, to learn parenting skills that she may not have had in the past. She expresses appreciation for the help that she's receiving. She expresses some anger towards the man that hurt her daughter but she also accepts some responsibility on her own part for not protecting her. And this is something that, in the number of evaluations that I've done, I don't often see. And I think it's a real healthy start that she is willing to accept responsibility herself. And that she's being very cooperative and learning and enjoying what she is learning.

The court next heard testimony from David Keyes, a psychologist with Catawba County Counseling Services. Mr. Keyes served as respondent's regular therapist. Mr. Keyes stated that respondent felt very "guilty . . . about leaving her child with the boyfriend and then having to return and having her be abused." In a letter addressed to DSS and presented to the court, Mr. Keyes summarized respondent's progress as follows:

> Overall, Ms. Eckard gained understanding of how and why her relationships with men are unhealthy. She was able to ascertain that the solution to her poor choices is to proceed more slowly in order to get to know someone more before advancing to an intimate or live-in relationship. She also understands that it is more important for her to consider her daughter's needs over her own needs for companionship.

Mr. Keyes added that respondent's motivation to change herself was high, and she was eager to grow and learn. Mr. Keyes testified that respondent's learning disability would not prevent her from appropri-

ately parenting Patricia. Mr. Keyes concluded that, in his experience, respondent has "already grown sufficiently to not be a danger to the child."

Ms. Nancy Pannell served as respondent's court-appointed mentor. Ms. Pannell provided transportation and supervision during visits between respondent and Patricia. Ms. Pannell testified that Patricia was always very happy to see respondent, did not cry, and there was nothing negative about the visits between mother and daughter.

Respondent testified that she did not knowingly allow Patricia to be injured by Mr. Hart. Respondent testified that the only form of corporal punishment she used on Patricia prior to the injury was a "smack" with her hand on Patricia's "butt." Respondent testified that she and Mr. Hart often fought over Mr. Hart's use of discipline on Patricia. Respondent testified that she left Mr. Hart after this incident. Respondent added that she would have left Mr. Hart earlier, but she "didn't know nowhere else to go." She also testified that she has a support network of friends at work, church, and parenting classes, as well as Ms. Pannell.

Ms. Ellen Menzies, DSS's Nurturing Program Coordinator, submitted a letter to the court summarizing respondent's performance during her court-ordered "Nurturing classes." Ms. Menzies reported that respondent had attended "each of the past 18 sessions and has consistently completed her reading and writing assignments." Although quiet and reluctant at first, Ms. Menzies wrote that respondent had

> become more open and honest about herself, her perceptions regarding her situation and in her interactions with other group members. She has been an attentive and seemingly committed group member throughout the series.
>
> Ms. Eckard has shown a real interest in gaining information in those areas which are considered to be the core constructs of the program. As reflected by her participation in group, she appears to have made particular progress in the areas of understanding the effect of corporal punishment and identifying alternative forms of behavior management. Typically group members have more difficulty grasping the abstract concepts presented, however, she has made an obvious gain in the area of parental empathy or identifying the needs of children. . . . Although Patricia has attended only one session, she and her mother seemed to be very

bonded and were appropriately affectionate. Ms. Eckard truly seems to value Patricia and their relationship.

Ms. Beth Peterinelli, a DSS social worker, submitted a report detailing DSS's evaluation of respondent's progress. This report informed the court that:

> Ms. Eckard continues to remain employed, pay child support, and visit her child regularly. She is currently enrolled in the Nurturing Program to gain in her confidence level and competence in child rearing skills. She has also participated in counseling. Additionally community volunteer Nancy Pannell has worked with Ms. Eckard in a supportive role.
>
> Ms. Eckard terminated her relationship with her former live together partner immediately upon being requested to do so by DSS when the injury was first reported. She has continued to maintain her own dwelling and has fully cooperated with DSS. She appears to have gained in her confidence level and to also have learned that it is her responsibility to protect her child.
>
> Ms. Eckard is somewhat limited and naive, and does tend to be concrete in her thinking. However; once she learns a concept, she is able to act on the concept. (emphasis in original)

The report also indicated that respondent "has done everything requested by [DSS]," and that respondent "is following her case plan and is exceeding minimal standards of care." DSS recommended that the permanent plan for Patricia be reunification with respondent.

Finally, the Guardian Ad Litem/Attorney Advocate/Petitioner/Appellee ("GAL"), M. Victoria Jayne, submitted a "permanency planning report" to the court dated 13 December 1999. In that report the GAL acknowledged that respondent has done everything DSS instructed her to do. However, the GAL requested that the court find and enter an order ceasing reunification efforts between respondent and Patricia. In support of this request, the GAL wrote:

> Although the mother has continued to abide by the requests of the Department of Social Services there is no evidence made available to the Guardian Ad Litem that the mother has ever acknowledged the seriousness of the abuse inflicted on Tricia prior to the skull fracture, ever accepted personal responsibility for her abuse of Tricia, or demonstrated that she has the ability or innate desire to make independent decisions to protect Tricia

> from abuse in the future. The mother has admitted to at least five (5) different intimate relationships with men in a span of two (2) years . . . In addition the Guardian Ad Litem learned from the Department of Social Services that the mother had befriended some individuals who, fooled her into giving them money and then betrayed her trust. Based on these very recent incidents the Guardian Ad Litem is not convinced that the mother is able to exercise independent judgment to protect herself, much less Tricia. . . .
>
> The Guardian Ad Litem is convinced that any "bonding" between Tricia and her natural mother and father is due solely to the nurturing, safe loving atmosphere of the Sigmon home. They have taken a frail, chronically abused, frightened baby of less than 2 years old and nurtured her into a precocious, inquisitive, enthusiastic, autonomous little girl, a little girl that now shows biased affection for her "daddy" Harry Sigmon and "mama" Paulette Sigmon . . . Although the mother may be sincerely trying to change her behavior and make healthy decisions for herself, the desire and ability to protect an infant is innate, in the Guardian Ad Litem's opinion, and the Guardian Ad Litem is not at all convinced that the mother possesses this innate mothering instinct or is capable of protecting Tricia in the future. (emphasis in original)

The GAL requested the court to order that: (1) reunification efforts be ceased, (2) if respondent did not agree to release her parental rights of Patricia, then DSS shall file a petition to terminate her parental rights, (3) a "good-bye visit be scheduled between each parent and the child separately," and (4) Patricia "remain in the home of the Sigmons permanently."

On 17 December 1999, the trial court filed its "permanency planning order." The Court made several findings of fact regarding respondent's ability to parent Patricia, including:

> 5. Ms. Eckard testified that at the sign of the "first mark" she would protect Tricia. This is evidence of her inability to understand that protecting Patricia means never letting a mark get there in the first place. Other people easily lead her.
>
> 6. Respondent mother has complied with the Department's Service Agreement and has taken advantage of every service offered to her. She is a well-meaning woman, but the Court

doubts her long term capability of being able to parent any child without constant and ongoing assistance from professionals for a number of reasons.

* * *

12. While Ms. Eckard has the desire to be a good parent, the Court believes she does not have the ability. She is gullible and naive with men and friends, to wit: her past relationships and an incident where she befriended a woman, took her into her home and then was robbed by her.

* * *

14. It is a powerful privilege to parent a child, and not a right to parent when abuse comes into play. The best interest of the child must outweigh parental rights. Ms. Eckard would require the Department and/or the GAL as a watchdog forever, with no guarantees that she would [sic] form questionable relationships, which could put her daughter at risk.

Based on its findings of fact, the trial court made the following conclusions of law:

1. The Catawba County Department of Social Services has exercised reasonable efforts toward reunification of the minor child with her mother, but reunification is not in the best interest of the minor child and would be contrary to the juvenile's best interest.

2. Efforts to reunify the minor child with her mother would be inconsistent with the child's health, safety, and need for a safe permanent home within a reasonable period of time.

3. The permanent plan for Tricia should be one of adoption by her foster parents.

The court ordered that it would be in Patricia's "best interest" that "[t]he custody of the minor child shall remain with the Catawba County Department of Social Service, with placement to remain in the Sigmon home as an adoptive risk placement. Adoption with the Sigmons is the permanent plan for Tricia." Respondent appeals.

Issue

The issues presented to this court are whether the findings of the trial court are supported by competent evidence, and whether those

findings support the court's conclusions. For the following reasons, we reverse the order of the trial court directing DSS to cease reunification efforts between respondent and Patricia.

Goals of the Juvenile Code

"The family occupies a special and highly revered place in the life of our nation and people. Thus our courts have accorded full constitutional protection to family relationships. '[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.' " *In re Webb*, 70 N.C. App. 345, 350, 320 S.E.2d 306, 309 (1984) (Becton, J. dissenting) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503-4, 52 L. Ed. 2d 531, 540, (1977)), *aff'd per curiam*, 313 N.C. 322, 327 S.E.2d 879 (1985). "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982)).

"[O]ne of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)." *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573, *modified & aff'd*, 311 N.C. 586, 319 S.E.2d 567 (1984). G.S. § 7B-100 sets forth the purpose of the Juvenile Code:

> This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:
>
> (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.

Standard of Review

All dispositional orders of the trial court in abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 676 (1997). If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991).

Order Ceasing Reunification

The purpose of a permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (1999). The trial court has the authority to cease reunification efforts pursuant to G.S. § 7B-507(b):

(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) (emphasis supplied). *See In re Brake*, 347 N.C. 339, 493 S.E.2d 418 (1997) (trial court has authority to order DSS to cease reunification efforts where, among other things, juvenile's mother failed to comply with previous court orders). In its permanency planning order, the trial court made the statutory findings that (1) DSS "has exercised reasonable efforts toward reunifica-

tion of the minor child with her mother, but reunification is not in the best interest of the minor child and would be contrary to the juvenile's best interest;" and (2) "[e]fforts to reunify the minor child with her mother would be inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable period of time." However, we hold that the evidence before the trial court does not support these findings.

As detailed in the recitation of the facts, every witness at the permanency planning hearing testified that respondent had done everything she was required to do by the court and DSS to be reunited with her child. Respondent (1) attended every class, (2) paid child support, (3) attended scheduled visits with Patricia, (4) acknowledged her responsibilities, (5) recognized her errors, and (6) appeared to learn from her mistakes. Respondent's psychologist, therapist, court-appointed mentor, Nurturing Program instructor, and social worker all testified that respondent had worked hard and made substantial progress towards achieving the goals outlined by the trial court and DSS. Based on its extensive evaluations by numerous psychologists and counselors, DSS recommended that reunification between respondent and Patricia remain the goal. Furthermore, there is no evidence in the record that the trial court ever found that respondent inflicted the injuries which lead to Patricia's removal from the home.

Despite overwhelming evidence of respondent's improvements, and full compliance with all provisions of the Family Services Case Plan, the trial court ordered DSS to cease reunification efforts eight months after Patricia was taken from respondent. The trial court further directed DSS to initiate parental right termination proceedings if respondent refused to relinquish her parental rights. After reviewing the transcripts and record, the only "evidence" presented at the hearing which tends to support the trial court's order is the recommendation submitted by the GAL-appellee. The trial court's findings substantially mirror GAL-appellee's recommendations. In its order, the trial court outlined certain findings of fact to support its conclusion that reunification efforts should cease: (1) respondent has had relationships with five different men in the two years preceding the hearing, (2) respondent is "gullible and naive," (3) respondent would require "ongoing assistance from professionals for a number of reasons," with "no guarantees that she would [not] form questionable relationships, which could put her daughter at risk," (4) respondent has an I.Q. "which ranks in the extremely low range," (5) "Tricia is too

bonded to her current placement [with the Sigmons] to risk her young and fragile well-being at this time" and (6) respondent did not do more to protect Tricia from Mr. Hart. Nevertheless, we hold that all of the above findings do not constitute sufficient evidence to support the conclusion that it is in Patricia's best interest to cease reunification efforts with her natural mother. This is particularly true in the light of the mountainous evidence presented to the trial court reaching an opposite conclusion regarding respondent's progress and parenting ability. *See In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984) (a prior adjudication of neglect can not be the sole basis for terminating parental rights).

At its initial review hearing, the trial court found that respondent "is aware that she has a short period of time in which to turn her life around." With the exception of GAL/appellee, every person whom the court assigned to assess respondent concluded that respondent had made substantial progress towards "turning her life around." DSS also recommended that it was in Patricia's best interest that the goal remain reunification of mother and daughter. In its permanency planning order, the trial court found that respondent "has complied with the Department's Service Agreement and has taken advantage of every service offered to her." Nonetheless, the trial court ordered DSS to cease reunification efforts, and to take steps to terminate respondent's parental rights.

Appellee's brief contains reference to matters that occurred after the 17 December 1999 order appealed from in this case. Documentation of these subsequent events are not included in the record on appeal. We do not consider any matters discussed in appellee's brief occurring after the 17 December 1999 order. *See* N.C.R. App. P. 9.

In summary, the trial court ordered that reunification cease: (1) despite finding that respondent had completed all of the services that DSS made available to respondent 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 respondent's improvements, and (3) despite the absence of any proof or finding that respondent had ever hurt Patricia. The trial court made the statutory finding that reunification efforts "would be inconsistent with the child's health, safety, and need for a safe permanent home within a reasonable period of time." However, the evidence presented to the trial court supports an opposite conclusion. *See* N.C. Gen. Stat. § 7B-507(b) (1999). Accordingly, we reverse the trial court's order and remand

this case to the trial court for further proceedings in order to enable DSS to carry out its statutory duties seeking reunification.

Reversed and remanded.

Judges WALKER and HUNTER concur.

JUDY C. KEARNS, PLAINTIFF v. WILLIAM F. HORSLEY, DONALDSON & BLACK, P.A. F/K/A DONALDSON & HORSLEY, P.A., DEFENDANTS

No. COA00-399

(Filed 19 June 2001)

1. **Premises Liability— New Jersey law—tripping on carpet in theater—directed verdict—judgment notwithstanding the verdict**

The trial court did not misapply New Jersey law to the underlying negligence case in an action for attorney malpractice and did not err by failing to grant plaintiff's motions for directed verdict or judgment notwithstanding the verdict based on plaintiff's demonstration that she tripped on torn carpet in a New Jersey theater, because: (1) plaintiff failed to identify any mode of operation of the theater which caused her injury in order to shift the burden of proof to the theater; (2) plaintiff's argument that the darkened theater was the negligent mode of operation fails since movie theaters could not do business at all if they could not be darkened; (3) plaintiff failed to show the theater breached any duty owed to plaintiff; and (4) there was no showing the theater was on notice of the dangerous condition.

2. **Trials— motion to bifurcate—legal malpractice claim—underlying negligence claim**

The trial court did not abuse its discretion in a legal malpractice case arising out of the underlying negligence case by granting defendant attorneys' motion to bifurcate the trial under N.C.G.S. § 1A-1, Rule 42(b), because: (1) defendants would have been prejudiced if both cases were tried at once since the issues of the two cases against different defendants requires the application of different state laws; and (2) there was no showing the timing of defendants' motion prejudiced plaintiff.

3. Trials— legal malpractice claim—underlying negligence claim—voir dire—severance of trial

The trial court did not err in a legal malpractice case arising out of the underlying negligence case by failing to allow plaintiff to conduct a voir dire to show that severance of the trial was improper, because plaintiff's request did not shed light on what evidence she intended to introduce.

4. Attorneys— legal malpractice—failure to file within statute of limitations—proof of validity of underlying claim

The trial court did not err in a legal malpractice case by failing to shift the burden to defendant attorneys to prove that plaintiff would have failed to recover in her underlying negligence claim against a New Jersey theater even if defendants filed her claim within the statute of limitations, because plaintiff was required to prove the validity of her underlying claim before she was entitled to go forward with her claim against the present defendants.

Appeal by plaintiff from judgment and an order entered 1 June 1999 by Judge Sanford L. Steelman, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 26 February 2001.

Wyatt Early Harris & Wheeler, by Stanley F. Hammer, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by J. Dennis Bailey and Stephen M. Russell, for defendant-appellees.

HUNTER, Judge.

Judy C. Kearns ("plaintiff") appeals: (1) the trial court's judgment dismissing her legal malpractice claim against William F. Horsley, Donaldson & Black, P.A. f/k/a Donaldson & Horsley, P.A. (collectively herein, "defendants"), based on the jury's verdict, and (2) the trial court's order denying plaintiff's motions for directed verdict, judgment notwithstanding the verdict, and a new trial. We find no error.

Although plaintiff's claim against defendants emerges out of a prior claim against an entirely different entity (herein, "General Cinemas"), we will expound on the underlying claim's facts only as necessary in addressing the issues raised in the present action.

Therefore, at the outset, the facts pertinent to this present appeal are as follows and are undisputed. On 1 June 1992, plaintiff attended the movies, with three colleagues, at a General Cinema in New Jersey. Just after the house lights dimmed, and while the previews began to show, plaintiff got up from her seat to use the restroom. While walking up the aisle, plaintiff tripped and fell, injuring her knee. On 5 May 1993, plaintiff hired defendants to represent her in her personal injury claim against General Cinemas on the basis that she believed she tripped on torn carpeting and General Cinemas was therefore negligent. Because "no action was filed on [plaintiff's] behalf within two years following the accident," plaintiff filed this action against the present defendants for legal malpractice, arguing that defendants had allowed the New Jersey statute of limitations to run on her claim against General Cinemas. Conversely, defendants deny "that her claim was time-barred."

The issues presented were originally tried before a jury "during the October 19, 1998 Civil Session of Superior Court, Guilford County," which trial ended in a mistrial. Thus, we deal solely with the second trial which ended with a jury verdict in defendants' favor rendered 30 April 1999. At that trial, defendants moved for bifurcation of the issues—specifically requesting that plaintiff be required to first prove that her "original claim was valid and would have resulted in a judgment in her favor against [General Cinemas,]" before she would be allowed to present evidence of the defendants' negligence in prosecuting that claim. The trial court granted defendants' motion. The trial court ruled, and so instructed the jury, that New Jersey law applied to plaintiff's personal injury claim of negligence against General Cinemas. However, the trial court denied plaintiff's requests to instruct the jury: (1) "that the plaintiff was not required to prove that a landowner had actual or constructive notice of the tear [in the carpet] if a mode of operation at the theatre created the tear," and (2) that defendants had the burden of proving that plaintiff was not injured by General Cinemas' negligence.

At the close of defendants' case-in-chief, plaintiff moved for a directed verdict, which motion was denied. Then after the jury returned its verdict finding no negligence on the part of General Cinemas, plaintiff moved for judgment notwithstanding the verdict or in the alternative, a new trial. These motions were also denied. Without a finding of negligence on the part of General Cinemas, plaintiff is unable to pursue her present claim against defendants. Thus, plaintiff appeals.

[1] Plaintiff brings forward five assignments of error for this Court's review. First, plaintiff argues that the trial court misapplied the applicable New Jersey law and thus, erred in failing to grant either her directed verdict or judgment notwithstanding the verdict motions where she demonstrated that she tripped on General Cinemas' torn carpet. It is plaintiff's contention that New Jersey law does not require her to show that General Cinemas had actual or constructive knowledge of the defect or that it breached its duty to plaintiff in some way, because the incident at issue creates "an inference of negligence," which defendants did not overcome. We disagree.

> Where the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to h[er] attorney's negligence, to prove that but for the attorney's negligence plaintiff would not have suffered the loss, plaintiff must prove that:
>
> (1) The original claim was valid;
>
> (2) It would have resulted in a judgment in h[er] favor; and
>
> (3) The judgment would have been collectible.

Rorrer v. Cooke, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). Therefore in the case at bar, in order for plaintiff to be able to go forward with her malpractice claim against defendants, she must have first proven—in pertinent part and pursuant to New Jersey law—that she had a valid personal injury claim against General Cinemas. To validate her claim against General Cinemas, plaintiff relies on *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426, 221 A.2d 513 (1966), in which the Supreme Court of New Jersey opined that,

> where a substantial risk of injury is implicit in the manner in which a business is conducted [that is, a business' mode of operation], and on the total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise or to continue, it would be unjust to saddle the plaintiff with the burden of isolating the precise failure.

Id. at 430, 221 A.2d at 515. Thus, plaintiff argues that simply because she tripped on torn carpet in General Cinemas' place of business and was injured, *Wollerman* stands for the proposition that the burden shifted to General Cinemas to prove that it was not negligent in having a torn carpet.

For plaintiff's theory of burden-shifting to apply, we believe plaintiff must have shown (1) that there was an implicit yet substantial risk

of injury in one of General Cinemas' modes of operations and, (2) that "it is fairly probable that [General Cinemas] is responsible either in creating the [torn carpet] or permitting [the carpet to be torn and not be repaired] . . . ." *Id.* Moreover, to show that her injury resulted from one of General Cinemas' modes of operation, plaintiff must have presented evidence that "the reasonable probability of having other than a minor accident from the use of [the torn carpet in General Cinemas' theatre] g[a]ve rise to a duty to take measures against it." *Znoski v. Shop-Rite Supermarkets, Inc.*, 122 N.J. Super. 243, 248, 300 A.2d 164, 167 (1973). We note that in her brief to this Court, plaintiff failed to identify *any* mode of operation of General Cinemas which caused her injury. We further note that there is nothing in the record to show that plaintiff provided such information at trial. Yet, in oral argument to this Court, plaintiff's attorney contended that the darkened theatre was the mode of operation which, in conjunction with the torn carpeting, caused plaintiff's injury. We, like the trial court, are unconvinced that plaintiff's evidence has risen to the level which allows the burden to shift pursuant to the *Wollerman* case. This is because we believe that plaintiff has taken *Wollerman* out of context and therefore, *Wollerman* does not apply.

In that case, Ms. Wollerman was shopping in the defendant-grocery store and slipped on a green bean, injuring herself. The *Wollerman* court stated: "That someone was negligent seems clear enough. Vegetable debris carries an obvious risk of injury to a pedestrian. A prudent man would not place it in an aisle or permit it to remain there." *Wollerman*, 47 N.J. at 428, 221 A.2d at 514. The court then went on to discuss the inherent danger of selling vegetables

> from open bins on a self-service basis, [and] the likelihood that some will fall or be dropped to the floor. *If the operator chooses to sell in this way, he must do what is reasonably necessary to protect the customer from the risk of injury that mode of operation is likely to generate*; and this whether the risk arises from the act of his employee or of someone else he invites to the premises. . . .

Id. at 429, 221 A.2d at 514 (emphasis added).

We see from the *Wollerman* court's statement that plaintiff is correct in assuming that: where it is shown that one of General Cinemas' "*mode[s] of operation*" caused the injuries sustained by plaintiff, the burden does shift to General Cinemas to prove that it was not negligent in that mode of operation. *Znoski*, 122 N.J. Super. at 247, 300

A.2d at 166. However, the present plaintiff failed to make the necessary showing. It is not enough for plaintiff to show only that she was injured by tripping over torn carpet in General Cinemas' place of business. Plaintiff must also show that in some way the torn carpet was a direct result of one of General Cinemas' modes of operation. *Wollerman*, 47 N.J. at 429, 221 A.2d at 514. This plaintiff failed to do.

Even in arguing that the darkened theatre was the negligent mode of operation at issue, plaintiff's argument must fail—for the simple reasoning that, movie theatres could not do business at all if they could not be darkened. *Falk v. Stanley Fabian Corp.*, 115 N.J.L. 141, 142, 178 A. 740, 741 (1935) ("[a] moving picture house *necessarily* operates in partial darkness. With a flood of diffused light, there would be no picture.") (Emphasis added.) Thus, this "mode of operation" is a theatre's *only* method of operation and as such, the theatre cannot be considered negligent but instead, its patrons must be considered to have assumed the risk in order to take part in the activity provided. *Id.* at 145, 178 A. at 742 ("[p]atrons of places of amusement assume the risk or dangers normally attendant thereon"). Further:

> It has been held that a moving picture operator violates no duty to a patron if, while a picture is being shown, the condition of light is that ordinarily used in exhibiting moving pictures to enable the audience to get a reasonably clear view of the image thrown on the screen. . . .

Id. at 143, 178 A. at 742-43. Thus, the darkening of the area within the theatre where the movie is being shown, is an operation of practicality and "compl[ies] with ordinarily used standards of care in [the] particular activit[y] . . . ." *Nierman v. Casino Arena Attractions, Inc.*, 46 N.J. Super. 566, 572, 135 A.2d 210, 213 (1957).

The *Wollerman* case, upon which plaintiff relies, deals solely with a plaintiff who was injured through some negligence caused in the defendant-grocer's mode of operation. However since, in the present case, plaintiff failed to show any negligent mode of operation through which she was injured, *Wollerman* is inapplicable. Thus, having offered no evidence regarding any mode of operation of the theatre that caused or could have caused the tear in the carpet, the present plaintiff could not shift the burden of proof to General Cinemas.

Instead, plaintiff was properly required to present the standard *prima facie* case of negligence against General Cinemas—including a

showing that General Cinemas owed her a duty with regard to the carpet. *Endre v. Arnold*, 300 N.J. Super. 136, 692 A.2d 97 (1997).

> Three elements are essential for the existence of a cause of action in negligence: (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach. Whether a duty exists is solely a question of law to be decided by a court and not by submission to a jury. *Wang v. Allstate Ins. Co.*, 125 N.J. 2, 15, 592 A.2d 527 (1991).

Id. at 142, 692 A.2d at 100 (citations omitted). Additionally, we agree with the *Znoski* court, which stated:

> We are unable to say that a substantial risk of injury is implicit, or inherent, in [General Cinemas' providing carpet for patrons to walk on. Carpets] are not dangerous instrumentalities, and they are uniquely suitable for the purpose for which furnished. [General Cinemas' theatre] was under a legal duty of exercising ordinary care to furnish a reasonably safe place and safe equipment for its patrons consistent with its operation and the scope of its invitation. It is not an insurer for the safety of its patrons. The issue is not merely whether it was foreseeable that patrons, or other third parties, would negligently or intentionally [trip over the carpet—where torn], but whether a duty exists to take measures to guard against such happenings. . . .
>
> *[Nevertheless, where] a duty exists is ultimately a question of fairness.* . . .

Znoski, 122 N.J. Super. 243, 247-48, 300 A.2d 164, 166.

Thus, specific to General Cinemas' business as a movie theatre, the general rule is that:

> The proprietor of a theater conducted for reward or profit, to which the general public are invited to attend performances, must use ordinary care to make the premises as reasonably safe as is consistent with the practical operation of the theater, and, if he fails in this duty, he may be held liable for personal injuries occasioned thereby; and this rule applies to the proprietor of a moving picture show.

Lancaster v. Highlands Finance Corp., 117 N.J.L. 476, 478-79, 189 A. 371, 372 (1937). Nevertheless in the case at bar, plaintiff failed to present a *prima facie* case of negligence against General Cinemas

because she lacked any showing of General Cinemas' breaching a duty owed her.

Further, even if plaintiff could have produced evidence that General Cinemas owed her a duty of care with regard to the carpet, without evidence that General Cinemas knew of the tear in the carpet or of how long the tear had been there before she fell, plaintiff lacked the necessary evidence to support a jury's finding that General Cinemas was on notice of the dangerous condition. Our research reveals that New Jersey courts have long held that to support a finding of culpable negligence, a plaintiff must show that the defendant either: (1) created the defect; (2) actually knew of the defect and permitted the continued hazardous use thereof; or (3) failed to discover the defect's existence in the exercise of reasonable care in the form of inspection. *Nierman*, 46 N.J. Super. at 571, 135 A.2d at 212.

Since a motion for judgment notwithstanding the verdict is simply a renewal of a party's earlier motion for directed verdict, the standard of review is the same for both motions. *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000). Thus, we deal with them together. It has long been established that:

> On appeal the standard of review for a JNOV [judgment notwithstanding the verdict] is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. The hurdle is high for the moving party as *the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's prima facie case.*

Id. at 498-99, 524 S.E.2d at 595 (citations omitted) (emphasis added).

Furthermore, our Supreme Court has held that:

> In ruling on a motion for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50(a), the trial court must consider the evidence in the light most favorable to the plaintiff. The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference. [Additionally, a] directed verdict is seldom appropriate in a negligence action. . . .

Newton v. New Hanover County Bd. of Education, 342 N.C. 554, 563, 467 S.E.2d 58, 65 (1996) (citation omitted). We have already held that

plaintiff was not entitled to a shift in the burden of proof since she failed to establish "an inference of negligence" pursuant to *Wollerman*, 47 N.J. at 429, 221 A.2d at 515. We have further opined that plaintiff failed to present the necessary *prima facie* case of ordinary negligence. Therefore, we hold that the trial court did not err in applying New Jersey law and plaintiff was neither entitled to a grant of her directed verdict nor judgment notwithstanding the verdict motions.

We need not address plaintiff's next assignment of error: that the trial court erred by refusing to instruct the jury according to the *New Jersey Model Jury Charges—Civil* § 5.24B, paragraphs 9 and 11 which is based on *Wollerman*. Having already held that *Wollerman* is inapplicable to plaintiff's case, it necessarily follows that plaintiff was not entitled to the *Wollerman* jury instruction.

[2] Thirdly, plaintiff argues that the trial court committed reversible error by granting defendants' motion to bifurcate the trial. It is plaintiff's contention that the issues of liability and damages "were inextricably related." N.C. Gen. Stat. § 1A-1, Rule 42(b) (1999) provides:

> The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.

In her brief to this Court, plaintiff concedes that pursuant to N.C. Gen. Stat. § 1A-1, Rule 42(b), "[t]he trial court is vested with broad discretionary authority in determining whether to bifurcate a trial . . . and this Court will not disturb the ruling unless it is manifestly unsupported by reason." However, plaintiff further states that this Court has held "that discretion should be exercised only in furtherance of convenience or to avoid prejudice." Thus, it is plaintiff's argument that the trial court abused its discretion because severance was unnecessary to avoid prejudice, and defendants' motion was untimely. We disagree.

In granting defendants' motion for severance, the trial court opined:

> Legal negligence cases, such as this case, involve the trying of a "case within a case." The plaintiff must first demonstrate that plaintiff must prove that: (1) the original claim was valid; (2) it would have resulted in a judgment in h[er] favor; and (3) the judg-

ment would have been collectible. *Rorer* [sic] *v. Cook*, 313 N.C. 338, 355, 329 S.E.2d 355, 365-6 (1985). In this case the determination of the first of these three things would require the application of the laws of the State of New Jersey, while the remaining issues in this case would involve the application of the laws of the State of North Carolina.

The Court, in its discretion finds and concludes that in furtherance of convenience and to avoid prejudice in this matter, that the issues of whether the plaintiff's original claim was valid and would have resulted in a judgment in her favor against the original party should be tried separately from the other issues in this matter. The Court further finds that these issues should be tried first before a different jury than will try the other issues.

Noting that the first of plaintiff's trials ended in mistrial, we believe the issues of the two cases against different defendants (even if only hypothetically), requiring the application of different state laws were, no doubt, confusing. We, therefore, agree with the trial court that the trying of both cases at once would likely have prejudiced the present defendants in defending themselves. Thus, we do not agree with plaintiff that the severance was in error. *See In re Will of Hester*, 320 N.C. 738, 360 S.E.2d 801 (1987) and, *Hoots v. Toms and Bazzle*, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

However, plaintiff argues that the motion was untimely made. Neither Rule 42(b) nor this Court has defined what is a "timely" motion for severance, and plaintiff does not attempt to either. Yet, plaintiff argues that because discovery was completed and the motion was made two weeks before trial, the motion was untimely and she was prejudiced. Contrary to plaintiff's argument and reversing this Court, our Supreme Court held that the severance of issues at the time they were submitted to the jury was proper. *Hester*, 320 N.C. 738, 360 S.E.2d 801. Therefore, without plaintiff's showing that the timing of defendants' motion prejudiced her, we hold that the motion was timely. *Id.* Regarding being prejudiced, plaintiff contends, "[s]pecifically, as a result of the severance ruling, plaintiff was unable to offer proof that General Cinemas' insurer investigated Ms. Kearn's case and found that there was torn carpet on the premises." We find no prejudice—and particularly, we note that plaintiff's argument of prejudice applies to the motion itself and not to the timing of the motion. "A trial court abuses its discretion when it makes 'a patently arbitrary decision, manifestly unsupported by reason.' " *Roberts v. Young*, 120

N.C. App. 720, 725, 464 S.E.2d 78, 82 (1995) (quoting *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994)). Plaintiff argues the error was an abuse of discretion, yet she offers no evidence to support her assertion, and we have found none. Thus, plaintiff's assignment is overruled.

[3] Plaintiff's fourth assignment of error is that the trial court committed reversible error by not allowing her to "put on a voir dire as to some of the things [she] would have put in[to evidence] had this not been severed." Plaintiff further argues that she was prejudiced by the trial court's ruling "[t]o the extent that [she] has been unable to persuade this Court that severance was improper . . . ." We are unpersuaded.

We first note that by her last statement above, plaintiff suggests that if the trial court had allowed her *voir dire*, she would—definitively—be able to persuade this Court that severance was improper. However, in making her request to the trial court, plaintiff never clearly outlined just what "things [she] would have put in[to]" the record. Thus, plaintiff essentially is arguing that this Court should grant her a new trial even when the request made sheds no light on what evidence she intended to introduce. We hold plaintiff was not entitled to such *voir dire* and is not now entitled to a new trial.

We note additionally, that all the case law on which plaintiff relies specifically supports a litigant's being "afforded a meaningful opportunity to be heard *when [s]he proposes to present evidence to support a motion.*" (Emphasis added.) That, however, is not the case here. Plaintiff's request for *voir dire* was made at the end of trial, "[a]t the close of the charge conference," and not at the time when defendants requested severance and the trial court was considering it. Therefore, the cases cited by plaintiff are inapplicable because plaintiff's request was not made "in support of [or in opposition of the] motion" to sever. *State v. Battle*, 136 N.C. App. 781, 787, 525 S.E.2d 850, 854 (2000).

[4] Plaintiff's final assignment of error is that the trial court erred by not shifting the burden to defendants to prove that plaintiff would have failed to recover in her claim against General Cinemas, even if defendants had filed within the statute of limitations. It is plaintiff's contention that although North Carolina's seminal case of *Rorrer v. Cooke*, *supra*, requires a plaintiff in a legal malpractice case to demonstrate that the underlying claim was valid and would have resulted in a favorable and collectible judgment, since defendants

here missed filing within the applicable statute of limitations, "defendant-attorney[s] should be required to demonstrate that plaintiff would not have prevailed on the underlying claim." We disagree.

To support her argument, plaintiff cites a Louisiana Supreme Court decision, *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So.2d 1109 (1982), in hopes that this Court will consider it persuasive. *Jenkins* stands for the proposition that because a defendant-attorney took plaintiff's case, the case must have had merit. Thus, where defendant-attorney has negligently allowed plaintiff's claim to be time-barred, the *Jenkins* court held that a plaintiff should not be required "to prove the amount of damages [suffered in the underlying case] by trying the 'case within a case' . . . ." *Id.* at 1110. Clearly, *Jenkins* is contrary to North Carolina law.

Instead, we find *Bamberger v. Bernholz*, 326 N.C. 589, 391 S.E.2d 192 (1990), dispositive. In that case, our Supreme Court reversed this Court's holding that the trial court erred in granting defendant-attorney's summary judgment motion, "for the reasons stated in Judge [John] Lewis' dissenting opinion." *Id.* at 589, 391 S.E.2d at 193. We particularly note that there was no doubt that defendant-attorney *had missed filing his plaintiff-client's underlying claim within the statute of limitations. See Bamberger v. Bernholz*, 96 N.C. App. 555, 558, 386 S.E.2d 450, 452 (1989), *reversed*, 326 N.C. 589, 391 S.E.2d 192 (1990). Nevertheless, in his dissent, (now retired) Judge Lewis plainly stated that:

> The standard in a legal malpractice case is set out in *Rorrer v. Cooke* . . . . [Pursuant to which] the plaintiff would have to prove the original claim against [the original defendants] was valid. . . .
>
> The plaintiff's forecast of the evidence as to the defendant[-attorney]'s quality of representation is certainly unflattering but that is not the main point of this case; *the law is clear as to the requirement for the success of a legal malpractice action and in this case the first hurdle [of meeting the Rorrer elements] cannot be cleared.*

Id. at 563-64, 386 S.E.2d at 454-55 (emphasis added). Therefore, we hold that the present plaintiff was required to prove her "case within a case" despite her allegation that the defendants allowed the statute of limitations to run on her underlying claim against General Cinemas. Thus, without a showing that her claim against General

Cinemas was valid and that it would have resulted in a favorable and collectible judgment, plaintiff was not entitled to go forward with her claim against the present defendants. In North Carolina it is clear that even where a defendant-attorney allows a plaintiff-client's claim to become time-barred, our laws do not support a shifting of the burden of proof to require defendant-attorney to prove that plaintiff-client could not have recovered in her underlying claim even if the claim had been filed within the statute of limitations. *Id.* Thus, the trial court did not err in failing to so hold.

No error.

Chief Judge EAGLES and Judge CAMPBELL concur.

ARE-100/800/801 CAPITOLA, LLC, PLAINTIFF v. TRIANGLE LABORATORIES, INC., DEFENDANT

No. COA00-578

(Filed 19 June 2001)

1. Landlord and Tenant— commercial—summary ejectment—jurisdiction

A district court had subject matter jurisdiction over a summary ejectment proceeding involving a commercial tenant despite defendant's argument that Chapter 42, Article 3 of the North Carolina General Statutes applies to residential tenants. N.C.G.S. § 42-26.

2. Landlord and Tenant— summary ejectment—late fees and repairs—failure to pay rent

The trial court was not precluded from granting summary judgment for plaintiff landlord in a summary ejectment action involving a commercial tenant where defendant contended that there were issues of fact involving late fees and repairs but did not deny that it failed to pay the rent. Whether the late fees were incorrect goes to the amount owed and not whether defendant failed to pay rent, and, while defendant might be entitled to an offset if it expended monies to repair the property, plaintiff's failure to make repairs does not alleviate defendant's obligation to pay rent.

3. Landlord and Tenant— constructive eviction—possession of property

The trial court was not precluded from granting summary judgment for plaintiff landlord in a summary ejectment action involving a commercial tenant where defendant contended that there was a genuine issue of material fact involving constructive eviction, but defendant did not abandon the property and sought to remain in possession pending disposition on appeal.

4. Landlord and Tenant— summary ejectment-termination of estate—notice according to lease

The trial court erred by granting summary judgment for plaintiff landlord in a summary ejectment action where plaintiff did not terminate defendant's estate according to the lease. When the termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.

5. Appeal and Error— cross-assignment of error—properly a cross-appeal—not considered

The Court of Appeals did not consider a cross-assignment of error arising from a summary ejectment where the supporting arguments did not provide an alternative basis in law for supporting the judgment and should have been raised in a cross-appeal.

Judge CAMPBELL concurs in part and dissents in part.

Appeal by defendant from order filed 11 February 2000 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 27 March 2001.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellee.

William G. Goldston for defendant-appellant.

GREENE, Judge.

Triangle Laboratories, Inc. (Defendant) appeals a judgment filed 11 February 2000 awarding summary judgment (the judgment) in favor of ARE-100/800/801 Capitola, LLC (Plaintiff). Plaintiff cross-assigns error to an order filed 6 April 2000 staying execution of the judgment pending disposition of the appeal of the judgment.

On 14 June 1995, Defendant, as tenant, entered into a lease agreement with ATP Properties Limited Partnership, J. Allen Yager and wife, Hilda Yager, as landlords (the Lease), to lease property located at 801 Capitola Drive, Durham (the Property).[1] The Lease provided Defendant would use the Property for "general office, laboratory, research and development purposes."

Pursuant to the Lease, Defendant was to pay a monthly minimum rent on a square foot basis "without demand and without counterclaim, deduction[,] or set-off, . . . payable on or before the first day of each calendar month." An "[e]vent of [d]efault" under the Lease included Defendant's failure "to pay any rent including additional rent within 3 business days after notice of its failure to do so from [Plaintiff] provided [Plaintiff] shall not be required to so notify [Defendant] for such failure more than three times in any twelve month period." Upon the occurrence of an "[e]vent of [d]efault," Plaintiff had the right, by written notice to Defendant to: re-enter the Property and remove Defendant and its belongings from the Property; terminate the Lease; or terminate Defendant's possession of the Property. If the term of the Lease was not specifically terminated in writing, the parties were to assume Plaintiff had "elected to terminate possession only, without terminating the term." If Plaintiff chose to only terminate possession of the Property, Defendant's "obligations to pay rent or any other sums due for the remainder of the Lease" remained unaffected.

The Lease obligated Plaintiff to: furnish the Property "hot and cold water, electricity for normal general office use, [and] removal of trash from site dumpsters"; maintain and repair "the roof and structural portions" of the Property; replace "any complete mechanical system" if the components could not be replaced or repaired by Defendant; and "replace or to make any and all repairs to any mechanical system." If Plaintiff defaulted or failed to perform its obligations under the Lease, Defendant was to notify Plaintiff and give Plaintiff a reasonable opportunity to cure the default. If Plaintiff failed to cure the default, Defendant had the option of expending reasonable sums to cure Plaintiff's default and "offset such sums against the payment of rent."

The Lease was amended on 10 February 1997 to allow Defendant an opportunity to correct a default for failure to pay rent. The amend-

1. Plaintiff is the successor in interest to ATP Properties Limited Partnership, J. Allen Yager and Hilda Yager with respect to the Lease.

ment to the Lease provided Defendant was to pay Plaintiff $179,825.56 for failure to pay rent. In a letter dated 27 July 1999, Plaintiff informed Defendant that pursuant to the Lease, Defendant was in default by failing to pay the monthly rent and related charges. Plaintiff requested Defendant "remit immediate payment in the amount of $59,705.54" and if payment was not received in accordance with the Lease, Plaintiff would "immediately initiate curative remedies under the Lease and the law." In a letter dated 13 October 1999, Plaintiff informed Defendant that Plaintiff had not "received payment of rent obligations due under the terms of the Lease for October 1999 and other rents dating back over 150 days." Plaintiff requested Defendant immediately cure the default and remit payment in the amount of $178,950.90 or Plaintiff would "immediately initiate curative remedies under the Lease and the law." In a letter dated 10 November 1999, Plaintiff again informed Defendant that Plaintiff had "not received payment of rent obligations due under the terms of the Lease for November 1999 and other rents dating back over 150 days." Plaintiff requested Defendant remit payment in the amount of $236,172.80 or Plaintiff would "immediately initiate curative remedies under the Lease and the law."

On 30 November 1999, Plaintiff filed a complaint for summary ejectment of Defendant. Plaintiff stated Defendant breached the Lease by failing to "pay rent within three business days after three demands" upon Defendant within one year. On 13 December 1999, a Durham County magistrate ordered Defendant be removed from the Property and Plaintiff be put in possession of the Property. On 23 December 1999, Defendant appealed *de novo* to the district court for a jury trial. Plaintiff filed a motion for summary judgment on 24 January 2000. In the sworn affidavit of J. Ronald Hass (Hass), CEO and President of Defendant, Defendant admitted it had not paid rent because Defendant felt it was being overcharged and Plaintiff was not fulfilling its obligations under the Lease. The trial court granted Plaintiff's motion for summary judgment on 11 February 2000, concluding the trial court had subject matter jurisdiction over the summary ejectment and Plaintiff was entitled to judgment as a matter of law.

On 10 March 2000, Defendant moved the trial court to stay execution of the judgment pending disposition of appeal to this Court. The trial court granted Defendant's motion to stay execution of the judgment on 6 April 2000, and found as fact that Defendant had made monthly rental payments to Plaintiff since 23 December 1999. The

trial court imposed the following conditions on Defendant pending disposition of appeal:

> (1) that Defendant shall commit no waste upon the [Property] . . . ; (2) that Defendant shall continue to make monthly rental payments to Plaintiff in the amount of $48,130.07, to be paid to the Clerk of Durham County Superior Court, on or before the 5th day of each month henceforth through and including July[] 2000; (3) that between July 6, 2000 and August 1, 2000, Defendant shall obtain a surety for the purpose of posting a bond equal to double the sum of $240,000 which would be the amount of rent due on the remainder of the [L]ease which expires on December 31, 2000, or in the alternative, Defendant may comply with this condition by posting $240,000 with the Clerk of Superior Court on or before August 1, 2000.

The issues are whether: (I) a district court has subject matter jurisdiction with regard to the summary ejectment of a commercial tenant; (II) genuine issues of material fact exist concerning Defendant's failure to pay rent pursuant to the Lease; and (III) Plaintiff's letter indicating it would "initiate curative remedies" terminated Defendant's leasehold estate.

I

[1] Defendant argues the trial court erred in granting Plaintiff's motion for summary judgment because Chapter 42, Article 3 of the North Carolina General Statutes applies to residential tenants, and, thus, the trial court was without subject matter jurisdiction. We disagree.

A trial court conducting a summary ejectment proceeding obtains its jurisdiction from N.C. Gen. Stat. § 42-26 and in order to have such jurisdiction, there must be a landlord-tenant relationship and one of the three statutory violations in section 42-26 must have occurred. *Hayes v. Turner*, 98 N.C. App. 451, 454, 391 S.E.2d 513, 515 (1990). Chapter 42, Article 2A of the North Carolina General Statutes provides limitations on ejectment of residential tenants. *See* N.C.G.S. § 42-25.6 (1999). Article 3, however, has been applied to summary ejectment of commercial tenants. *See Holly Farms Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 414, 442 S.E.2d 94, 96 (1994); *see also Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 84, 398 S.E.2d 628, 631-32 (1990), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991).

In this case, the trial court had subject matter jurisdiction over the summary ejectment proceedings. Defendant is a commercial tenant and Plaintiff is the landlord. In addition, one of three statutory violations listed in section 42-26 has occurred: Defendant failed to pay rent. Accordingly, the trial court did not err in exercising jurisdiction in this summary judgment action.

II

[2] Defendant next argues the trial court erred in granting Plaintiff's motion for summary judgment because genuine issues of fact existed concerning Plaintiff's overcharge for late fees, damages to Defendant's business, and Plaintiff's constructive eviction of Defendant. We disagree.[2]

A motion for summary judgment is properly granted "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).

Overcharge of late fees

In this case, the evidence viewed in the light most favorable to Defendant, *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 no genuine issue of fact as to Defendant's failure to timely pay rent. Defendant argues there is a dispute about the amount of the late charge Plaintiff assessed Defendant; Defendant, however, does not deny it has failed to pay rent. Indeed, Hass, in his affidavit, admits Defendant had failed to pay rent. Accordingly, whether or not Plaintiff has assessed Defendant an incorrect late fee goes to the amount of money Defendant owes to Plaintiff and not to whether Defendant has failed to pay rent.

Plaintiff's failure to make repairs

Additionally, Defendant argues Plaintiff's failure to make repairs to the Property entitles Defendant to an offset on the amount of rent.

2. Defendant also argues that a genuine issue of fact exists as to whether it is actually in default on the rental payments in light of North Carolina's Residential Rental Agreements Act, codified at N.C. Gen. Stat. Chapter 42, Article 5. The Residential Rental Agreements Act, however, only applies to dwellings used for residential purposes. *See* N.C.G.S. § 42-38 (1999); *see also* N.C.G.S. § 42-40(2) (1999). Thus, Defendant, as a commercial tenant, is not protected by the Residential Rental Agreements Act.

The Lease requires that in order for Defendant to be entitled to an offset, Defendant must expend reasonable sums to cure Plaintiff's default. In this case, Defendant has not shown it expended any monies to repair the Property. In any event, even if Defendant had expended monies to repair the property, this would offset a portion of the rent and does not address Defendant's failure to pay rent or to notify Plaintiff of the offset. Accordingly, Plaintiff's failure to make certain repairs does not alleviate Defendant of its obligation to pay rent, thus, no genuine issue of fact exists as to Defendant's default under the Lease.[3]

Constructive eviction

[3] Defendant next argues a genuine issue of fact exists as to whether Plaintiff constructively evicted Defendant by Plaintiff's failure to make repairs. A tenant, who seeks to establish constructive eviction, "has the burden of showing . . . he abandoned the premises within a reasonable time after the landlord's wrongful act." *K&S Enters. v. Kennedy Office Supply Co., Inc.*, 135 N.C. App. 260, 266, 520 S.E.2d 122, 126 (1999), *affirmed*, 351 N.C. 470, 527 S.E.2d 644 (2000). In this case, Defendant has failed to show he abandoned the Property. Indeed, Defendant sought to remain in possession of the Property pending disposition of this case before this Court. Thus, as Defendant did not abandon the Property, Defendant cannot withhold rental payments and claim constructive eviction. *See Thompson v. Shoemaker*, 7 N.C. App. 687, 690, 173 S.E.2d 627, 630 (1970) ("it would be grossly unjust to permit a tenant to continue in possession of premises and shield himself from payment of rent by reason of alleged wrongful acts of the landlord"), *superseded by statute on other grounds, Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 193 (1987). Accordingly, there are no genuine issues of material fact concerning Defendant's failure to pay rent.

III

[4] Defendant finally argues that the trial court erred in granting Plaintiff's motion for summary judgment because Plaintiff failed to terminate Defendant's estate. We agree.

North Carolina General Statutes permit a landlord to seek summary ejectment when "the tenant . . . has done or omitted any act by

3. We note the Lease also requires Defendant to pay rent "without demand and without counterclaim, deduction[,] or set-off."

which, according to the stipulations of the lease, his estate has ceased." N.C.G.S. § 42-26(2) (1999). Under section 42-26(2), a breach of a lease cannot be made the basis for summary ejectment unless the lease provides for termination upon such a breach or reserves the right of reentry for such a breach. *Stanley v. Harvey*, 90 N.C. App. 535, 537, 369 S.E.2d 382, 384 (1988). When the termination of a lease depends upon notice, "the notice must be given in strict compliance with the contract as to both time and contents." *Id.* at 539, 369 S.E.2d at 385.

In this case, the Lease provides that if Defendant defaulted, Plaintiff had the option, by written notice to Defendant, to re-enter the Property, terminate the Lease, or terminate Defendant's possession of the property. Plaintiff's written notices to Defendant merely indicate Plaintiff will "initiate curative remedies under the Lease and the law." None of Plaintiff's three notices of default to Defendant state that Plaintiff intends to re-enter the Property, terminate the Lease, or terminate Defendant's possession of the Property as required by the Lease. Also, Plaintiff's letters to Defendant did not provide clear and unequivocal notice to Defendant that Plaintiff was terminating Defendant's estate. Plaintiff, therefore, had no authority under the Lease to proceed with the summary ejectment proceeding without Defendant's estate ceasing. Accordingly, the trial court erred in granting Defendant's motion for summary judgment.[4]

[5] Plaintiff cross-assigns error to the trial court's order staying execution of the judgment pending appeal. Plaintiff's arguments concerning its cross-assignment of error are reasons the trial court erred in staying execution of the judgment and those reasons do not provide "an alternative basis in law for supporting" the judgment. The proper method to raise these arguments would have been a cross-appeal. *See Williams v. N.C. Dept. of Economic and Community Development*, 119 N.C. App. 535, 539, 458 S.E.2d 750, 753 (1995); *see also* N.C.R. App. P. 10(d). Accordingly, Plaintiff's failure to appeal the trial court's order waives this Court's consideration of the matter on appeal. *Id.*

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4. Plaintiff argues because it did not specifically terminate the Lease, its notices to Defendant were to be construed as terminating Defendant's possession. Plaintiff, however, had several options provided by the Lease upon default by Defendant. All of these options required Plaintiff to provide Defendant with written notice of Plaintiff's option. As Plaintiff's notices did not indicate which option it was exercising, Plaintiff's notices are insufficient to terminate Defendant's estate.

Reversed.

Judge McGEE concurs.

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

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

I respectfully dissent from the majority opinion on the issue of whether plaintiff terminated defendant's leasehold estate, thereby allowing plaintiff to bring an action for summary ejectment.

With respect to Part III of the majority opinion, I agree that under N.C. Gen. Stat. § 42-26(2), a breach of a lease cannot be made the basis for summary ejectment unless the lease provides for termination upon such a breach or reserves the right of re-entry for such breach. *Morris v. Austraw*, 269 N.C. 218, 222, 152 S.E.2d 155, 159 (1967). The majority concedes that the lease in the instant case provides for the right to "terminate the Lease, or terminate the Defendant's possession of the property."

The majority holds in footnote 4 that because "Plaintiff's notices did not indicate which option it was exercising, Plaintiff's notices are insufficient to terminate Defendant's estate." I disagree.

The record in the instant case indicates that the parties entered into a 32-page (plus 7 pages of exhibits) commercial lease ("the Lease") whereby defendant-Tenant ("defendant") agreed to pay plaintiff-Landlord ("plaintiff") a monthly minimum rent on a square foot basis ("base rent") plus common area maintenance ("CAM") charges "without demand and without counterclaim, deduction or set-off." The Lease was entered into as of 14 June 1995. On 10 February 1997, the parties entered into a formal lease amendment wherein they agreed that defendant was then in default for failure to pay rent but that defendant was given an opportunity to cure in accordance with the terms and conditions outlined therein. The parties agreed that the total amount owing at that time was $179,825.56 which was to be paid in accordance with a payment schedule attached to the lease amendment. Other than the changes made by the amendment, all of the terms of the Lease were to remain in full force and effect.

Section 26(a)(i) of the Lease made defendant's failure "to pay rent including additional rent within 3 business days after notice of

its failure to do so from Landlord" an "Event of Default." Upon any such "Event of Default," Section 26(b) of the Lease entitled plaintiff, upon written notice to defendant, to:

> (i) re-enter the Demised Premises and correct or repair any condition which shall constitute a failure on Tenant's part to perform or abide by the terms of this Lease, . . . and (ii) re-enter the Demised Premises and remove therefrom Tenant and all property belonging to or placed on the Demised Premises by, or at the direction of, Tenant, and place or store such Tenant property . . . and [Landlord] shall be further entitled to either (x) to terminate the term hereof or (y) to terminate Tenant's right to possession or occupancy only, without terminating the term of this Lease Agreement. *Unless the term is specifically terminated by notice in writing, it shall be assumed that the Landlord has elected to terminate possession only, without terminating the term.*

(Emphasis added). Pursuant to this provision, upon any "Event of Default," plaintiff had the following options: (1) terminate the remainder of the Lease; (2) exercise its reserved right of re-entry to terminate defendant's right to possession of the property; or (3) ignore the default and do nothing. Further, the parties agreed, as part of the Lease, that if plaintiff's written notice to defendant under Section 26(b) did not specifically terminate the Lease, then it was to be assumed that plaintiff had elected to exercise its right of re-entry.

On three separate occasions[5] in a three-and-a-half month span, plaintiff sent defendant written notice informing defendant that it was in default of the Lease pursuant to Section 3 ("Covenant to Pay Rent") and Section 26 ("Events of Default"). Each of these notices demanded that defendant immediately cure default by payment of the past due amount, and warned defendant that "[i]f payment is not received in accordance with the Lease, the Landlord will immediately initiate curative remedies under the Lease and the law."

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5. In addition to these three occasions (letters dated 27 July 1999; 13 October 1999 and 10 November 1999), there was evidence of at least two prior defaults by tenant: (1) an amendment to the Lease by a Letter Agreement dated 24 July 1996, where the Tenant acknowledged an indebtedness of past due rent to the Landlord and agreed to a payment schedule to retire this indebtedness and (2) the Lease Amendment dated 10 February 1997 wherein the Tenant acknowledged that it was in default under both the Lease and the Letter Agreement and agreed to make past due rent payments for December 1996 and January 1997, and made acknowledgment of an indebtedness due the Landlord in the amount of $179,825.56. Except as specifically modified by the Lease Amendment, the Lease (including all default provisions) remained in full force and effect.

There is no question that defendant's repeated failure to pay rent after having been notified by plaintiff that it was past due constitutes an "Event of Default" under Section 26(a)(i) of the Lease. There is likewise no question that Section 26(b) of the Lease gives the plaintiff the option either to terminate the Lease upon an event of default (i.e. breach of the Lease), or to exercise its reserved right of re-entry and to terminate defendant's right to possession or occupancy, so long as defendant is given written notice. The only question, and the issue on which I disagree with the majority opinion, is whether plaintiff's warning that "[i]f payment is not received in accordance with the Lease, the Landlord will immediately initiate curative remedies under the Lease and the law," was sufficient to cause defendant's leasehold estate to have "ceased" under G.S. § 42-26(2). I believe that it was.

The majority opinion relies on this Court's decision in *Stanley v. Harvey*, 90 N.C. App. 535, 369 S.E.2d 382 (1988), to support its conclusion that plaintiff's written notices to defendant "did not provide clear and unequivocal notice to Defendant that Plaintiff was terminating Defendant's estate." While I agree with the decision reached in *Stanley*, I believe the majority's reliance upon it in the instant case is misplaced for the following reasons.

First, the lease in *Stanley* did not provide for a right of re-entry to terminate possession. The only way the lessor in *Stanley* could cause the lessee's estate to "cease" was to terminate the lease altogether. The Court in *Stanley* held that the notice to vacate the premises was not a clear and unequivocal notice that the lease was to be terminated, since the lessee could arguably refuse such request to vacate because the lease did not provide for an automatic right of re-entry. However, in the instant case plaintiff did not attempt to terminate the Lease, instead choosing to rely on the parties agreed upon assumption that its written notices constituted an election to exercise its reserved right of re-entry to terminate defendant's possession. Since plaintiff was not attempting to terminate the Lease, the holding in *Stanley* is not controlling.

Second, the lease in *Stanley* was a residential lease, whereas the parties in the instant case had entered into a commercial lease with detailed provisions concerning the rights of the parties upon default. It should be presumed that the parties who have entered into a commercial lease have negotiated at arm's length and understand the results of their negotiations as memorialized in their written lease agreement. Thus, I do not believe the defendant in the instant case

misunderstood the notices it received from plaintiff. Defendant must have understood the provision in Section 26 of the Lease setting out the assumption that written notice from plaintiff which did not specifically terminate the Lease was an election by the plaintiff to terminate possession only. Allowing the commercial lessor to go forward with summary ejectment in a situation such as this is consistent with the agreement that the parties had entered into. Thus, I believe plaintiff met the required obligations for it to institute a summary ejectment action.

For the foregoing reasons, although I concur with Parts I, II, and that portion of Part III dealing with plaintiff's cross-assignment of error, I respectfully dissent from that portion of Part III of the majority opinion holding that plaintiff failed to effectively terminate defendant's leasehold estate. I would, therefore, affirm the trial court's grant of summary judgment for plaintiff.

STATE OF NORTH CAROLINA v. GARY WAYNE HAYWOOD

No. COA00-412

(Filed 19 June 2001)

1. **Sexual Offenses— first-degree—force element missing in original indictment—amendment not substantial alternation**

The trial court properly concluded the indictment charging defendant with first-degree sexual offense under N.C.G.S. § 15-144.2(a) should not have been dismissed even though it omitted the element of force, because the State's amendment of the indictment to include the addition of the term "by force" did not substantially alter the charge against defendant when the terms "feloniously" and "against the victim's will" were already included in the indictment.

2. **Discovery— prior criminal records of non-law enforcement witnesses of the State—not required**

The trial court did not err by denying defendant's motion to require the State to furnish the prior criminal records of non-law enforcement witnesses for the State, because our Supreme Court

has held that the State is not required to produce such information in discovery.

3. Conspiracy— first-degree rape—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to commit first-degree rape, because: (1) there was evidence that after the female victim told a coconspirator that she did not want to have sex with him, the coconspirator asked defendant to step outside the car to talk with him; (2) after the men returned to the car, the coconspirator drove to a convenience store where he and defendant entered and the coconspirator bought condoms; and (3) defendant allegedly engaged in all the same sex acts with the victim that his coconspirator did.

4. Rape— first-degree—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree rape, because: (1) a nurse testified that the victim told her at the hospital on the night of the crime that the men had penetrated both her vagina and her rectum, N.C.G.S. § 8C-1, Rule 803(4); (2) the victim testified that defendant had committed all the same sex acts that his coparticipant did; (3) the jury could have imputed the coparticipant's use of a handgun to defendant under the theory of acting in concert; and (4) there is substantial evidence that the coparticipant aided and abetted defendant in committing the rape.

5. Sexual Offenses— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense, because: (1) the jury could have imputed the coparticipant's use of a handgun to defendant under the theory of acting in concert; and (2) there is substantial evidence that the coparticipant aided and abetted defendant in having oral and anal intercourse with the victim.

6. Conspiracy— motion for bill of particulars denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion for a bill of particulars under N.C.G.S. § 15A-925(a) on the charge of conspiracy, because defendant was not harmed by the State's failure to notify him that it planned to use his conversation with his coconspirator outside the car as evidence of a

conspiracy when the State presented no evidence regarding the content of the conversation and defendant was able to present evidence to specifically rebut all of the State's evidence on conspiracy.

7. Criminal Law— denial of recess at close of State's evidence—no prejudice

The trial court did not abuse its discretion in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by denying defendant a recess at the close of the State's evidence until the next day to confer with counsel regarding his decision to testify and present witnesses on his behalf, because: (1) defendant has not shown that he was prejudiced by his decision to take the stand and present a witness on his behalf; (2) it was only through defendant's testimony that he was able to present evidence on the defense of necessity and evidence negating the charge of conspiracy; (3) the State was not permitted to cross-examine defendant regarding prior convictions; and (4) the Court of Appeals is unable to say that the trial court would not have granted a recess of shorter duration if defendant had clearly asked for one.

8. Evidence— defendant's reputation for non-violence—warning to defense counsel—opening door for defendant's previously excluded past convictions

The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by warning defense counsel that his questioning of a witness regarding the witness's opinion of defendant's reputation for non-violence might allow the State to introduce previously excluded evidence of defendant's past convictions, because: (1) the trial court's warning was not a formal ruling on the evidence; and (2) the court was not required to exclude the evidence of defendant's prior convictions in the first place.

9. Criminal Law— jury instruction—duress—necessity

The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by denying defendant's request for a jury instruction on the defense of duress, because: (1) defendant did not present evidence that he engaged in sexual acts with the victim in order to prevent his coparticipant from injuring defendant; and (2) defendant's theory that he pretended to go along with his copar-

ticipant's assault on the victim in order to prevent the coparticipant from beating the victim further goes to the defense of necessity, on which the trial court did instruct.

10. Sexual Offenses— first-degree—wrong name used in jury instruction—no plain error

The trial court did not err by inserting the name of defendant's coparticipant rather than the name of defendant in its jury instruction on the charge of first-degree sexual offense, because: (1) defendant did not object to the charge before the jury retired as required by N.C. R. App. P. 10(b)(2) in order to preserve this issue for appeal; and (2) there was no plain error when there is no significant chance the jury convicted defendant of first-degree sexual offense thinking it was convicting the coparticipant.

11. Sexual Offenses; Rape— first-degree—disjunctive jury instruction proper

The trial court did not err by denying defendant's post-verdict motion to set aside the verdict on the charges of first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape, because the Supreme Court has upheld a defendant's convictions for these crimes based upon the same disjunctive jury instruction utilized in this case showing defendant could be found guilty of these crimes if he either displayed a dangerous or deadly weapon or was aided and abetted by one or more persons during their commission.

12. Sexual Offenses; Rape— first-degree—motion for new trial, arrest of judgment, and other relief properly denied

The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by denying defendant's motion for appropriate relief seeking a new trial, arrest of judgment, and other relief as appropriate, because there was no showing the trial court abused its discretion.

Appeal by defendant from judgments entered 22 May 1998 by Judge A. Leon Stanback, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 28 March 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Hubert N. Rogers, III, for defendant.

HUDSON, Judge.

Defendant appeals from his conviction of the crimes of first degree rape, first degree sexual offense, and conspiracy to commit first degree rape. We find no error.

The facts presented at trial tended to show that Loretta Kimbrough (Loretta) was walking along a road in Robeson County on the evening of 26 October 1996 when a car containing three men pulled up beside her. Defendant was in the passenger seat, James Haywood (James), defendant's cousin, was driving, and Tim Robinson (Tim) sat in the backseat. Loretta recognized James' face and knew Tim, as he had previously dated her sister. Loretta told James she was walking to a club called T.J.'s to meet her sisters. James told her that T.J.'s was closed and asked if she would like to go with them to buy some beer. She said she would and got into the backseat of the car.

Instead of driving to a store, James drove down a dirt road and asked Loretta to get out of the car to talk with him. He then asked her if she would have sex with him, and she told him no. When Loretta got back into the car, James asked defendant to get out of the car to talk with him. Defendant did, but neither Loretta nor Tim could hear what they said. James then drove to a convenience store. He and defendant went inside, and James purchased a pack of condoms. After they left the convenience store, Loretta began to be worried and asked to be taken back to where they had found her; she testified that defendant laughed at her.

James eventually drove to a vacant barn and forced Loretta out of the car by pointing a gun at her and hitting her in the face. He continued to beat her and began to sexually assault her. Defendant sat in the car for approximately twenty-five minutes, and testified that he got out of the car to try to make James stop. However, Loretta testified that, although defendant never beat her, he took turns with James sexually assaulting her. Tim testified that at one point defendant returned to the car where Tim still sat in the backseat, handed him a condom, and asked him if he wanted to participate. Tim refused. Against James' protests, defendant eventually insisted that they leave and that they take Loretta with them. Defendant drove Loretta to a bridge near a West Point Pepperell plant and let her out of the car. He and Tim testified that defendant was upset with James for beating Loretta.

In a trial commencing 18 May 1998, defendant was found guilty of first degree rape, first degree sexual offense, and conspiracy to commit first degree rape, and not guilty of second degree kidnapping. He was sentenced to between 240 and 297 months on the first degree rape charge, to between 240 and 297 months on the first degree sexual offense, and to between 151 and 191 months on the conspiracy charge, the sentences to run concurrently. Defendant filed notice of appeal to this Court.

[1] Defendant first contends on appeal that his indictment for first degree sexual offense should have been dismissed in that it omitted the element "by force." The indictment in question reads in pertinent part: "the defendant named above unlawfully, willfully and feloniously did engage in a sexual offense with Lorretta [sic] Kimbrough against the victim's will." N.C.G.S. § 15-144.2(a) (1999) states that in indictments for sex offense, "it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim." Defendant's indictment did omit the term "by force" specified in G.S. § 15-144.2(a). Over the objection of defendant, the court allowed the State to amend the indictment to insert this term.

Pursuant to N.C.G.S. § 15A-923(e) (1999), a bill of indictment may not be amended in a manner which substantially alters the charge set forth. *See State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). Therefore, we must determine whether the addition of the term "by force" in the indictment substantially altered the charge against defendant. Our Supreme Court opined in *State v. Johnson*, 226 N.C. 266, 268, 37 S.E.2d 678, 679 (1946), that while a rape indictment omitting both the terms "forcibly" and "against the will" of the victim is fatally defective, the term " 'forcibly' can be supplied by any equivalent word" and "is sufficiently charged by the words 'feloniously and against her will.' " Since the indictment in the present case did include the terms "feloniously" and "against the victim's will," we believe the charge was not substantially altered by the addition of the term "by force." Thus, the trial court did not err in allowing the amendment.

[2] Defendant next argues the trial court erred in denying his motion to require the State to furnish the prior criminal records of non-law enforcement witnesses for the State. Our Supreme Court has held that the State is not required to produce such information in discov-

ery. *See State v. Bruce*, 315 N.C. 273, 279, 337 S.E.2d 510, 514-15 (1985). This assignment of error is overruled.

Defendant further contends the trial court erred in denying his motion to dismiss the charges against him for insufficiency of the evidence. In ruling on a motion to dismiss, the trial court must decide whether there is substantial evidence as to each essential element of the crime charged and that defendant was the person who committed the offense. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Furthermore, the court must consider all of the evidence in the light most favorable to the State; the defendant's evidence, unless favorable to the State, is not to be taken into consideration. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982).

[3] Defendant first contends there was insufficient evidence of a conspiracy to commit first degree rape. Conspiracy is an agreement between two parties to do an unlawful act. *See State v. LeDuc*, 306 N.C. 62, 75, 291 S.E.2d 607, 615 (1982), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Evidence of an overt act or express agreement is not required and the crime may be proved solely by circumstantial evidence. *See id.* at 75-76, 291 S.E.2d at 615-16. A person is guilty of rape if he engages in vaginal intercourse with a person by force and against her will; the crime is elevated to first degree if, among other options, he displays a dangerous weapon or is aided and abetted by another person. *See* N.C.G.S. § 14-27.2 (1999).

At trial, the State proved the crime of conspiracy based solely on circumstantial evidence. In particular, there was evidence that after Loretta told James she did not want to have sex with him, James asked defendant to step outside the car and talk with him. After the men returned to the car, James drove to a convenience store where he and defendant entered and James bought condoms. James then drove to a trailer park behind the store and tried to get Loretta out of the car; when a light came on in one of the trailers, defendant allegedly told James it was the wrong stop. As James was driving to the barn where Loretta was raped, defendant purportedly laughed when Loretta asked to be taken back to where they had found her. Defendant knew James owned a handgun and had seen him with it earlier that day. When they reached the barn, James threatened Loretta with the handgun, forced her out of the car, and began sexu-

ally assaulting her. Defendant allegedly engaged in all the same sex acts with Loretta that James did, including oral, vaginal, and anal intercourse.

We believe the above evidence taken together is adequate to support the inference that defendant made an agreement with James to commit rape in the first degree. Thus, the trial court did not err in submitting the charge of conspiracy to commit first degree rape to the jury.

[4] Defendant next argues there was insufficient evidence that he committed first degree rape. Specifically, he contends that there was no evidence he penetrated Loretta's vagina with his penis. Loretta testified at trial regarding defendant: "He put his penis in my rectum. He made me have sex with him." Thus, it is true that she did not specifically testify that defendant penetrated her vaginally. However, a nurse testified Loretta told her at the hospital the night of the crime that the men had penetrated both her vagina and her rectum. *See* N.C.R. Evid. 803(4) (statements made for purposes of medical treatment are exceptions to hearsay rule). In addition, Loretta testified that defendant had committed all the same sex acts James had.

Defendant also asserts there was insufficient evidence to elevate the crime of rape to first degree. The trial court instructed the jury it could find defendant guilty of first degree rape if he "displayed a dangerous or deadly weapon" or "was aided and abetted by another person" during the commission of the crime. *See* G.S. § 14-27.2(a)(2)(a) & (c). The evidence is undisputed that James displayed a handgun during his and defendant's sexual assault of Loretta. The jury could have imputed James' use of the handgun to defendant under the theory of acting in concert and was in fact given an instruction on this theory.

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979); *cf. State v. Collier*, 72 N.C. App. 508, 325 S.E.2d 256 (1985) (co-defendant's dis-

play of weapon during rape may be used as aggravating factor in defendant's sentencing).

In addition, the record is replete with evidence that James aided and abetted defendant in committing the rape. James threatened Loretta with a gun and beat her into submission, stood by while defendant raped her, and the two men sexually assaulted her simultaneously at least once. Thus, there was substantial evidence to support defendant's conviction of first degree rape.

[5] Defendant also asserts there was insufficient evidence he committed the crime of first degree sexual offense. *See* N.C.G.S. § 14-27.4 (1999); *id.* § 14-27.1(4) (1999). Specifically, he claims there was no evidence that he displayed a dangerous or deadly weapon or that James aided and abetted him in having oral or anal intercourse with Loretta. For reasons stated above, defendant's argument has no merit.

[6] Defendant next argues as error the trial court's denial of his motion for a bill of particulars on the charge of conspiracy. N.C.G.S. § 15A-925(a) (1999) sets forth that, upon motion of a defendant, the trial court "may order the State to file a bill of particulars." The motion must specify which items of factual information are desired by the defendant, and "[i]f any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars." G.S. § 15A-925(b), (c).

The grant or denial of a motion for a bill of particulars is within the discretion of the trial court and is not reversible except for "palpable and gross abuse thereof." *State v. Young*, 312 N.C. 669, 676, 325 S.E.2d 181, 186 (1985). Furthermore, "denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case." *State v. Moore*, 335 N.C. 567, 588, 440 S.E.2d 797, 809, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994) (citation omitted).

As stated above, evidence of an overt act or express agreement is not required to prove the crime of conspiracy; it may be proven solely by circumstantial evidence. *LeDuc*, 306 N.C. at 75-76, 291 S.E.2d at 615-16. Given the nature of conspiracy, therefore, it is a crime particularly appropriate for the granting of a bill of particulars. As Justice (later Chief Justice) Mitchell wrote in a concurring opinion in *State v.*

Christopher, 307 N.C. 645, 652-53, 300 S.E.2d 381, 385 (1983): "We have previously indicated that, in conspiracy cases, we will encourage our trial courts to allow motions for bills of particulars directing prosecutors to reveal information required to enable defendants to meet the charges against them, to the extent such information is known to the prosecutors."

In the present case, defendant requested that the State provide:

> The terms and contents of any alleged agreement between the Defendant and any other person wherein they agreed to commit the offense of first degree forcible rape, when and where said conversation occurred, and the names of all persons present at the time of said conversation and agreement.

This request was objected to by the State and denied by the court.

In regard to the specific information requested by defendant in the bill of particulars, the only evidence of a conversation between James and defendant regarding a plan to commit rape was that they spoke outside the car before going to the convenience store. The State presented no evidence as to the substance of the conversation. Defendant testified that the conversation consisted of James telling him that his drug supplier was not at home, so they would just go ahead and get the beer. Defendant also stated that he was not aware James was buying condoms in the convenience store, that he was not aware of any plan James had to rape Loretta, and that he merely pretended to have sex with Loretta in order to placate James and keep him from hurting Loretta. Furthermore, Tim testified that on the way to the barn, James kept saying he had to "get some 'me me,' " and defendant asked him what in the world he was talking about.

In conclusion, we do not believe defendant was harmed by the State's failure to notify him that it planned to use his conversation with James outside the car as evidence of a conspiracy. The State presented no evidence regarding the content of the conversation, and defendant was able to present evidence to specifically rebut all of the State's evidence on conspiracy. Thus, we find no reversible error in the trial court's denial of defendant's motion for a bill of particulars on the conspiracy charge.

[7] Defendant next argues the trial court erred in denying him a reasonable recess to confer with counsel regarding his decision to testify and present witnesses on his behalf. At the close of the State's evidence and after defendant's motion to dismiss had been denied, at

approximately 4:15 p.m., counsel for defendant requested that the court recess until morning so that he could discuss with his client whether to take the stand in his own defense. This motion was denied.

Our Supreme Court made clear in *State v. Goode*, 300 N.C. 726, 268 S.E.2d 82 (1980), the importance of allowing a defendant time to confer with his attorney at the close of the State's evidence in order to decide whether or not to testify.

> Although the rules of criminal procedure have not dealt directly with this question, such recesses at the close of the State's evidence are deeply ingrained in the course and practice of our courts and, when requested, have been granted as a matter of course so long that "the memory of man runneth not to the contrary."

Id. at 730, 268 S.E.2d at 84. However, the decision whether to grant a recess at the close of the State's evidence is addressed to the discretion of the trial court, and a defendant must show he was prejudiced by the denial to establish reversible error. *See id.* at 729-30, 268 S.E.2d at 84.

Assuming *arguendo* the trial court erred in denying defendant's motion for a recess to confer with his attorney, defendant has not shown that he was prejudiced by his decision to take the stand and present a witness in his behalf. It was only through defendant's testimony that he was able to present evidence on the defense of necessity and evidence negating the charge of conspiracy. Furthermore, the State was not permitted to cross-examine him regarding prior convictions. Finally, we note that while the defendant in *Goode* asked for a "short recess" to confer with counsel, *id.* at 728, 268 S.E.2d at 83, and denial of this request was found to be reversible error, defendant in this case asked for a recess until the next day. We are unable to say that the trial court here would not have granted a recess of shorter duration if defendant had clearly asked for one. Defendant's assignment of error on this point is overruled.

[8] Defendant next contends the trial court erred by warning defense counsel that his questioning a witness regarding the witness's opinion of the defendant's reputation for non-violence might allow the State to introduce previously excluded evidence of defendant's past convictions. Previously, on cross-examination of defendant, the State had attempted to inquire about his convictions for communicating threats

and assault on a female. These convictions had not been furnished to defendant in discovery, and pursuant to N.C.G.S. § 15A-910(3) (1999), the court prevented the State from cross-examining defendant about them. When defendant put his former employer on the stand to testify as a character witness, the trial court admonished defense counsel at an unrecorded bench conference that if the witness testified about defendant's trait for non-violence, it might open the door for the State to impeach him with evidence of the previously excluded convictions. Defense counsel later summarized the court's statement for the record and entered an objection. The trial judge responded by noting that his warning was merely that and not a formal ruling on the evidence.

Sanctions imposed for failure to comply with discovery procedures are permissive and are ordered in the sound discretion of the trial court. *See State v. King*, 311 N.C. 603, 619, 320 S.E.2d 1, 11 (1984). Given that the court was not required to exclude the evidence of defendant's prior convictions in the first place, we do not believe the judge acted improperly in warning defense counsel that testimony regarding defendant's trait for non-violence might cause him to reconsider his previous ruling excluding evidence of defendant's prior convictions. Assuming *arguendo* defendant's assignment of error on this point is properly presented to this Court, *see* N.C.R. App. P. 10(b) (complaining party must obtain a ruling by the court in order to preserve appeal), it is without merit.

[9] Defendant next asserts the trial court erred in denying his request for a jury instruction on the defense of duress. A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence. *See State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). In order to be entitled to an instruction on duress, a defendant must present evidence that he feared he would "suffer immediate death or serious bodily injury if he did not so act." *State v. Cheek*, 351 N.C. 48, 73, 520 S.E.2d 545, 560 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000) (citation omitted).

We agree with the trial court that defendant did not present evidence that he engaged in sexual acts with Loretta in order to prevent James from injuring him. Defendant testified that James did not point the gun at him the entire evening and did not threaten his life. Rather, he testified that he pretended to go along with James' assault on Loretta in order to prevent James from beating her further. It was thus proper for the trial court to instruct the jury on the defense of necessity. Necessity excuses otherwise criminal behavior which was

reasonably necessary to protect life, limb, or health, and where no other acceptable choice was available. *See State v. Thomas*, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215, *disc. review denied*, 329 N.C. 792, 408 S.E.2d 528 (1991). This the trial court did. In conclusion, the trial court did not err in failing to instruct the jury on the defense of duress.

[10] Defendant further claims the trial court erred by inserting the name of James Haywood rather than the name of defendant in its jury instruction on the charge of first degree sexual offense. Defendant did not object to the charge before the jury retired as required by N.C.R. App. P. 10(b)(2) in order to preserve the issue for appeal. Thus, our review is limited to whether the court committed plain error in its instruction. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

The record indicates that the trial court repeatedly referred to the defendant as Gary Haywood during jury instructions, including elsewhere in the charge on sexual offense, and made the error of using James Haywood's name only one time. We do not believe there is any significant chance the jury convicted defendant of first degree sexual offense thinking it was instead convicting James Haywood. The judge's instruction did not amount to plain error.

[11] Defendant next argues the trial court erred in denying his post-verdict motions to set aside the verdict on each charge. In support of this assignment of error, defendant refers this Court to his earlier arguments on the insufficiency of the evidence, which we have found to be without merit.

Defendant also contends that the first degree rape and first degree sexual offense charges should have been set aside based on the lack of a unanimous verdict. The trial court instructed the jury it could find defendant guilty of these crimes if it found that defendant either "displayed a dangerous or deadly weapon" or was "aided and abetted by one or more other persons" during their commission. *See* G.S. § 14-27.2(a)(2)(a) & (c) and § 14-27.4(a)(2)(a) & (c). Defendant argues that members of the jury could thus have convicted him of these crimes based upon either of two different theories. This Court has previously determined that a trial court may properly instruct a jury in the disjunctive "when the acts charged in the disjunctive constitute a single wrong which can be established by a finding of various alternative elements." *State v. Green*, 124 N.C. App. 269, 282, 477 S.E.2d 182, 188 (1996), *aff'd*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert.*

denied, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999) (quotations omitted). In *State v. Belton*, 318 N.C. 141, 165-66, 347 S.E.2d 755, 770 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), the Supreme Court upheld a defendant's convictions for first degree rape and sexual offense based upon the same disjunctive jury instruction utilized in the present case. Defendant's argument must fail.

[12] Defendant finally contends the trial court erred in denying his motion for appropriate relief seeking a new trial, arrest of judgment, and other relief as appropriate. *See* N.C.G.S. § 15A-1414 (1999). In support of this assignment of error, defendant reasserts all of his previous arguments to the Court. The disposition of a motion for appropriate relief is subject to the sentencing judge's discretion and will not be overturned absent a showing of abuse of discretion. *See State v. Arnette*, 85 N.C. App. 492, 498, 355 S.E.2d 498, 502 (1987). In that we have found no merit in defendant's arguments above, we will not overrule the judge's decision to deny defendant's motion for appropriate relief.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

DURHAM VIDEO & NEWS, INC., D/B/A MOVIE TOWN, PETITIONER V. DURHAM BOARD OF ADJUSTMENT, AND CITY OF DURHAM, RESPONDENTS

No. COA00-609

(Filed 19 June 2001)

1. Zoning— search for adult merchandise—administrative search warrant required

An administrative search warrant was needed for zoning officials to search a store for adult merchandise. The enforcement of the zoning code is not frustrated by requiring a warrant for administrative searches, video and book sales are not pervasively regulated industries, and Durham's zoning ordinance does not set forth specific and regularly enforced guidelines for the search of video and book stores. Inspectors may do a cursory inspection of a store's contents, as a customer might, and obtain a warrant

based on their observations; the behavior of the zoning officials in this case clearly went beyond the bounds of a normal customer of the store and constituted a search as that term is understood under the Fourth Amendment.

2. Search and Seizure— administrative search warrant—supporting affidavit

An administrative search warrant was valid where the language in the affidavit was virtually identical to that approved in *South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.*, 129 N.C. App. 282.

3. Zoning— issue not raised before board of adjustment—not before superior court

Petitioner's argument that an administrative search warrant was invalid because the magistrate signed only four of five pages was not considered where petitioner did not bring up the issue in its motion to suppress the evidence from the search before the board of adjustment. The superior court sat as an appellate court and had no authority to address issues not argued before the board of adjustment.

4. Zoning— report from planning staff—not timely received—no prejudice

There was no prejudicial error in a zoning decision where a report from the planning staff was not mailed to petitioner the requisite ten days before the hearing. Everything in the report was a matter of public record, nothing in it could have taken petitioner by surprise, and petitioner showed no prejudice from its late receipt of the record.

5. Zoning— adult establishment—sufficiency of evidence

There was sufficient evidence in a zoning action to conclude that petitioner was operating an adult bookstore and adult mini motion picture theater where petitioner objected to determining whether a publication or motion picture was "adult" by looking only at the pictures and advertisements on the covers. The board of adjustment in this case was merely enforcing zoning requirements and made no determination that petitioner violated criminal obscenity laws; in the context of zoning enforcement, it is reasonable to rely upon the pictures and titles on the covers because the publishers make a distinct effort to impart to viewers the content of the material and because reading and viewing all of

the books, magazines, and videos in an adult establishment would render the zoning laws unenforceable.

6. Zoning— adult establishment ordinance—non-adult materials

The age and price of the stock were factors which a zoning board of adjustment could properly consider in determining the relative importance of the adult and non-adult materials when deciding whether petitioner was operating an adult business in violation of zoning restrictions.

7. Zoning— adult establishment ordinance—sexual devices

A zoning board of adjustment did not err when considering whether petitioner was operating an adult business in violation of zoning ordinances by making an incidental finding regarding the presence of sexually oriented devices on the property even though sexually oriented devices are not included as a consideration in N.C.G.S. § 14-202.10.

8. Zoning— adult establishment ordinance—amendment of statute

The superior court did not err in a zoning action by refusing to clarify which version of N.C.G.S. § 14-202.10 was used by the board of adjustment in deciding whether petitioner was operating an adult business because the amendment merely codified the Court of Appeals' explanations of the word "preponderance" and was not a substantive change in the law.

9. Constitutional Law— adult establishment zoning ordinance—not vague or overbroad

An adult establishment zoning ordinance was not unconstitutionally vague or overbroad, both facially and as applied.

Appeal by petitioner from judgment and order entered 1 September 1999, and from order entered 15 November 1999 by Judge Knox V. Jenkins, Jr., in Durham County Superior Court. Heard in the Court of Appeals 28 March 2001.

Loflin & Loflin, by Thomas F. Loflin, III, for petitioner.

Karen A. Sindelar, Assistant City Attorney, City of Durham, for respondents.

HUDSON, Judge.

Petitioner appeals from a judgment and order of the Durham County Superior Court affirming the Durham Board of Adjustment's decision that petitioner was operating an adult establishment in violation of the Durham zoning code. We affirm the determination of the Superior Court.

On 15 October 1998, a Durham zoning enforcement officer issued a Notice of Violation charging petitioner with operating an adult establishment in an improper zoning district in violation of Chapter 24, Section 6, of the Durham City/County Zoning Ordinance. Petitioner's store, Movie Town, is located in a "General Commercial" district in which adult establishments are not allowed.

On 16 October 1998, petitioner appealed the Notice to the Durham City/County Board of Adjustment (the Board) pursuant to N.C.G.S. § 160A-388(b). A quasi-judicial hearing was held on the matter on 9 December 1998. The Board voted to uphold the Notice of Violation, concluding that petitioner was operating both an adult bookstore and an adult mini-motion-picture theater. Petitioner then filed a petition for writ of certiorari with the Durham County Superior Court under N.C.G.S. § 160A-388(e), which court affirmed the Board's decision in a judgment and order filed 1 September 1999. Petitioner thereafter moved the court to amend its findings of fact or make additional findings, which motion was denied. Petitioner gave timely notice of appeal to this Court.

Petitioner first argues that the Superior Court erred in its ruling that the administrative search warrant used to collect all of the City's evidence in this case was lawfully issued, or, in the alternative, was not necessary. On 15 and 16 October 1998, Durham zoning officials Pratt Simmons and Landy Void visited Movie Town, identified themselves as zoning officials, and viewed the areas of the store and the merchandise. Based on what they observed during these brief visits, they sought and received an administrative search warrant on 19 November. On that date, Simmons, Void, and zoning enforcement officer Dennis Doty conducted a more thorough inspection, documenting with greater detail the kinds of merchandise sold and taking photographs and a video of the store.

At the hearing before the Board, petitioner moved to suppress the evidence gathered on 19 November based upon the invalidity of the search warrant. The Board denied petitioner's motion. The Superior

Court upheld the Board's decision, finding that the warrant was valid, and that even if it was not, a warrant was not constitutionally required "because all materials viewed by Mr. Simmons and associates were openly displayed, and commercially available and viewable by the public." *See* N.C.G.S. § 15-27.2(f) (evidence obtained by invalid warrant may be used when warrant is not constitutionally required under the circumstances of the case).

[1] We first address whether an administrative warrant was needed in this situation. The Fourth Amendment's prohibition against unreasonable searches does apply to administrative inspections of private commercial property. *See v. City of Seattle*, 387 U.S. 541, 18 L. Ed. 2d 943 (1967). Although the expectation of privacy the owner of commercial property enjoys is significantly less than that granted to a private home owner, the circumstances in which warrantless searches of commercial property will be allowed are limited. *Donovan v. Dewey*, 452 U.S. 594, 69 L. Ed. 2d 262 (1981). Considerations in determining the propriety of legislative schemes allowing warrantless searches include whether the industry involved is a "closely regulated" one such that business owners should be aware of the need for regular inspections (such as in gun and liquor sales), whether the law specifically sets out the frequency and scope of the inspections owners may expect, and whether a warrant requirement would significantly frustrate enforcement of the law. *Id.*

The above criteria are not present in the case before us. Video and book sales are not pervasively regulated industries, and Durham's zoning ordinance does not set forth specific and regularly enforced guidelines for the search of video and book stores. Furthermore, we do not believe enforcement of the zoning code is frustrated by the requirement of obtaining a warrant to conduct administrative searches. Inspectors may do a cursory inspection of a store's contents as may a customer and, based on their observations, obtain a warrant authorizing a more detailed search.

"A search occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed.' " *Maryland v. Macon*, 472 U.S. 463, 469, 86 L. Ed. 2d 370, 376 (1985) (citation omitted). In *Maryland*, a plain-clothes detective browsed for several minutes through an adult bookstore and then purchased two magazines from the clerk. The clerk was subsequently arrested for the distribution of obscene materials. The United States Supreme Court determined that "[t]he officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place

of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment." *Id.* at 469, 86 L. Ed. 2d at 377.

In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 60 L. Ed. 2d 920, 930 (1979), however, the Supreme Court explained that "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees." In *Lo-Ji Sales*, the Town Justice and ten other officials searched a bookstore for obscene materials for six hours. Two or three marked police cars were parked out front, and no customers remained in the store after becoming aware of the presence of the police. The store's film booths were adjusted so that the films could be viewed without inserting any coins. Police officers removed magazines from their plastic casings so that they could be read. The Court commented on these actions: "The Town Justice viewed the films, not as a customer, but without the payment a member of the public would be required to make. Similarly, in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them." *Id.* While *Maryland* and *Lo-Ji Sales* are criminal cases, they are instructive regarding the expectation of privacy properly enjoyed by the owner of a video and book store.

In the present case, zoning enforcement officers Dennis Doty, Pratt Simmons, and Landy Void visited petitioner's store on 19 November, took pictures, and recorded a 40 minute video detailing what they saw, even though a sign posted in the store prohibited the use of any visual or sound recording equipment by customers. They took two video tapes off the shelf and played portions of them on a video player they had brought. They made measurements of the square footage of the store using a measurement wheel. Although their presence on the property was less intrusive than that of the officials in *Lo-Ji Sales*, we believe their behavior clearly went beyond the bounds of that of a normal customer of the store. They were conducting a search of the property as that term is understood under the Fourth Amendment and needed a warrant to conduct it.

[2] We therefore turn to the question of whether the administrative warrant authorizing the search in this case was valid. To make the warrant process meaningful, the underlying facts sufficient to establish administrative probable cause to search must be set out in the affidavit supporting an administrative warrant. *Gooden v. Brooks*,

Comr. of Labor, 39 N.C. App. 519, 525, 251 S.E.2d 698, 703, *appeal dismissed*, 298 N.C. 806, 261 S.E.2d 919 (1979); *see also* N.C.G.S. § 15-27.2(c). In the present case, zoning enforcement officer Pratt Simmons set forth in an affidavit that he had visited petitioner's store on 15 and 16 October 1998:

> During both inspections, I observed that the preponderance of the publications, including videotapes, offered for sale or rent in the business appeared to be distinguished or characterized by their emphasis on matter depicting, describing or relating to sexual activities and human genitals, pubic regions, buttocks and female breasts. In addition, merchandise such as artificial genitals and other sexual paraphernalia was displayed. To the rear of the business establishment were approximately 22 booths and it appeared that the preponderance of videos viewed in such booths were distinguished or characterized by their emphasis on matter depicting, describing or relating to sexual activities, human genitals, pubic regions, buttocks and female breasts.

Petitioner contends Simmons' statements were merely "conclusory" and inadequate to support a warrant. However, the language in Simmons' affidavit is virtually identical to that approved as sufficient to establish probable cause to conduct an administrative search by this Court in *South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.*, 129 N.C. App. 282, 291-92, 498 S.E.2d 623, 629, *appeal dismissed and disc. review denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). Petitioner's argument must therefore fail.

[3] Petitioner also stresses that the warrant was invalid because the magistrate who issued it signed only four out of five pages constituting the warrant. However, petitioner did not bring up the issue of the lack of a proper signature on the warrant in its motion to suppress the evidence from the search before the Board. The Superior Court sat as an appellate court in this case, and thus had no authority to address issues not previously argued before the Board. *See Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985). For the same reason, we decline to address petitioner's argument on this point as well. *See* N.C. R. App. P. 10(b)(1)

[4] Petitioner next contends the Superior Court erred in determining the Board did not violate its own rules which required that the planning department's staff report on petitioner's case be mailed to petitioner 10 days prior to hearing. Petitioner did not receive a complete copy of the staff report until after business hours on 7 December

1998, 2 days before the hearing. Based on this fact, counsel requested that the hearing be continued until 18 December. This request, which was made at the hearing after petitioner's motion to suppress had been argued at length, was denied.

Having thoroughly reviewed the record on this issue, we determine petitioner was in no way prejudiced in its preparation for the hearing by its late receipt of the staff report. The staff report contained copies of the original Notice of Violation, petitioner's appeal, the petitioner's building permit and floor plan submitted with that permit, petitioner's sign permit, the definition of adult establishment from Durham's ordinance and the North Carolina statutes, and a summary of the Court of Appeals' holding in *South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.*, cited above. Everything contained in the staff report was already a matter of public record, and nothing in it could have taken petitioner by surprise.

Counsel for petitioner did argue to the Board that there were certain inaccurate notations on the map of the store included in the staff report, and that if he had received the map earlier, he could have subpoenaed someone to refute them. However, counsel was cryptic regarding which information on the map was misleading, and we see no reason why the manager of Movie Town, who did testify at the hearing, could not have pointed out any inaccuracies in the map. Petitioner has shown no prejudice whatsoever in its late receipt of the staff report; we do not believe it is necessary to remand for a new hearing on this basis.

[5] Petitioner next contends that there was insufficient evidence to support the Board's conclusion that petitioner was operating an adult bookstore and adult mini-motion-picture theater, and that the Board's decision to this effect was arbitrary and capricious. The Superior Court had a duty to insure that the decision of the Board was "supported by competent, material and substantial evidence in the whole record," and that its decision was not arbitrary and capricious. *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 128 N.C. App. 703, 706-07, 496 S.E.2d 825, 827, *appeal dismissed and disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998). This Court must conduct a similar review. *Id.* at 707, 496 S.E.2d at 827.

After a thorough consideration of the record before the Board, we determine that its findings of fact and conclusions of law to the effect that petitioner was operating an adult bookstore and adult mini-motion-picture theater, as those businesses are defined in N.C.G.S.

§ 14-202.10(1) & (6), are supported by competent, material, and substantial evidence in the whole record. We will, however, address a number of specific concerns set forth by petitioner.

Petitioner strenuously objects to the Board's finding of fact that: "Whether a group of publications, including both written publications and videos, emphasize specified sexual activities or specified anatomical areas as defined by statute can be reasonably determined by looking at the titles and pictures on the covers of such publications." Petitioner insists that whether a certain publication or motion picture is "adult" may be determined only by reading or viewing the entire publication or movie. This assertion is based on the United States Supreme Court's holding that in judging whether material may be considered "obscene," the trier of fact must determine, in part, "whether the work, *taken as a whole*, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 431 (1973) (emphasis added); *see also State v. Watson*, 88 N.C. App. 624, 364 S.E.2d 683, *appeal dismissed and disc. review denied*, 322 N.C. 485, 370 S.E.2d 235 (1988) (discussing similar requirements under North Carolina's obscenity statute, found at N.C.G.S. § 14-190.1).

Miller, however, deals with the enforcement of criminal obscenity statutes. In the case before us, there was no determination that Movie Town was violating criminal obscenity laws by selling or renting particular magazines or videos. The Board was merely enforcing zoning requirements relating to adult establishments. There was no requirement that the Board consider, for example, the artistic value of Movie Town's merchandise. The Board was instead called upon to determine whether the books, magazines, and videos sold and the motion pictures presented by Movie Town were "distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas." *See* G.S. § 14-202.10(1) & (6). We agree that such a determination may reasonably be made in the context of zoning enforcement by examination of the covers and titles of written publications and videos.

Petitioner would argue that even if a magazine cover contains pictures of entirely nude women, and thus displays "specified anatomical areas," *see* G.S. 14-202.10(10), zoning enforcement officers should have to read the entire magazine to determine that the content of the magazine "as a whole" is indeed more of the same. Such a standard would make zoning laws regarding adult establishments unenforce-

able. Movie Town houses thousands of books, magazines, and videos; it would take months to read and view in its entirety all of the material the store sells.

Furthermore, we believe the publishers of adult videos and magazines make a distinct effort to impart to persons viewing their titles and covers that the content of the material is characterized by an emphasis on pictures of unclothed breasts, buttocks, or genitalia and/or displays of sexual acts. The magazine covers filmed by the zoning enforcement officers in this case showed titles such as *Bump & Grind*, *Wicked Fetishes*, *Panty Girls*, and *Open Legs & Lace*, and all displayed women and men in various states of undress in sexually inviting poses. The video boxes filmed by the officers exhibited photographs of people having sexual intercourse, with advertisements such as "Real People Having Real Sex!" and "Explicit Anal Sex." In conclusion, in the context of zoning enforcement, we believe it is reasonable to rely upon an analysis of the pictures and titles on the covers of magazines, videos, and other publications to decide whether such works emphasize the anatomical parts and sexual activities specified in G.S. § 14-202.10(10) & (11).

[6] Petitioner also objects to the Board's findings that the non-adult material carried by Movie Town was of less weight and importance compared to the adult material in part because the non-adult stock was generally older and less expensively priced. We believe age and price of the stock were factors the Board could properly consider in determining the relative importance of the adult and non-adult materials to Movie Town's business.

[7] Finally, petitioner objects to the Board's finding that the store "contains a display area for sexually oriented devices, including but not limited to vibrators and dildos, which helps give an adult context to the display of the adult publications in the area." Petitioner correctly asserts that the sale of sexually oriented devices is not included in G.S. § 14-202.10 as a consideration for determining whether an establishment is "adult." However, we do not believe it was reversible error for the Board to make an incidental finding regarding the presence of sexually oriented devices on the property.

[8] Petitioner next argues the Superior Court improperly refused petitioner's request to amend its judgment to reflect the judge's understanding of which version of G.S. § 14-202.10 the Board used in deciding the case. Durham's zoning ordinance explicitly adopts the

definitions of adult establishment, adult bookstore, and adult mini-motion-picture theater set forth in G.S. § 14-202.10 as its own. In 1998, after Durham adopted the definitions as set forth in G.S. § 14-202.10, the definition of "adult bookstore" in G.S. § 14-202.10(1) was amended to define an adult bookstore as one:

> Having as a preponderance *(either in terms of the weight and importance of the material or in terms of greater volume of materials)* of its publications . . . which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(language added by amendment in italics). Petitioner claims the definition of "preponderance" was thus substantively changed by the amendment to the state statute. Petitioner contends the definition of "adult bookstore" in Durham's ordinance did not similarly change, given that the amendment to G.S. § 14-202.10 was not ever expressly adopted by the City Council. Therefore, if the Board applied the amended version of G.S. § 14-202.10 to petitioner, the Board committed an error of law.

The Board's decision concludes that Movie Town "meets the statutory definition of an adult bookstore whether the pre-1998 definition as clarified through case law is used or the definition as amended in 1998 is used." The Superior Court, in reviewing the Board's decision, found that "the Board's application of the term 'preponderance' as it exists in City ordinance through incorporation of state statute into such ordinance was consistent with that state statute, as interpreted by case law."

Petitioner made a motion to amend the judgment pursuant to N.C. R. Civ. P. 52(b), requesting that the Superior Court clarify its understanding of whether the Board used the pre- or post-amendment definition of G.S. § 14-202.10 in making its decision. This motion was denied, and petitioner contends to this Court that the Superior Court erred in failing to explain its decision.

Petitioner's argument is without merit. *Fantasy World*, 128 N.C. App. at 710, 496 S.E.2d at 829, filed on 3 March 1998, interpreted the word "preponderance" in G.S. § 14-202.10(6) to mean "superiority in weight." *South Blvd. Video*, 129 N.C. App. at 288, 498 S.E.2d at 627, filed 21 April 1998, also recognized that the term "preponderance" as

used in G.S. § 14-202.10(1) & (6) denotes a superiority in weight "which is a qualitative measurement." Thus, the General Assembly's amendment of G.S. § 14-202.10, effective 15 July 1998, merely codified the Court of Appeals' explanations of what the word "preponderance" had meant in the statute since its adoption. As such, the amendment was not a substantive change in the law. Therefore, it is irrelevant whether the Board interpreted Durham's ordinance as incorporating G.S. § 14-202.10 either before or after the statute's amendment. The Superior Court did not err in refusing to clarify which version of the statute it believed the Board used in making its decision.

[9] Petitioner furthermore argues that the Superior Court erred in concluding that Durham's adult establishment ordinance is not unconstitutionally vague or overbroad, both facially and as applied to this case. Petitioner concedes that this Court addressed and confirmed the facial validity of the term "preponderance" used in G.S. § 14-202.10 in *Fantasy World*, 128 N.C. App. at 708, 496 S.E.2d at 828, and *South Blvd. Video*, 129 N.C. App. at 287, 498 S.E.2d at 627. Petitioner does not point out any other portion of the statute it contends is vague or overbroad. It merely repeats its argument that the Board applied the ordinance in an arbitrary manner when it judged whether Movie Town was an adult establishment by viewing the covers of books and videos displayed in the store. This argument has been addressed above and found to be without merit.

Petitioner's final assertion is that the Superior Court erred in affirming the Board's decision in its entirety. As petitioner's previous arguments, set forth in support of this assignment of error, have failed, this assignment of error fails as well.

In conclusion, the Superior Court properly upheld the decision of the Board that petitioner was operating an adult establishment in violation of Durham's zoning ordinance.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. KUNTA KENTA REDD

No. COA00-268

(Filed 19 June 2001)

1. Evidence— videotape—undercover cocaine buys

The trial court did not err in a prosecution for trafficking in cocaine, possession of cocaine with intent to sell and deliver, and selling cocaine by admitting into evidence the State's videotape which recorded undercover buys of cocaine, because: (1) a proper foundation was laid to authenticate the videotape; and (2) even if the trial court erred in failing to conduct a voir dire, such error was not prejudicial when the evidence portrayed on the videotape was merely cumulative and served to corroborate the testimony of three officers as well as the physical evidence gathered from each undercover buy.

2. Discovery— marked money—undercover cocaine buys

The trial court did not abuse its discretion in a prosecution for trafficking in cocaine, possession of cocaine with intent to sell and deliver, and selling cocaine by denying defendant's request to exclude the marked money seized from defendant although defendant requested disclosure of the evidence but was not informed of the State's intent to offer it into evidence until the day before trial, because: (1) defendant did not request additional time to examine the money; (2) defendant had an opportunity to inspect the money but chose not to do so; and (3) defendant was not prejudiced.

3. Witnesses— qualifications—volunteer deputy testifying as law enforcement officer

The trial court did not err in a prosecution for trafficking in cocaine, possession of cocaine with intent to sell and deliver, and selling cocaine by denying defendant's motion for a new trial based on a volunteer deputy testifying as a law enforcement officer, because: (1) defendant failed to object to the deputy's qualifications as a witness at trial and has not shown that the deputy lacks any requirements set forth by the Rules of Evidence for a witness; and (2) the deputy had personal knowledge since he was an eyewitness to the undercover buys, making him competent to testify as a lay witness regardless of his qualifications as a law enforcement officer.

4. Drugs— sale of cocaine—sufficiency of indictment

Even though defendant contends the indictment for 98 CRS 1697 states that defendant sold cocaine to one undercover officer while the evidence at trial indicated that another undercover officer negotiated for the purchase and later handed the bag of cocaine over to the undercover officer named in the indictment, the indictment pertaining to this sale is not subject to dismissal because the record supports that both undercover officers were involved in the buy.

5. Drugs— possession of cocaine—sufficiency of indictment

Although defendant contends the indictment for 98 CRS 1701 and 98 CRS 1703 charged that defendant possessed different amounts of cocaine from that established by the State's evidence at trial, the trial court properly denied dismissal of these charges because the amount charged and amounts testified to weigh 28 grams or more of cocaine as required by N.C.G.S. § 90-95(h)(3).

6. Drugs— trafficking in cocaine—jury instruction—amount of cocaine—no plain error

The trial court did not commit plain error by instructing the jury on the charge of trafficking in cocaine under N.C.G.S. § 90-95(h)(3)(a) that the amount of cocaine defendant knowingly possessed had to be more than 28 but less than 200 grams of cocaine in order for defendant to be found guilty, rather than the proper instruction of 28 grams or more of cocaine, because: (1) the State pointed out this error and the trial court corrected the instruction; and (2) defendant was not prejudiced in light of the trial court's prompt instructions which corrected the error.

Appeal by defendant from judgments entered 30 July 1999 by Judge Ernest B. Fullwood in Pender County Superior Court. Heard in the Court of Appeals 21 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Mark J. Pletzke, for the State.

Hosford & Hosford, P.L.L.C., by Geoffrey W. Hosford, for defendant-appellant.

WALKER, Judge.

On 30 July 1999, defendant was convicted of two counts of trafficking in cocaine by sale, two counts of trafficking in cocaine by

possession, three counts of possessing cocaine with intent to sell and deliver and three counts of selling cocaine. These convictions were consolidated for judgment and defendant received two consecutive sentences of a minimum of 35 months and a maximum of 42 months.

The State's evidence tends to show the following: Around the beginning of November 1997, the Pender County Sheriff's Department (sheriff's department) and the State Bureau of Investigation (SBI) began a narcotics investigation which involved "undercover buys" of cocaine by Deputy John Dixon (Dixon) of the sheriff's department and Agent Steven Zolastowski (Zolastowski) of the SBI. The investigation was supervised by Deputy Billy Sanders (Sanders) of the sheriff's department. During each undercover buy, Dixon and Zolastowski wore plain clothes, traveled in an undercover vehicle and posed as drug buyers. In addition, Dixon was wired with devices underneath his clothing to enable Sanders, who remained in a surveillance vehicle near each transaction, to listen to and make audio and video recordings of each transaction.

In the early evening hours of 30 January 1998, Dixon, Zolastowski and an informant met defendant at a garage in the Union Bethel Church Road area to conduct a sale of cocaine that had been prearranged a few days earlier. After negotiating a price with Zolastowski and Dixon for the cocaine, defendant delivered it to Dixon and Zolastowski paid defendant.

Dixon also made additional undercover buys of cocaine from defendant in February, March, and on two occasions in April of 1998. At this last buy on 4 April 1998, before Dixon left the garage, the members of the sheriff's department surrounded the garage and searched several people, including defendant. The money found in defendant's pockets matched money marked by the sheriff's department which Dixon had given to defendant in exchange for cocaine the previous day.

At the close of the State's evidence, defendant filed a motion for nonsuit for all charges, which the trial court allowed as to two counts of conspiring to traffic in cocaine, two counts of trafficking in cocaine by manufacture, one count of possessing with intent to sell or deliver cocaine, one count of selling cocaine, one count of delivering cocaine, and four counts of maintaining a place to keep a controlled substance. Defendant did not offer any evidence and the jury returned guilty verdicts in the remaining charges.

[1] Defendant's first assignment of error concerns the admission into evidence of the State's videotape which recorded the undercover buys. Defendant contends the trial court committed reversible error by admitting the videotape into evidence for the following reasons: (1) it was not properly authenticated; (2) the trial court denied defendant's request for a *voir dire* regarding its foundation; (3) it contained inadmissible statements by third parties; and (4) its probative value was substantially outweighed by its prejudicial effect.

In support of his contention that the videotape was not properly authenticated, defendant cites *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971) (superseded by Rule 901 of our Rules of evidence enacted in 1983, as stated in *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991)) and argues the trial court should have used its test for authentication. We note that *Lynch*, which was decided prior to the adoption of the North Carolina Rules of Evidence, did not involve the admission of a videotape but set forth a seven-pronged test "[t]o lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement . . . ." *Id.* at 17, 181 S.E.2d at 571 (citations omitted). In addition, our Supreme Court has "conclude[d] that the authentication requirements of Rule 901 [of our Rules of Evidence] have superseded and replaced the seven-pronged *Lynch* test." *Stager*, 329 N.C. at 317, 406 S.E.2d at 898 (citation omitted). In *Stager*, it was held "[u]nder Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence." *Id.*, *citing* 2 *Brandis on North Carolina Evidence* § 195, at 132 (3d ed. 1988).

In addressing the admissibility of a videotape, this Court has established the following four-pronged test:

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or video tape [sic] fairly and accurately illustrates the events filmed (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . ."; (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4) "*testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed.'* "

State v. Mewborn, 131 N.C. App. 495, 498, 507 S.E.2d 906, 909 (1998), *citing State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608 (1988), *reversed on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). This test is consistent with Rule 901 of our Rules of Evidence, which provides in pertinent part "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.R. Evid. 901(a) (1999).

Notwithstanding that Rule 901 has superseded *Lynch's* seven-pronged test for authenticity of a tape recording, our Supreme Court has held "*Lynch* clearly continues to govern the issue of deleting improper material from a tape before it is played to a jury." *State v. Gibson*, 333 N.C. 29, 41, 424 S.E.2d 95, 102 (1992) (citations omitted) (holding the substance of tape was admissible despite trial court's error in not conducting a *voir dire*), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). Therefore, under *Lynch*, the trial court must "conduct a *voir dire*, rule on all questions of admissibility and order the tape to be edited or redacted as necessary." *Id.* This is necessary "to keep out irrelevant, prejudicial or otherwise inadmissible material." *Id.* Once admitted by the trial court, videotapes may be used "for both substantive and illustrative purposes." *Cannon*, 92 N.C. App. at 254, 374 S.E.2d at 608, *citing* N.C. Gen. Stat. § 8-97.

Here, the State sought to establish authentication of the videotape and a foundation for its admissibility through the following evidence: (1) Dixon pretested the video camera he operated to ensure it would work properly during each undercover buy; (2) because the same eight millimeter videotapes were used to record all undercover buys in the area, including undercover buys not involving defendant, Dixon removed each videotape from the camera immediately after each undercover buy and gave it to Sanders; (3) Sanders then copied each undercover buy involving defendant onto one of two marked VHS videotapes; (4) the videotapes were then consolidated into a third videotape which was admitted at trial, and which did not contain inactive segments characterized as "dead time;" (5) other than recording the eight millimeter videotapes onto a VHS videotape, the video recordings were not altered in any way; (6) all videotapes were kept in a locked file cabinet which was under the control of Sanders; (7) the videotape presented at trial accurately depicted the scenes where buys from defendant occurred; and (8) the videotape would assist Dixon and Sanders in explaining their testimonies to the jury.

In response to defendant's objection to the videotape being admitted at trial on the basis that it is not the original, but "a dub of a dub of a dub[,]" the trial court concluded as follows:

> . . . I think that a copy of the dubbing is all right, provided that it does not alter what was originally depicted in reference to this matter and provided that the original is available so that if the defendant wishes to offer the original, he can. But if the subject matter is not altered in any way, then I think that the copy can be offered . . . .

We agree the trial court determined a proper foundation was laid to authenticate the videotape. Even if the trial court erred in failing to conduct a *voir dire*, such error was not prejudicial, as the evidence portrayed on the videotape was merely cumulative and served to corroborate the testimonies of Dixon, Sanders and Zolastowski, as well as the physical evidence gathered from each of the undercover buys. This assignment of error is therefore overruled.

[2] In his next assignment of error, defendant contends that because he had no notice of the State's intention to present the marked money seized from him as evidence, the trial court abused its discretion in denying his request to exclude it. Although defendant contends he requested disclosure of such evidence on 28 April 1998, he was not informed of the State's intention to offer marked money into evidence until the day before the trial in July 1999.

The disclosure of evidence by the State is governed by N.C. Gen. Stat. § 15A-903 (1999) which provides in pertinent part:

> (d) Documents and Tangible Objects.—Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and *which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.*

(emphasis added). In addition, our Supreme Court has held:

> When a party fails to comply with [a discovery] order, the trial court may grant a continuance or a recess, prohibit the violating

> party from introducing the non-disclosed evidence, or enter any other appropriate order. Because the trial court is not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, is within the trial court's discretion[,] including whether to admit or exclude evidence not disclosed in accordance with a discovery order.

State v. Weeks, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988) (citations omitted).

In *State v. Drewyore*, 95 N.C. App. 283, 382 S.E.2d 825 (1989), defendant argued "the trial court erred in denying [her] motion to strike and overruling [her] objections to the admission of evidence which consisted of photographs of the area in which defendant had been seen driving . . . [since] the State did not make these photographs available to [her] before trial, even though [she]" had requested them. *Id.* at 289, 382 S.E.2d at 828-29. This Court found the trial court did not abuse its discretion regarding its admission of the photographs because they "were made available to defendant before they were introduced into evidence, defendant did not request that the court allow her additional time to examine these photographs after she had obtained access to them, and defendant has not alleged that the prosecuting attorney acted in bad faith." *Id.* at 290, 382 S.E.2d at 829.

Similarly in the instant case, although the marked money was made available to defendant shortly before trial, defendant did not request additional time to examine it. The trial court found that upon being made aware of the marked money, defendant had an opportunity to inspect it but chose not to do so. Defense counsel stated, "I am not contending that there was any lack of good faith" on the part of the State. When the trial court asked defense counsel what prejudice defendant would suffer from the admission of the marked money, he answered "it could be extremely detrimental to my client's case[,]" referring to the parties' one and one-half years of preparation before trial. In denying defendant's motion to exclude the evidence, the trial court stated:

> It's still clear to me that, while [the marked money] was made available, it wasn't made available in a timely manner; however, it has been made available before, at least the day before, the jury has been impaneled, and the Court finds that the defendant has not suffered any specific prejudice as a result of any delay in

notice of this item and, as a result, the Court is going to deny the motion.

We agree with the trial court that defendant was not prejudiced by the admission of the marked money into evidence.

[3] We next address defendant's contention that a new trial is warranted by the trial court's error in allowing Dixon, a volunteer deputy, to testify as a law enforcement officer. In support of his contention, defendant asserts although Dixon had not yet completed training to qualify as a certified law enforcement officer at the time of the undercover buys, he was allowed to testify as a sworn, certified officer. Defendant further asserts he was thereby prejudiced because this testimony unfairly lent credibility to Dixon by creating a false impression to the jury about his qualifications and experience during the undercover buys.

We first note the competency of a witness to testify is a matter which rests in the sound discretion of the trial court in light of its observation of the particular witness. *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987). In addition, Rule 601 establishes a minimum standard for competency of a witness as to his capacity to understand and relate, under the obligations of an oath, facts which will assist the jury in determining the truth. N.C.R. Evid. 601 (1999); *Hicks*, 319 N.C. 84, 352 S.E.2d 424. Rule 602 further requires that a witness have personal knowledge of the matter to which he testifies. N.C.R. Evid. 602 (1999); *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986) (holding that personal knowledge of a witness was established by her testimony that she heard defendant make the statements in question and had the ability to hear him make the statements).

Defendant failed to object to Dixon's qualifications as a witness at trial and has not shown that Dixon lacks any requirements set forth by our Rules of Evidence for a witness. As an eyewitness to the undercover buys, Dixon had personal knowledge. He was therefore competent to testify regarding the undercover buys as a lay witness, regardless of his qualifications as a law enforcement officer.

Defendant's remaining assignments of error, pertaining to his indictments, consist of the following: (1) the trial court erred by denying his motion for nonsuit as to the charges in 98 CRS 1697, 98 CRS 1701 and 98 CRS 1703 because the State's evidence varies fatally from the indictments; (2) the trial court erred in denying his motion to dismiss the charges in 98 CRS 1701 and 98 CRS 1703 because the State

failed to charge a crime; and (3) the trial court committed plain error by re-instructing the jury on charges not in the indictments as well as on theories not alleged in the indictments.

At the outset, we note the standard of review for a motion for nonsuit or to dismiss charges against a criminal defendant is "whether there is substantial evidence of each essential element of the offense charged (or of a lesser offense included therein), and of the defendant being the one who committed the crime." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984) (citations omitted). "*Substantial* evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). Furthermore,

> the evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980), *citing State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975).

In this State, an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered the controlled substance, if that person is known. *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534 (1974) (citation omitted). "[W]here the bill of indictment alleges a sale to one person and the proof tends to show only a sale to a different person, the variance is fatal." *Id.* This is because the State's proof must conform to the specific allegations contained in the indictment, or it is insufficient to convict defendant of the crime charged, thus warranting a motion to dismiss. *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894, *cert. denied*, 444 U.S. 874, 62 L. Ed. 2d 102 (1979) (citations omitted).

[4] Defendant first contends the indictment for 98 CRS 1697 states that defendant sold cocaine to Dixon, while the evidence at trial indicated that Zolastowski negotiated for the purchase and later handed the bag of cocaine over to Dixon. The State asserts and the record

supports that both Dixon and Zolastowski were involved in the buy, such that the naming of Dixon is sufficient. The indictment pertaining to this sale is therefore not subject to dismissal on this basis.

[5] Second, defendant contends that the indictment for 98 CRS 1701 and 98 CRS 1703 charged that defendant possessed different amounts of cocaine from that established by the State's evidence at trial. However, in both cases, the amount charged and amounts testified to weigh "28 grams or more of cocaine" pursuant to N.C. Gen. Stat. § 90-95(h)(3) (1999). Dismissal of these charges was therefore properly denied.

[6] We now address whether the trial court erred in instructing the jury on charges not contained within the bills of indictment. The record reveals that when the trial court first instructed the jury on whether defendant was guilty of trafficking in cocaine under N.C. Gen. Stat. § 90-95(h)(3)(a), it erroneously stated the amount of cocaine defendant knowingly possessed had to be "more than 28 but less than 200 grams of cocaine" in order for defendant to be found guilty, rather than "28 grams or more of cocaine." The State pointed out this error and the trial court corrected the instruction.

We note that defendant failed to object to the trial court's corrected jury instructions but now contends on appeal the trial court committed plain error resulting in prejudice to him. *See State v. Keys*, 87 N.C. App. 349, 356, 361 S.E.2d 286, 290 (1987) (citation omitted) (holding defendant's failure to object to jury instructions precluded her from raising instructional issue on appeal unless trial court's charge was plain error). After careful review, we conclude defendant was not prejudiced in light of the trial court's prompt instructions which corrected the error.

In sum, defendant received a fair trial free of prejudicial error.

No error.

Judges BIGGS and SMITH concur.

GOVIND CHANDAK AND MADHU CHANDAK, PLAINTIFFS v. ELECTRONIC INTERCONNECT CORPORATION AND GLOBAL CIRCUITS OF NORTH CAROLINA, INC., DEFENDANTS

No. COA00-212

(Filed 19 June 2001)

1. Pleadings— sanctions—frivolous claim—timeliness of Rule 11 motion—three months not unreasonable—Rule 60 motion improper method to seek review

The trial court did not abuse its discretion by denying plaintiffs' N.C.G.S. § 1A-1, Rule 60 motion contesting the issuance of sanctions under N.C.G.S. § 1A-1, Rule 11 and N.C.G.S. § 6-21.5 against plaintiffs for filing a frivolous action even though defendants waited three months after the hearing to file its claim for sanctions, because: (1) the three months delay after the hearing was not unreasonable; and (2) a Rule 60 motion is an inappropriate method to seek review of questions of law, fact, or procedure, and the proper method is to appeal from the original order.

2. Pleadings— sanctions—frivolous claim—jurisdiction of district court to hear post-judgment Rule 11 motion

The district court had jurisdiction to consider defendants' motion for sanctions under N.C.G.S. § 1A-1, Rule 11 and N.C.G.S. § 6-21.5 against plaintiffs for filing a frivolous action for a hazardous waste claim after a magistrate dismissed the underlying action for summary ejectment and the judgment is not void under N.C.G.S. § 1A-1, Rule 60(b)(4), because: (1) the district court has original jurisdiction of the action in order for it to be assigned to a magistrate for trial, N.C.G.S. § 7A-211; (2) any judgment rendered by the magistrate is a judgment of the district court and is appealable to the district court for a de novo trial, N.C.G.S. §§ 7A-224 and 7A-228; and (3) the district court regains authority to act in the case once a magistrate enters judgment.

3. Pleadings— sanctions—frivolous claim—Rule 60 motion

The trial court did not abuse its discretion by denying plaintiffs' motion under N.C.G.S. § 1A-1, Rules 60(b)(1), (2), (3), and (6) contesting the issuance of sanctions under N.C.G.S. § 1A-1, Rule 11 and N.C.G.S. § 6-21.5 against plaintiffs for filing a frivolous action, because: (1) there was no showing of any mistake, inadvertence, surprise or excusable neglect; (2) there was no showing of newly discovered evidence; (3) plaintiffs' allegations

of improper conduct revolve around their attorney instead of fraud, misrepresentation, or other misconduct of an adverse party; and (4) plaintiffs, rather than their counsel, were the source of the facts surrounding the complaint and directed that the action continue despite the possibility of sanctions.

Appeal by plaintiffs from order entered 30 November 1999 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 5 March 2001.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellants.

Ellis & Winters, LLP, by Paul K. Sun, Jr., for defendant-appellees.

EAGLES, Chief Judge.

This case presents questions of a district court judge's authority to issue sanctions after a magistrate has dismissed the underlying action.

This appeal began as a claim by plaintiffs Govind and Madhu Chandak against the defendants Electronic Interconnect Corporation and Global Circuits of North Carolina, Inc. for summary ejectment. Plaintiff-lessors, filed the action against the defendants claiming that the defendant-lessees had failed to pay back rent and breached their lease by failing to clean up a chemical spill. One week after filing the complaint, Mr. Chandak sent his counsel Thurston Debnam a note stating that he had received an envelope appearing to contain a rent check. Chandak's note also stated "[l]egally—I would want them to vacate the place. I am willing to let them stay with some modification in the Lease Agreement. The other objective is of course to prohibit them from making any other claims against me."

Defendants responded to the summary ejectment claim by tendering the full amount of rent plus court costs. Defendants took this action despite their belief that they had paid the current rent. Accompanying the check, defendants' counsel sent a letter that warned that plaintiffs had no basis for their claim and threatened to pursue sanctions. Although Debnam testified he told Chandak that tender foreclosed summary ejectment, Chandak still wanted to proceed with the claim. In his deposition for the abuse of process action, Debnam admitted that he never told Chandak that he had a frivolous

claim and testified that he believed that he could proceed under the hazardous waste claim. While Debnam testified he was concerned about sanctions, Chandak showed no worry. Debnam testified that Chandak told him, "[o]h, so the worst thing that could happen to me is I'd have to pay five, six hundred dollars in attorneys fees."

Just prior to the hearing on 16 March 1998, Debnam sent a letter to the defendants stating that despite the tender of rent, plaintiffs would continue the case to seek a "comprehensive resolution" between the parties. In the 16 March 1998 letter, Debnam included a list of proposed changes for the lease. After reviewing the letter, Chandak wrote Debnam that, "I hope we have clarified that we will not accept the $10039.00 rent money and rather have the ejection unless we can work out rent modifications." Despite a second warning from the defendants of the possibility of sanctions, plaintiffs continued with their case. After a hearing, a magistrate dismissed the action and taxed costs to the plaintiffs on 30 March 1998. Neither party appealed from this judgment.

On 30 June 1998, defendants filed a motion for sanctions against the plaintiffs and plaintiffs' counsel Thurston Debnam under Rule 11 of the North Carolina Rules of Civil Procedure and G.S. § 6-21.5 (1999). This motion was heard by a district court judge. On 12 August 1998, the district court ordered the plaintiffs but not plaintiffs' counsel to pay the defendants $2465.00 in attorneys' fees. In its order, the district court concluded that the parties' lease contained no provision that would allow forfeiture; that plaintiffs' counsel at the time advised the plaintiffs of the propriety of continuing; that the plaintiffs' complaint was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the plaintiffs brought this claim and continued this claim for an improper purpose. Debnam sent a copy of the order to Mr. Chandak and asked that Chandak call if he had any questions. The two met about two weeks later. During this meeting, Chandak requested that Debnam pay all or part of the sanctions. According to Debnam's testimony, Chandak was only interested in "having someone to pay the money for him." The plaintiffs failed to appeal from this order.

On 14 January 1999, defendants filed a civil action against plaintiffs seeking damages pursuant to several claims including abuse of process. In discovery for the abuse of process action, defendants deposed Mr. Debnam. On 11 June 1999, after deposing Debnam, plaintiffs filed a motion to set aside or amend the sanctions order pur-

suant to Rule 60(b) of the Rules of Civil Procedure. The district court denied this motion. In its order, the court made the following relevant conclusions of law:

> 1. This Court had jurisdiction over the parties and the subject matter in connection with the defendants' motion for sanctions. The Court had authority to enter the sanctions order. Plaintiffs were not prejudiced by the District Court's adjudication of the sanctions motion
>
> . . . .
>
> 3. Plaintiffs' contention that defendants' motion for sanctions was untimely is an assertion of legal error and may not be considered as a ground for relief from judgment under Rule 60.
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> . . . .
>
> 5. Under North Carolina law, a lessor may summarily eject the lessee for breach of a lease condition only if the lease specifically provides that some act or omission will terminate the lease or entitle the lessor to reentry.
>
> . . . .
>
> 15. Plaintiffs have not shown mistake, inadvertence, surprise, or excusable neglect that would support relief from judgment under Rule 60(b)(1).
>
> 16. Plaintiffs did not exercise due diligence in raising the facts and in arguing the legal grounds they claim support this motion. Plaintiffs have not shown newly discovered evidence that would support relief from judgment under Rule 60(b)(2).
>
> 17. Plaintiffs have not shown fraud, misrepresentation, or other misconduct by defendants as would support relief from judgment under Rule 60(b)(3).
>
> 18. Plaintiffs have not shown that the sanctions order is void as necessary to support relief from judgment under Rule 60(b)(4).
>
> 19. Plaintiffs have not shown any other reason justifying relief from the operation of the sanctions order, as required for relief from the judgment under Rule 60(b)(6). Plaintiffs had a full opportunity to present their defense to defendants' sanctions motion. There are no extraordinary circumstances that would justify relief from judgment. The equities do not support relief from

judgment based on the actions of plaintiffs. The interests of justice do not support relief from the sanctions order.

20. In order to obtain relief from judgment under Rule 60(b)(1) or Rule 60(b)(6), plaintiffs must show a meritorious defense.

21. Plaintiffs have not shown a meritorious defense to the imposition of sanctions against them.

The trial court also concluded that the plaintiffs' summary ejectment action was taken for an improper purpose and was not well grounded in law or fact. Plaintiffs appeal from the trial court's denial of their Rule 60 motion.

At the outset, we note that our Courts have described Rule 60(b) as "a grand reservoir of equitable power to do justice in a particular case." *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998). The decision whether to grant relief under Rule 60(b) rests firmly within the trial court's discretion and absent an abuse of that discretion, we will not disturb its judgment. *Id.* Further, it is well established in our State's jurisprudence that erroneous judgments are correctable only on appeal. *Burton v. Blanton*, 107 N.C. App. 615, 617, 421 S.E.2d 381, 383 (1992) (citations omitted). A party may never substitute a Rule 60(b) motion for an appeal. *Id.*

In their first argument, plaintiffs contend that the trial court erred in denying their Rule 60(b) motion because the sanctions order was void as a matter of law. Under G.S. § 1A-1, Rule 60(b)(4), a trial court may relieve a party from a judgment that is void. In the context of Rule 60(b)(4) a judgment is void "only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Burton*, 107 N.C. App. at 616, 421 S.E.2d at 382; *see Hoolapa v. Hoolapa*, 105 N.C. App. 230, 232, 412 S.E.2d 112, 114 (1992). Here, the plaintiffs argue that the trial court lacked jurisdiction over the sanctions motion because (1) the defendants failed to file their Rule 11 motion in a timely fashion and (2) the defendants improperly filed their motion with the district court judge rather than with the magistrate who heard the case.

[1] As to the first contention, plaintiffs argue that the defendants impermissibly waited more than three months after the hearing to file their claim for sanctions. This Court has held that a party should make a Rule 11 motion within a reasonable time after he discovers an impropriety. *Griffin v. Sweet*, 136 N.C. App. 762, 765, 525 S.E.2d 504,

506 (2000) (citation omitted). We are not persuaded that three months is an unreasonable delay, on this record. However, the questions raised by the plaintiffs on their Rule 60 motion are questions of law. As we have set out, a Rule 60 motion is an inappropriate method to seek review of questions of law, fact or procedure. *Burton*, 107 N.C. App. at 616, 421 S.E.2d at 382; *see Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 391 S.E.2d 211, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). The correct vehicle to challenge those issues is by appeal from the original order. *Id.* Accordingly, we decline to consider the timeliness of defendants' Rule 11 motion.

[2] Plaintiffs also contend that the district court judge had no jurisdiction to consider the defendants' motion for sanctions. According to the plaintiffs, the magistrate's court was the only forum where the defendants could bring their motion. Defendants counter this argument by contending that the magistrate has no authority to impose sanctions. Without deciding whether a magistrate has authority to render sanctions under Rule 11, we hold that the district court had jurisdiction to do so in this case.

The issue presented on appeal is whether a district court judge has the authority to hear a post-judgment Rule 11 motion arising out of an action tried by a magistrate. Magistrates have jurisdiction of small claims actions only through the discretion of the judicial district's chief district court judge. G.S. § 7A-211 (1999) states:

> In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending in his district if the defendant is a resident of the county in which the magistrate resides.

Therefore, the district court must have original jurisdiction of the action for it to be assigned to a magistrate for trial. If the chief district judge fails to make an assignment within five days of a request for assignment, the action begins in district court. G.S. § 7A-215 (1999). Once the magistrate receives an assignment, the magistrate conducts the small claims action pursuant to the rules set out in G.S. § 7A-214 (1999) *et seq.* Any judgment rendered by the magistrate is a judgment of the district court and is appealable to the district court for a trial *de novo*. G.S. § 7A-224 (1999); G.S. § 7A-228 (1999).

The statutes create a scheme in which the chief district court judge assigns the case to the magistrate. The magistrate tries the case

and his or her judgment becomes a judgment of the district court. Defendants argue that at that point the district court regains jurisdiction of the action. The only evidence of the General Assembly's intent as to post-judgment motions in small claims actions before a magistrate is found in G.S. § 7A-228 (1999). The relevant text deals with Rule 60 motions. G.S. § 7A-228 states that:

> (a) The chief district court judge may authorize magistrates to hear motions to set aside an order or judgment pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate. The exercise of the authority of the chief district court judge in allowing magistrates to hear Rule 60(b)(1) motions shall not be construed to limit the authority of the district court to hear motions pursuant to Rule 60(b)(1) through (6) of the Rules of Civil Procedure for relief from a judgment or order entered by a magistrate and, if granted, to order a new trial before a magistrate.

This section sets out that after judgment, the chief district court judge may authorize a magistrate to hear a Rule 60 motion. However, this authorization does not strip the district court of the authority to hear Rule 60 motions.

In the absence of any explicit language directly relevant to post-judgment Rule 11 motions after the time for appeal has expired, we apply the same logic found in G.S. § 7A-228 to the facts here. Once a magistrate enters judgment, that judgment becomes a judgment of the district court. G.S. § 7A-224. At that point, the district court judge has regained authority to act in the case. Accordingly, the parties may file a post-judgment Rule 11 motion in the district court in the same fashion that they file a Rule 60 motion. Accordingly, we hold that the district court had jurisdiction over the sanctions motion and that the judgment is not void under Rule 60(b)(4). We note that because it is not before us, we do not decide whether the district court judge may refer to the magistrate a motion for Rule 11 sanctions or whether a district court judge may consider a Rule 11 motion prior to the entry of judgment. We expressly limit our holding to the facts here.

[3] Next, plaintiffs assign error to the trial court's denial of their motion pursuant to G.S. § 1A-1, Rules 60(b)(1),(2),(3) and (6). We hold that the trial court did not abuse its discretion in denying the motion. Rule 60(b)(1) provides relief from a final judgment for "[m]istake, inadvertence, surprise or excusable neglect." The record shows that Chandak appeared at the sanctions hearing with his counsel. Chandak had the opportunity to speak personally to the

judge and through his counsel. In their brief, the plaintiffs fail to identify how their claim falls under Rule 60(b)(1). After a careful review of the record, we conclude that the trial court did not abuse its discretion.

Rule 60(b)(2) provides for relief from judgment based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Here, the only potential source of new evidence raised by the plaintiffs is found in Debnam's deposition. However, a review of that testimony reveals that it does not present any new evidence. The deposition recounts conversations between Chandak and Debnam. Further, the rest of the testimony concerns the sanctions hearing at which Chandak was present. Plaintiffs have shown no new evidence that would require relief under Rule 60(b)(2). *See Lang v. Lang*, 108 N.C. App. 440, 448-49, 424 S.E.2d 190, 194, *disc. review denied*, 333 N.C. 575, 429 S.E.2d 570 (1993).

Rule 60(b)(3) states that relief is available due to "[f]raud . . . misrepresentation, or other misconduct of an adverse party." Here, the allegations of improper conduct revolve around Debnam, not the defendants. Accordingly, plaintiffs fail to meet this rule.

Rule 60(b)(6) states that relief is available for "[a]ny other reason justifying relief from the operation of the judgment."

> The setting aside of a judgment pursuant to G.S. 1A-1, Rule 60(b)(6) should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E.2d 9 (1980). In addition to these requirements, the movant must also show that he has a meritorious defense. *Sides v. Reid*, 35 N.C. App. 235, 241 S.E.2d 110 (1978).
>
> General Statute 1A-1, Rule 60(b)(6) "is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). Our Supreme Court has indicated that this Court cannot substitute "what it consider[s] to be its own better judgment" for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it "probably amounted to a substantial miscarriage of justice."

> *Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982). Further, "[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117, *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991) (citation omitted). Apparently, plaintiffs' argument is that the trial court should have set aside the order due to Debnam's alleged failure to advise the plaintiffs that they should dismiss the summary ejectment action. We disagree.

While Debnam's conduct as counsel may provide the basis for litigation by his client Chandak, we do not believe counsel's alleged failure to advise is dispositive here. The record shows that the plaintiffs were well aware of the risks they were taking. Plaintiffs knew of the possibility of sanctions. Debnam relayed the threats from defendants' counsel as well as his own worries. Chandak showed no concern and even remarked that at most he would have to pay "five or six hundred dollars." Chandak was the source of the facts surrounding the complaint and directed that the action continue despite the possibility of sanctions. Further, throughout the life of the summary ejectment claim, Chandak let his true purpose be known. He constantly sought modifications in the lease. In a 17 March 1998 letter, Chandak made clear that he had no intention of dismissing the ejectment action until he obtained lease modifications. Finally, Chandak attended and participated in the sanctions hearing. Given the evidence of Chandak's involvement and his improper purpose, we conclude that the trial court did not abuse its discretion in denying the plaintiffs' motion.

Finally, the remainder of plaintiffs' arguments challenge the facts surrounding the appropriateness of the entry of sanctions. The appropriate place to make these arguments was on appeal of the sanctions order and not on a Rule 60(b) motion.

Based on the foregoing the decision of the trial court is

Affirmed.

Judges HUNTER and CAMPBELL concur.

STATE OF NORTH CAROLINA v. NELSON VINCENT BIDGOOD

No. COA00-638

(Filed 19 June 2001)

1. Evidence— prior crimes or acts—rape of another victim—identity—common plan or scheme

The trial court did not commit plain error in a first-degree rape case by admitting testimony under N.C.G.S. § 8C-1, Rule 404(b) regarding defendant's alleged rape of a prior victim less than ten months before the victim in this case, because: (1) both rapes occurred around the time the victims were smoking or preparing to smoke crack cocaine; (2) defendant instructed both victims to remove their own clothing; (3) defendant threatened to stab or kill both victims if they did not cooperate; and (4) the trial court limited the jury's consideration of the testimony to the purpose of showing identity and a common plan or scheme.

2. Rape— first-degree—dismissal of charges involving second victim—failure to declare a mistrial ex mero motu not error

The trial court did not abuse its discretion in a first-degree murder case by failing to declare a mistrial ex mero motu under N.C.G.S. § 15A-1063(1) after dismissing the charges involving a second victim which were joined for trial with the charge involving the first victim, because: (1) defendant has not brought forward on appeal any assignment of error relating to the joinder; (2) the jury was not exposed to substantive evidence concerning the events involving the second victim; and (3) the jury was not so prejudiced by the joinder and subsequent dismissal of the charges involving the second victim as to render it impossible for the jury to fairly consider the allegations concerning the first victim.

3. Rape— first-degree—short-form indictment—constitutional

The trial court did not err in a first-degree rape case by failing to dismiss the short-form indictment even though it failed to allege all the essential elements of first-degree rape, because our Supreme Court has already upheld the indictment's constitutionality.

4. Sentencing— prior record level—subsequent reversal of conviction on appeal

Defendant is entitled to be resentenced for his conviction of first-degree rape when the prior record level found by the trial court was based in part upon his conviction for uttering a forged instrument and being an habitual felon that was subsequently overturned on appeal.

Appeal by defendant from judgment entered 12 November 1999 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Christine M. Ryan, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

MARTIN, Judge.

Defendant was charged with the first degree rape of Andrena Denise McClure, the first degree rape of Candy McDonald, first degree sexual offense against Ms. McDonald, and with feloniously breaking or entering Ms. McDonald's home. He entered pleas of not guilty. The State's motion to join the offenses was allowed. At the close of the State's evidence, the trial court dismissed the charges relating to Ms. McDonald. The jury returned a verdict finding defendant guilty of first degree rape in the case involving Ms. McClure. Defendant appeals from the judgment entered upon the verdict.

Briefly summarized, the State's evidence relating to the alleged attack upon Ms. McClure tended to show that Ms. McClure encountered defendant on 4 March 1997 near her home. Defendant asked Ms. McClure if she wanted to get high and she replied that she did. Defendant then followed Ms. McClure to her apartment where they smoked crack cocaine. Later that evening, Dennis Bennett, Ms. McClure's boyfriend, returned home and found defendant in the apartment with her. Bennett became angry and escorted defendant out of the home.

On the morning of 5 March 1997, defendant returned to the apartment; Ms. McClure's son, who was thirteen at the time, answered the door, and defendant asked him if Bennett was in the apartment.

Defendant then asked to see Ms. McClure. When she came to the door, defendant asked if she had a stem, which is drug paraphernalia used in smoking crack cocaine. Ms. McClure told her son to go upstairs, then she and defendant went into the kitchen to smoke defendant's cocaine. While in the kitchen, defendant asked for a knife to cut the drugs. When Ms. McClure turned away to retrieve a glass for water, defendant held the knife to her side and forced her to perform fellatio on him. Defendant, still holding the knife, then instructed Ms. McClure to undress and he had vaginal intercourse with her. Ms. McClure testified that she tried to call to her son for help but defendant said he would stab her if she made noise. Defendant left soon after, but returned five minutes later with crack; Ms. McClure let him in the apartment and they smoked the cocaine. When defendant left about twenty minutes later, Ms. McClure showered and got into bed; she also told her son that defendant had raped her. She testified that she did not call the police because she had been using drugs and feared she might lose custody of her son.

When Bennett came home from work, Ms. McClure told him what had occurred and Bennett advised her to call the police, but she refused. Nevertheless, on 6 March 1997, Bennett approached two officers at a local store and told them about the rape. The officers followed Bennett to Ms. McClure's apartment. Ms. McClure initially told police that defendant had knocked on the door of her apartment and asked for a glass of water; once in the kitchen, defendant grabbed a knife, held it to her neck and raped her. She did not tell them that she had smoked crack with defendant the night before. Ms. McClure gave the clothes she wore on the day of the attack to the Crime Scene Search Technician Tracy Collins. On 26 March 1997, Ms. McClure picked defendant out of a photographic lineup. On 2 February 1998, she went to Carolinas Medical Center and gave hair and blood samples for DNA testing; at this point she admitted to investigators that she had smoked crack with defendant on the day of the alleged rape.

Ms. McClure's son testified that on the day in question he had been smoking marijuana and playing video games. He heard a male voice say, "I should cut you." Thirty or forty minutes later, according to his testimony, he thought he heard someone call for help but thought he was merely "tripping." He also testified that he was "zoned out" from the marijuana. He eventually walked downstairs and saw defendant going to the door; defendant said, "Nothing is going on." After defendant left and Ms. McClure went upstairs, she told her son

she had been raped at knife point. Ms. McClure's son also picked defendant out of a photo lineup.

Elinous Whitlock, a trace evidence analyst with the Charlotte-Mecklenburg Crime Lab, testified that on 11 November 1997 he examined Ms. McClure's clothing and found semen in the crotch of the panties. He then forwarded the specimen to Jane Burton, Chief Criminalist of the Charlotte-Mecklenburg Crime Lab, who sent defendant's blood sample, Ms. McClure's blood sample, and the stain cut off the panties to the State Bureau of Investigation on 25 February 1998. David Freeman, a forensic micro-geneticist for the SBI, testified that DNA samples taken from the stain on the crotch of Ms. McClure's panties matched the DNA of defendant's blood sample and did not match the victim's DNA sample. Freeman testified that it was "scientifically unlikely that the stain originating from the panties would come from anyone else, other than [defendant]."

The State also offered, pursuant to G.S. § 8C-1, Rule 404(b), testimony by Sandra Tate, who testified that on 27 May 1996, she and some friends walked to another friend's apartment to smoke crack cocaine. Defendant was present and asked Ms. Tate to accompany him while he retrieved some money to pay for more crack cocaine; she agreed to do so. At a deserted area, defendant grabbed Ms. Tate, threw her to the ground and told her to remove her clothing. He threatened to kill her if she did not cooperate. After a struggle, Ms. Tate partially disrobed and defendant had vaginal intercourse with her. After completing the act, defendant ran away when a vehicle approached. Ms. Tate later identified defendant from a photographic lineup. The trial court instructed the jury that Ms. Tate's testimony was presented for the "very, very limited" purpose "of showing, if the evidence is believed, that there existed in the mind of the defendant, a plan or a scheme or a system or design involving the crimes that he's charged with—that relates to the crimes he is charged with . . . and also, for that purpose of the identity of the person who committed the crime [sic], if any, that are charged in the cases for which he is on trial."

I.

[1] Defendant first argues the trial court committed plain error by admitting testimony, in violation of Rule 403 and 404(b), regarding defendant's alleged rape of Sandra Tate. Defense counsel made a pretrial motion *in limine* to exclude evidence concerning the alleged

rape, but concedes he did not object to the introduction of the evidence at the time the testimony was offered at trial. It is well established in this State that a motion *in limine* "is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (citations omitted). We thus review for plain error.

Plain error is " '*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 . . . .' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). In order to prevail under a plain error analysis, the defendant must show that "(1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

Evidence of other crimes or acts is inadmissible for the purpose of showing the character of the accused or for showing his propensity to act in conformity with a prior act. N.C. Gen. Stat. § 8C-1, Rule 404(b). Such evidence "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." *Id.* The North Carolina Supreme Court has held that Rule 404(b) is a rule of inclusion. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, —— U.S. 149 L. Ed. 2d 305 (2001). Indeed, North Carolina's appellate courts have been "markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b), such as establishing the defendant's identity as the perpetrator of the crime charged." *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987) (citation omitted). The use of evidence under Rule 404(b) is guided by two constraints: "similarity and temporal proximity." *State v. Barnett*, 141 N.C. App. 378, 389-90, 540 S.E.2d 423, 431 (2000) (citation omitted).

> When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the

> analogy attaches less to the acts than to the character of the actor.

State v. Artis, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

In the present case, testimony was offered by the State under Rule 404(b) regarding defendant's alleged rape of Sandra Tate who was, like the victim, a black female drug user. Ms. Tate testified that she was raped by defendant on 27 May 1996, less than ten months before Ms. McClure was raped on 5 March 1997. Both rapes occurred around the time the victims were smoking or preparing to smoke crack cocaine. In both cases defendant instructed his victims to remove their own clothing. In both cases defendant threatened to stab or kill the victims if they did not cooperate.

Following Ms. Tate's testimony, the trial court instructed the jury that Ms. Tate's testimony was presented for the "very, very limited" purpose "of showing . . . that there existed in the mind of the defendant, a plan or a scheme . . . and also, for that purpose of the identity of the person who committed the crime." Because the rape of Ms. McClure and the alleged rape of Ms. Tate were sufficiently similar and occurred less than ten months apart, we hold Ms. Tate's testimony was admissible under Rule 404(b).

Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403; *State v. Everhardt*, 96 N.C. App. 1, 384 S.E.2d 562 (1989), *affirmed*, 326 N.C. 777, 392 S.E.2d 391 (1990). That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision. *Id.* In light of the similarities noted above, we hold the trial court did not abuse its discretion by admitting Ms. Tate's testimony and limiting the jury's consideration of it for the limited purpose of showing identity and a common plan or scheme.

II.

[2] Defendant next assigns error to the trial court's failure to declare a mistrial *ex mero motu* after dismissing the charges involving Candy McDonald. He contends it was impossible for defendant to receive a fair trial after the jury heard Ms. McDonald's testimony and other evidence relating to the cases in which she was the alleged victim.

Pursuant to G.S. § 15A-1063(1), a judge may declare a mistrial *ex mero motu* if "[i]t is impossible for the trial to proceed in conformity with [the] law." A trial court's "power to declare a mistrial must be 'exercised with caution and only after careful consideration of all available evidence and only after making the requisite findings of fact on the basis of evidence before the Court at the time judicial inquiry is made.' " *State v. Chriscoe*, 87 N.C. App. 404, 408, 360 S.E.2d 812, 814 (1987) (citations omitted). Whether or not to declare a mistrial is a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a gross abuse of such discretion. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

In *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), a deputy sheriff testified that the defendant had been arrested "on another charge" and also that the defendant had been "indicted for murder." The trial court struck this testimony and instructed the jury not to consider it, but denied the defendant's motion for a mistrial. The Supreme Court reversed, holding that defendant should have been granted the mistrial. While acknowledging that "[o]rdinarily where the evidence is withdrawn no error is committed," the Court noted:

> In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the Court has held to the opinion that a subsequent withdrawal did not cure the error.

Id. at 272-73, 154 S.E.2d at 60-61 (citation omitted). The Court determined that the prejudicial effect of the deputy's testimony that Aycoth had previously been under indictment for murder, when considered with other circumstances at the trial, was of such serious prejudice that it could not be cured by the court's instruction.

In the present case, however, the charges against defendant involving allegations of crimes against Candy Lee McDonald were joined for trial with the charge involving the alleged rape of Ms. McClure. Defendant has not brought forward on appeal any assignment of error to the joinder. Ms. McDonald testified that at the time of the alleged incident she was a cocaine addict and that, due to an epileptic condition, she was unable to remember the incident nor could she remember speaking with the investigating officers. Ms. McDonald's testimony was stricken in its entirety because of her inability to recall the incident. The trial court also excluded testimony by the investigating officers with respect to the statements made by

Ms. McDonald and, at the close of the State's evidence, dismissed the charges relating to her. Thus, the jury was exposed to no substantive evidence concerning the events involving Ms. McDonald. Upon dismissing the charges involving Ms. McDonald, the trial court instructed the jury:

> . . . when we began the trial, the trial related to transactions between two alleged victims. One was Candy Lee McDonald. . . .
>
> Those [charges] have been taken away from your consideration. . . .
>
> And I'm specifically instructing you that as it relates to the testimony of Candy McDonald during this trial, that that is STRICKEN; and, that you are not to consider that testimony, at all, in your deliberations. Your deliberations will be solely related to the accusation of crime—the crime of rape committed by the defendant against Andrena Denise McClure.
>
> You are not to include any testimony by Ms. McDonald in making your decision or in your deliberations in any way, shape or form.

We conclude that under the circumstances of this case, defendant was not so prejudiced by the joinder and subsequent dismissal of the charges involving Ms. McDonald as to render it impossible for the jury to fairly consider the allegations concerning Ms. McClure and make a fair determination of defendant's guilt or innocence of that charge without regard to the scant evidence, subsequently withdrawn, concerning Ms. McDonald. Therefore, we hold the trial court's withdrawal of that evidence, dismissal of the McDonald charges, and subsequent instruction to the jury, was sufficient and no abuse of discretion occurred in its failure to declare a mistrial as to the charge of rape of Ms. McClure. This assignment of error is overruled.

III.

[3] Defendant alleges the trial court erred by not dismissing the indictment against him because the "short-form" indictment did not allege all the essential elements of first degree rape, thereby violating his due process rights. The indictment in the present case identified the crime charged as "First Degree Rape G.S. 14-27.2," and stated:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 5th day of March 1997, in Mecklenburg

> County, Nelson Vincent Bidgood did unlawfully, wilfully and feloniously with force and arms engage in vaginal intercourse with Andrena Denise McClure, by force and against the victim's will.

N.C. Gen. Stat. § 15-144.1(a) provides:

> In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

Defendant nevertheless contends the short-form indictment violates his due process rights under the United States and North Carolina Constitutions. This argument has 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), *reh'g denied,* 531 U.S. 1120, 148 L. Ed. 2d 784 (2001), which held in part that the short form indictments for first degree rape authorized by G.S. § 15-144.1 "have been held to comport with the requirements of the North Carolina and United States Constitutions." *Id.* at 505, 528 S.E.2d at 342 (citations omitted).

IV.

[4] Finally, defendant next alleges he is entitled to be re-sentenced because the Prior Record Level found by the trial court was based in part upon a conviction which was subsequently overturned on appeal. The trial court determined that defendant's Prior Record Level for sentencing purposes was Level V, based in part upon a conviction for uttering a forged instrument and being an habitual felon. However, subsequent to defendant's sentencing in the instant case, his conviction for uttering a forged instrument was reversed on appeal. *State v. Bidgood,* No. COA99-134, (unpublished opinion filed 21 December 1999). The reversal of this conviction would result in a Prior Record Level of IV.

G.S. § 15A-1340.11(7) provides, in pertinent part:

> A person has a prior conviction when, *on the date a criminal judgment is entered*, the person being sentenced has been previously convicted of a crime:
>
> . . .
>
> b. In the superior court, *regardless of whether the conviction is on appeal to the appellate division*;

N.C. Gen. Stat. § 15A-1340.11(7) (emphasis added). However, we believe, and the State does not disagree, that it would be unjust to permit an enhanced sentence to stand where it is made to appear that the Prior Record Level has been erroneously calculated due to a subsequent reversal of a conviction on appeal, and we do not believe the General Assembly intended such a result. G.S. § 15A-1442(5b) authorizes the correction of such errors:

> The following constitute grounds for correction of errors by the appellate division.
>
> . . .
>
> (5b) Violation of Sentencing Structure.—The sentence imposed:
>
> a. Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 . . . .

Therefore, we remand this case to the trial court for entry of judgment which accurately reflects defendant's Prior Record Level.

No error; remanded for re-sentencing.

Judges THOMAS and BIGGS concur.

STATE OF NORTH CAROLINA v. PETER JUSTIN PALLAS

No. COA00-497

(Filed 19 June 2001)

1. Constitutional Law— due process—no knowing use of false testimony

The State did not knowlingly use false testimony in violation of defendant's trial for murder, kidnapping and armed robbery by its use of a codefendant's testimony that three shots were fired at the victim rather than four as shown by the autopsy, although the State had argued in a second codefendant's trial that the codefendant—witness had not testified truthfully in that trial, since the exact number of shots fired and the identity of the person firing a fourth shot was immaterial and the inconsistencies were for the jury to resolve. Even if the codefendant's testimony was erroneously admitted, the error was not prejudicial because other witnesses also linked defendant to the robbery, kidnapping and murder of the victim.

2. Constitutional Law— right to present defense—attorneys from codefendant's trial—not permitted to testify

The trial court did not violate a defendant's right to present his defense to charges of first-degree murder, first-degree kidnapping, and armed robbery where the court prohibited testimony from the prosecutor and defense attorney in the earlier trial of a codefendant and did not enforce a subpoena for another codefendant. The closing argument of the prosecutor in the prior trial about inferences to be drawn from a codefendant's testimony in that trial is not the equivalent of the State knowingly presenting false testimony in this trial, the tendered testimony of the defense attorney would have been cumulative, and defendant failed to make an offer of proof as to the testimony of the missing codefendant.

3. Constitutional Law— right to confront witnesses—cross-examination limited

The trial court did not unconstitutionally limit cross-examination by defendant in a prosecution for first-degree murder, first-degree kidnapping, and armed robbery. The right to confront and cross-examine is not absolute and may bow to accommodate other legitimate interests in the criminal trial

process; the court may exclude evidence that is irrelevant, nonprobative, speculative, not within a witness's personal knowledge, or that includes legal conclusions from a lay witness.

4. Criminal Law— hung jury—insufficient time for deliberation—mistrial denied

The trial court did not abuse its discretion by denying defendant's motions for a mistrial when informed that the jury could not reach a unanimous verdict where the court correctly found that there had not been sufficient deliberation by the jury in the first instance and that there was insufficient evidence that the jury was hung in the second.

5. Homicide; Kidnapping; Robbery— evidence sufficient

The trial court did not err in a prosecution for first-degree murder, first-degree kidnapping, and armed robbery by denying defendant's motions for nonsuit where the State presented sufficient evidence.

Appeal by defendant from judgment entered 2 September 1999 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 18 April 2001.

Roy A. Cooper, Attorney General, by Joyce S. Rutledge, Assistant Attorney General, for the State.

Geoffrey W. Hosford for defendant-appellant.

WYNN, Judge.

In August 1999, defendant was tried and convicted for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon.

The State's evidence tended to show that three teenagers—defendant (16), Keith Wiley (19), and Alicia Doster (16) successfully planned the murder of Richie Futrelle (17). This tragedy was heightened by the additional revelation that the killing stemmed from a disputed cocaine debt of around $25.00.

It began when the three invited Futrelle to an abandoned house that they shared. When Futrelle arrived at the house, he helped John Mullins fix his car. After Mullins left, defendant and Wiley hit and kicked Futrelle; they hog-tied his hands and feet with pre-cut cable, and took his wallet. Then, they carried Futrelle to his father's car;

placed him in the trunk; drove the car to a deserted area, and removed him from the trunk.

Somehow Futrelle untied the cable from his hands in the trunk; but, the three again tied him up and Doster gagged him with a bandana. Then they walked Futrelle down to a ditch where they laid him on his back. Again, Futrelle freed himself from the cable. When Futrelle started running, Wiley shot him in either the arm or leg with a sawed-off 12-gauge shotgun; Futrelle screamed. Wiley handed the shotgun to defendant, who shot Futrelle in his back or arm and in the back of his neck.

The medical evidence confirmed a gaping gunshot wound to Futrelle's right arm, a large gaping wound to the center of his back at the shoulder blade, a large wound to the left of his buttocks, and a wound at his left groin caused his death. The wound in Futrelle's chest damaged his right lung, lacerated a blood vessel under his heart and filled his chest cavity with blood. The shotgun blast to his back fatally destroyed his spinal column. The buttocks' wound fatally ruptured his kidney and liver.

Following additional evidence and the resulting jury convictions, the trial judge sentenced defendant to life imprisonment without parole. He appeals to this Court.

The issues on appeal are whether the trial court erred in: (I) denying defendant's motion to exclude testimony of Alicia Doster; (II) prohibiting defendant from introducing evidence in support of his motion to exclude the testimony of Alicia Doster; (III) excluding the testimony of defense witnesses and preventing defendant from compelling attendance of a witness; (IV) denying defendant's motion for mistrial; (V) and denying defendant's motion for a nonsuit at the close of State's evidence and again at the close of all of the evidence. For the reasons stated below, we conclude that defendant received a fair trial, free from prejudicial error.

[1] First, defendant argues that the trial court violated his constitutional right to due process of law by allowing the State to introduce the alleged untruthful testimony of Doster. We disagree.

"The law is clear that a prosecutor's presentation of known false evidence, allowed to go uncorrected, is a violation of a defendant's right to due process." *State v. Joyce*, 104 N.C. App. 558, 565, 410 S.E.2d 516, 520 (1991). However, "[i]nconsistencies and contradic-

tions in the State's evidence are a matter for the jury to consider and resolve." *State v. Edwards*, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988), *rev. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). Where the evidence is found to be "inconsistent or contradictory, rather than a knowing falsehood, such contradictions in the State's evidence are for the jury to consider and resolve." *State v. Clark*, 138 N.C. App. 392, 397, 531 S.E.2d 482, 486 (2000).

In this case, defendant moved to exclude Doster's testimony, asserting that the State knew that she gave false testimony. He states that in the May 1999 trial of co-defendant Wiley, the prosecutor in that case argued that Doster had not testified truthfully. He contends that the State is bound by that argument in this case; however, the State responds that "there was no untruthful testimony on the part of Miss Doster as it relates to whether or not this defendant . . . did, in fact shoot" Futrelle.

In the subject case, we find that there is no reasonable likelihood that Doster's memory that three shots had been fired, instead of four shots as confirmed by the autopsy report, affected the jury's judgment in convicting defendant of felony murder, kidnapping and armed robbery. The exact number of shots fired or the actual identity of the person firing a fourth shot was not material and the inconsistencies were for the jury to resolve.

Even assuming, for the sake of argument, that Foster's statement was erroneously admitted, the error was not prejudicial. "Where improperly admitted evidence merely corroborates testimony from other witnesses, we have found the error harmless." *State v. Wynne*, 329 N.C. 507, 519, 406 S.E.2d 812, 818 (1991). In this case, Doster was not the only witness linking defendant to armed robbery, kidnapping and murder of Futrelle. Futrelle's mother testified that her son told her he was going to defendant's house on the day of the murder; and she never saw her son alive again. John Mullins who had been at the place where defendant, Wiley and Doster planned and carried out the robbery and kidnapping, saw Futrelle arrive that afternoon; and he learned that defendant and Wiley committed the murders. Mullins also observed that defendant was in possession of Futrelle's keys. Brian Jacobs testified that he saw defendant and Wiley drive Futrelle's car to the back of a trail and shortly thereafter, he saw the two men walk out of the woods. Further, defendant was connected to numerous items from the crime scene and on his person at the time of arrest. Overwhelming evidence of a defendant's guilt may render a

constitutional error harmless. *See State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988). Under the record on appeal in this case, we find sufficient evidence connecting defendant to the robbery, kidnapping and felony murder of Futrelle; and thus, the admission of Doster's testimony regarding the firing of three shots if error was harmless. *See State v. Soyars*, 332 N.C. 47, 59, 418 S.E.2d 480, 487 (1992).

[2] In his second argument, defendant contends the trial court violated his constitutional right to present his defense to the charges, when it prohibited him from introducing evidence and refused to enforce the subpoena and the writ that he properly issued to his witnesses. We disagree.

"Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970). "However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case." *State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976). "Due process does not include the right [to develop] immaterial evidence." *Baldwin*, 276 N.C. at 700, 173 S.E.2d at 533.

In this case, defendant subpoenaed, John Merrill, the assistant district attorney who made the closing argument in the earlier trial of co-defendant Wiley. The State moved to quash the subpoena because Merrill was an advocate in the murder trial of co-defendant Wiley, and worked with the State in preparation in this trial. The State argued that the evidence in this trial was substantially identical to that of the trial of the co-defendant, Wiley. The State also argued that any knowledge of Sherrill is privileged work product; and that defendant seeks to circumvent N.C. Gen. Stat. § 15A-Article 48, the discovery statutes, by use of subpoena.

The trial court may not "permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action." N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) 1999). Further, the trial court at all times has the discretion to exclude "needless presentation of cumulative evidence," even where the evidence is arguably relevant, and to "exercise reasonable control over

the mode and order of interrogating witnesses . . . so as to . . . avoid needless consumption of time." N.C. Gen. Stat. § 8C-1, Rules 403 and 611 (1999); *see also State v. Barton*, 335 N.C. 696, 441 S.E.2d 295 (1994).

In this case, the content of any possible testimony of Sherrill and its lack of materiality was addressed by the trial court. We find the prosecutor's mere opinion about possible inferences to be drawn from Doster's testimony concerning her witnessing only three shots, is not equivalent to the knowing presentation of false testimony that would reasonably affect the jury's judgments as to defendant's culpability for felony murder, kidnapping and armed robbery.

The trial court also prohibited defendant from introducing any evidence through the testimony of Bruce Mason, the attorney who represented co-defendant Doster. In a *voir dire* hearing, Mason testified he had not been present during every meeting between Doster and the detectives. He also stated in *voir dire* that the prosecutors discussed how the testimony would be conducted and the facts of the case with Doster. The State argued that Mason's testimony arguably raised attorney-client privilege issues and that the "the Court, as jury, has already heard evidence about the amount of time that Doster spent with detectives and with the District Attorney's office involving this case."

Nonetheless, defendant asserts that he did not have any questions for Mason that violated the lawyer-client privilege, but sought him as a witness to discuss what the detectives and the prosecutors said to Doster in their preparations for her testimony. According to the record, Doster testified at trial about those topics in considerable detail and defendant both cross-examined and recross-examined her. During the cross-examination, she admitted the differences in the various statements she gave to law enforcement officers; estimated the exact number of hours spent in meetings with police and prosecutors; and testified about her plea agreement with the State. Thus, the tendered testimony would have been cumulative. Moreover, even assuming, for the sake of argument, that similar testimony by Mason was relevant to any theory of the defendant's case, any error in not admitting that evidence was harmless. *See State v. Hightower*, 340 N.C. 735, 745, 459 S.E.2d 739, 745 (1995).

We also uphold the trial court's decision not to enforce the subpoena for Wiley's appearance because defendant failed at trial to make an offer of proof as to Wiley's proposed testimony.

"Accordingly, defendant has failed to preserve this issue for appellate review under the standard set forth in N.C.G.S. § 8C-1, Rule 103(a)(2)." *State v. Braxton*, 352 N.C. 158, 184, 531 S.E.2d 428, 443 (2000), *cert. denied*, 121 S.Ct. 890, 148 L.Ed.2d 797 (2001). "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). "The reason for such a rule is that 'the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.' " *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310 (1994) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). In the case at bar, defendant made no offer of proof regarding his proffered testimony and the significance of the excluded testimony is not obvious from the record. The defendant therefore failed to preserve any issue concerning the exclusion of this testimony for appellate review.

[3] In his third argument, defendant contends that the trial court violated his constitutional right to confront and cross-examine the witnesses against him. The defendant specifically argues that the trial court's limitation on his cross-examination of Doster and Mullins constituted reversible error, on the grounds that he was precluded from testing the credibility of these two State witnesses and such preclusion prejudicially influenced the jury's verdict.

"The Sixth Amendment of the Constitution, made applicable to state criminal proceedings by *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), guarantees the right of an accused in a criminal trial to be confronted with the witnesses against him." *State v. Fortney*, 301 N.C. 31, 36, 269 S.E.2d 110, 112-13 (1980). "But, the defendant's right to cross-examination is not absolute. The testimony which defendant sought to elicit must be relevant to some defense or relevant to impeach the witness." *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854, *rev. denied*, 333 N.C. 793, 431 S.E.2d 28 (1993). "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *State v. Fortney*, 301 N.C. at 36, 269 S.E.2d at 113. The trial court may exclude evidence that is irrelevant, non-probative, speculative, not within a witness' personal knowledge, and calling for legal conclusions from a lay witness. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 602, 611(a), 611(b) and 701 (1999).

As to this assignment of error, defendant first argues that the trial court prevented him from questioning Doster concerning her plea agreement, memory loss, memory gain and pre-trial confinement. The trial court sustained the State's objection to this line of questioning. Significantly, these questions had already been answered by Doster in prior questioning. The defendant further argues that the trial court improperly prevented him from questioning Mullins about his involvement in the murder. However, the record on appeal shows that defendant questioned Mullins about whether he had been charged with anything; and Mullins twice answered that he had not been charged. We hold that defendant fails to make a showing that the verdict was improperly influenced by any of the trial court's curtailments of his cross-examination; accordingly, this assignment of error is overruled.

[4] Next, defendant contends that the trial court committed reversible error when it denied his motion for a mistrial after the jury informed the trial court that it is unable to reach unanimous verdict.

This Court has held that the decision to order a mistrial lies within the discretion of the trial judge. *See State v. Pakulski*, 319 N.C. 562, 568, 356 S.E.2d 319, 323 (1987). Such a ruling is reviewable only for gross abuse of discretion. *See State v. Darden*, 48 N.C. App. 128, 268 S.E.2d 225 (1980). A mistrial is generally granted where there have been improprieties in the trial of such a serious nature, that defendant cannot receive a fair and impartial verdict. *See State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 140 (1998); *see also* N.C. Gen. Stat. § 15A-1061 (1996); *State v. Cagle*, 346 N.C. 497, 516, 488 S.E.2d 535, 548 (1997).

In this case, the jury left the courtroom at 2:42 p.m. to commence its deliberations. At approximately one hour and a half later, the bailiff made the judge aware that the jury had a question; that was discussed with counsel and then a record was made as follows:

> THE COURT: All right. Let the record reflect that the jury knocked on the door, handed a note to the Bailiff and the Bailiff delivered the note to me. The note says, "If we are hung on Count No. 1 and if we find the defendant guilty of 2 or 3 or both, would he still get life with no chance of parole?"
>
> I have spoken with counsel in Chambers and it is my intention to bring the jury back in and to inform them that they are not to be concerned with the punishment in this case, that their role

is to find the facts of the case as they find the facts to be, and that is their function in this case, and they are not to consider the punishment as to any crime. . . .

MR. HOSFORD: Your honor, at this time, without the jury present, I would make a motion for mistrial on Count I if the jury says they are hung.

THE COURT: Well, because of the nature of the way the question is worded, I'm not going to deal with that at this time. I don't think they have sufficiently deliberated as to reach that point.

This colloquy confirms that the trial court correctly found that there had not been sufficient deliberation by the jury to conclude that it had no reasonable possibility of agreement on the murder charge. The record shows that the jury deliberated less than two hours on three charges in a case involving twenty-seven witnesses and over a hundred exhibits.

Moreover, we also uphold the trial court's ruling on defendant's second motion for a mistrial, which followed the delivery of a jury note at just after 5:00 p.m. on the same afternoon. In the second note, the jury wrote: "We would like to have in writing the five points of the burden of proof for first degree murder charges. We would like to reconvene at 9:30 tomorrow morning." After defendant moved for mistrial, the trial court responded:

[T]he jury got the case at quarter to 3:00 . . . and it's a little after 5:00, and there is not further indication in this note that . . . they are in a hung status . . . . [A]s a matter of fact, they are wanting some further instructions on the law. And there is no sufficient reason at this time to entertain that motion.

We overrule this assignment of error because the facts show no abuse of discretion and no serious improprieties that would make it impossible for defendant to receive a fair and impartial verdict. *See State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985); *State v. Davis*, 130 N.C. App. at 679, 505 S.E.2d at 140; *see also* N.C. Gen. Stat. § 15A-1061 (1999).

[5] In his final argument, defendant contends that the trial court erred when it denied his motions for nonsuit at the close of the State's evidence and again at the close of all of the evidence.

A motion for nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State

is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. [citation omitted]. Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit.

State v. McKinney, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *Id.* at 117, 215 S.E.2d at 582.

We hold that the trial court did not abuse its discretion when it denied defendant's motion for nonsuit because the State presented substantial evidence that defendant committed first-degree murder under the felony murder rule, first-degree kidnapping, and robbery with a dangerous weapon. Therefore, this assignment of error is overruled.

For the foregoing reasons, we find that defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges TIMMONS-GOODSON and HUDSON concur.

RAWLS & ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP PLAINTIFF-APPELLEE v. ALICE W. HURST AND BILLY A. HURST, DEFENDANTS-APPELLANTS

No. COA00-567

(Filed 19 June 2001)

1. **Civil Procedure— summary judgment—sealed depositions—judge's review—copies of relevant pages**

   The trial judge properly reviewed the documents before him on a summary judgment motion where four sealed depositions remained unopened but the judge was provided with copies of the relevant pages.

2. **Real Property— sale and lease—latent ambiguity in description—revised final plat**

   The trial court did not err by granting summary judgment for plaintiff on specific performance and breach of contract claims

arising from the sale and lease of land where it was necessary for the court to consider extrinsic evidence because there was a latent ambiguity in the contract property description and the defendants breached the contract by not conveying the property according to a revised final plat.

3. Trespass— disputed property—presence of construction equipment and materials—delayed action—implied consent

The trial court did not err by denying defendants' motion for summary judgment on a trespass claim arising from a disputed sale and lease of property where there was implied consent by defendants because they knew of construction items on the property and did not take action for several months.

4. Unfair Trade Practices— real estate sale—plats

The trial court did not err by denying defendants' motion for summary judgment or by granting plaintiff's motion for summary judgment on an unfair or deceptive trade practices claim arising from the disputed sale and lease of real property where there was no evidence that defendant seller was prevented from consulting with her attorney before signing the Final Plat or the Revised Final Plat, no evidence that she was prevented from carefully reviewing the plats before she signed them, and no evidence that plaintiff's attorney used the firm preparing the plats for purposes of circumventing rules.

Appeal by Mr. and Mrs. Hurst from order entered 21 February 2000 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 26 March 2001.

Ward and Smith, P.A. by Donald S. Higley, II and Ryal W. Tayloe for Plaintiff-Appellee Rawls & Associates.

Lee E. Knott, Jr. for Defendants-Appellants.

BRYANT, Judge.

Mr. and Mrs. Hurst appeal the trial court's denial of their motion for summary judgment. We conclude the trial court committed no error.

Mr. and Mrs. Hurst own a tract of land in Chocowinity, North Carolina (the Property). On 9 October 1996 the Hursts agreed to sell two lots (Out Parcels) and to lease a portion of the property (Tract 2)

to Rawls for a forty-year term. The contract, as set out in a "Letter of Intent", contained several conditions to be resolved before the closing date. One condition was to seek approval from the Town of Chocowinity for all zoning permits. Rawls employed Jarvis Associates, P.A. (Jarvis Associates), an engineering and surveying firm, to pursue a zoning amendment. Jarvis Associates prepared a new survey of the Property entitled "Preliminary Plat for Alice W. Hurst" (Preliminary Plat). This was the first of three plats prepared by Jarvis Associates.

The Preliminary Plat altered the dimensions of the Out Parcels and Tract 2 from how they were drawn on the contract map. On 5 March 1997, Charles H. Manning, III, (Manning), a Jarvis Associates employee, met with Mrs. Hurst and obtained her approval and signature on the Preliminary Plat and application for a zoning amendment.

A few months later a portion of the property was dedicated by Mrs. Hurst to the N.C. Department of Transportation (DOT) to widen U.S. Highway 17. On 14 November 1997 a new plat, entitled "Final Plat Alice W. Hurst" (Final Plat) was prepared. The Final Plat was approved and signed by Mrs. Hurst on 1 December 1997. Less than a week later, Mrs. Hurst and her children met with Manning and Rawls on the Property. Manning showed the corners of the Property staked in accordance with the Final Plat.

Sometime thereafter Jarvis prepared a Revised Final Plat after discovering the Final Plat did not show internal access easements referred to in the contract. On 8 January 1998, Mrs. Hurst signed the Revised Final Plat.

On 14 January 1998, the Hursts signed a forty-year lease for Tract 2. The description of Tract 2 in the lease was derived from the Revised Final Plat and the lease specifically referenced the Revised Final Plat. Then Mrs. Hurst, through her attorney, had a proposed deed forwarded to Rawls' attorney conveying the Out Parcels. Rawls rejected the deed because it left a twenty foot gap between Tract 2 and the back lines of the Out Parcels. The property description in the deed was from the Preliminary Plat as opposed to the Revised Final Plat. Notwithstanding Rawls' insistence that the Out Parcels be conveyed pursuant to the Revised Final Plat, Mrs. Hurst refused to do so.

On 9 June 1998, Mrs. Hurst complained of trespass on her property—the Out Parcels. On 30 June 1998, Rawls filed an action seeking

specific performance of the contract to convey the two Out Parcels in accordance with the Revised Final Plat. The Hursts asserted counterclaims for trespass and breach of contract.

On 29 January 1999, Rawls' motion for summary judgment was denied. On 1 April 1999, the trial court allowed Mr. and Mrs. Hurst's motion for leave to amend their answer to assert a counterclaim for unfair or deceptive trade practices. On 24 February 2000, the trial court denied the Hursts' motion for summary judgment and entered summary judgment in favor of Rawls. Mr. and Mrs. Hurst appealed.

I.

[1] On appeal, the Hursts first contend the trial court erred in failing to open and read every deposition filed prior to ruling on the summary judgment motion. We disagree.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2000). A summary judgment motion should be granted when, based upon the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are to be decided. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903 (1981). However, when there are factual disputes which are material to the disposition of the case, summary judgment may not be used. *Whiteside v. Lawyers Sur. Corp.*, 107 N.C. App. 230, 233, 418 S.E.2d 829, 831 (1992). "An issue of material fact is one which may constitute a legal defense or is of such a nature as to affect the result of the action or is so essential that the party against whom it is resolved may not prevail; an issue is genuine if it can be supported by substantial evidence." *Cox v. Cox*, 75 N.C. App. 354, 355, 330 S.E.2d 506, 507(1985) (quoting *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974)).

In the instant case, the Hursts submitted a certificate from an Assistant Clerk of Superior Court, who certified that four of the sealed depositions remained unopened. The Hursts argue that the trial judge could not have based his summary judgment ruling "on complete discovery" as stated in the Order granting summary judgment for Rawls because he did not review all of the depositions. They assert that the trial judge's failure to consider four of the seven depo-

sitions deprived them of their "full right to be heard according to the law" required by Canon 3A(4) of the Code of Judicial Conduct. Rawls states the trial judge was provided with copies of the relevant pages of testimony contained in the unopened original depositions, a contention which is undisputed by the Hursts. Moreover, Rawls argues that the Contract is enforceable; thus a failure by the judge to read any of the depositions is harmless error. We agree.

We interpret the statement, "on complete discovery" to mean that the trial judge's ruling was made after there was complete discovery by the parties *not* that he based *his ruling* on complete discovery. Thus, we conclude that the trial judge properly reviewed the documents before him to determine if the summary judgment motion should have been granted. Further, having concluded that the review of the documents was proper, we find no merit in the contention that the trial judge violated Canon 3A(4) of the Code of Judicial Conduct.

II.

[2] Next, the Hursts contend the trial court erred by granting summary judgment in favor of Rawls on the issues of specific performance of the contract and breach of contract by the Hursts. The parties make essentially the same arguments for these two issues; therefore we address them simultaneously.

In an action seeking specific performance of a real estate contract, summary judgment is appropriate if the requirements of a valid contract are met. *Williford v. Atlantic American Properties, Inc.*, 129 N.C. App. 409, 411, 498 S.E.2d 852, 854 (1998), *rev'd*, 350 N.C. 58, 510 S.E.2d 376 (1999). A contract for the sale of real property must meet the following requirements: be in writing; signed by the parties; contain an adequate description of the real property; recite a sum of consideration; and contain all key terms and conditions of the agreement. *See generally Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970) (citations omitted). "Every valid contract must contain a description of the subject-matter; but it is not necessary it should be so described as to admit of no doubt what it is, for the identify of the actual thing and the thing described may be shown by extrinsic evidence." *Green v. Harshaw*, 187 N.C. 213, 221, 121 S.E. 456, 459 (1924).

Extrinsic evidence is allowed where, as here, there is a latent ambiguity, "that is, when the words of the instrument are plain and

intelligible but leave it uncertain as to what property is embraced in the conveyance and presents a question of identification of the property." *Root v. Allstate Ins. Co.*, 272 N.C. 580, 588, 158 S.E.2d 829, 835-36 (1968). In such case plaintiff may offer extrinsic evidence tending to identify the property, and defendant may offer evidence tending to show impossibility of identification, i.e., ambiguity. *Bradshaw v. McElroy*, 62 N.C. App. 515, 516, 302 S.E.2d 908, 910 (1983).

In the instant case, the description of the real property in the "Letter of Intent" states the following: "[l]ocated in the town of Chocowinity, County of Beaufort, State of North Carolina, being known as and more particularly described as: the Northwest corner of Highway 17 and Patrick Lane as shown on the attached map labeled Exhibit A." Exhibit A is a map of the Property as it was prior to the dedication of a portion of it to the DOT. After the highway dedication, the property subject to sale under the contract consisting of the Out Parcels shown in Exhibit A, was partially within the newly dedicated property. If one were to rely solely on the contract for a description of the Out Parcels, the conveyance would be ambiguous.

During the summary judgment hearing some of the extrinsic evidence allowed by the trial court was as follows: 1. Testimony of Rawls that the contract was intended to be flexible and left many issues to be resolved prior to closing; 2. Evidence of a Preliminary Plat signed by Mrs. Hurst which she admits changed the configuration of the Out Parcels; 3. Evidence of a Final Plat signed by Mrs. Hurst, followed by a Revised Final Plat signed by Mrs. Hurst; and 4. Evidence that the Hursts signed a lease agreement for Tract 2 which also contained a description of the Out Parcels consistent with the Revised Final Plat.

Here there was clearly a latent ambiguity in the contract property description. The extrinsic evidence allowed during the summary judgment hearing served to identify the property. Therefore, it was necessary for the trial court in this case to allow extrinsic evidence.

The property subject to conveyance under the contract is that described in the Revised Final Plat. The Hursts should have conveyed the property according to the Revised Final Plat and their failure to do so constituted a breach. Accordingly, we find that the trial court did not err in granting summary judgment for Rawls and we affirm the trial court with respect to both issues—specific performance and breach of contract.

III.

[3] Next, the Hursts argue that the trial court erred by denying their motion for summary judgment and granting summary judgment in favor of Rawls on the issue of Rawls' alleged trespass on the Hursts' property. We disagree.

Prior to 3 November 1997, Wimco Corporation, a general contractor, placed a mobile office, construction equipment, materials, dumpsters and construction waste on the Out Parcels. These items were present on the property during a ground-breaking ceremony which Mrs. Hurst attended. Mrs. Hurst, through her attorney, complained to Rawls' attorney about the alleged trespass in a letter dated 9 June 1998, some time *after* Rawls rejected the deed to the Out Parcels.

A plaintiff may have a claim for trespass to real property if: (1) plaintiff was in possession of the land at the time of the alleged trespass; (2) defendant made an unauthorized entry on the land; and (3) plaintiff was damaged by the alleged invasion of his possessory rights. *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). A person who enters and remains upon land possessed by another without the possessor's consent or any other privilege is a trespasser. *Smith v. Voncannon*, 283 N.C. 656, 661-62, 197 S.E.2d 524, 529 (1973). "An entry on land in the possession of another is privileged as against the possessor in so far as it is pursuant to his consent." *Id.* at 661, 197 S.E.2d at 528-29 (quoting Restatement (Second) of Torts § 167 (1965)). Consent may be implied and an apparent consent may be sufficient if it is brought about by the acts of the person in possession of the land. There does not have to be an invitation to enter the land, it is sufficient that the possessor's conduct indicates that he consents to the entry. *Id.* at 661, 197 S.E.2d at 529.

In the instant case, there is no dispute that Wimco Corporation (owned by Rawls) placed a mobile office, construction equipment and materials onto one of the Out Parcels prior to a ground-breaking ceremony on November 3, 1997. Mrs. Hurst was present at the ground-breaking and her two adult children visited the property on one occasion. However, no one objected to the presence of the items for at least seven months. The letter from the Hursts alleging trespass by Rawls was not sent until June of 1998. In fact, the Hursts did not complain of a trespass until *after* Rawls rejected the deed to the Out Parcels tendered by Mrs. Hurst. Based on *Smith*, we find that there was implied consent by the Hursts because they knew of the con-

struction items on the Out Parcels and failed to take any action for several months. Thus, we conclude that Rawls, through his agents, occupied the property with the consent of the Hursts. Accordingly, we find that the trial court did not err by denying the Hursts' summary judgment motion on the issue of trespass on the Hursts' property and we affirm the trial court.

IV.

[4] Finally, the Hursts argue that the trial court erred by denying their motion for summary judgment and by granting summary judgment in favor of Rawls regarding unfair or deceptive trade practices. Again, we disagree.

In order to establish a claim under Chapter 75 of the General Statutes, a claimant must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to the claimant. *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 155, 520 S.E.2d 570, 579 (1999) (quoting *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991)); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980).

"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." *Johnson*, 300 N.C. at 263, 266 S.E.2d at 621 (1980). A practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. *Id.* at 265, 266 S.E.2d at 622. Whether an act or practice violates Chapter 75 is a question of law. *Budd Tire Corp. v. Pierce Tire Co. Inc.*, 90 N.C. App. 684, 691, 370 S.E.2d 267, 271 (1988).

The Hursts allege that Rawls committed a number of deceptive acts. They contend that Rawls' decision to have Jarvis Associates prepare a new map, which moved back the Out Parcels to accommodate the highway dedication, without first seeking the approval of Mrs. Hurst or her attorney, was deceptive. The Hursts also contend that no one told Mrs. Hurst that her signature on the revised plats would result in her being obligated to convey additional property to Rawls. These contentions are without merit.

Mrs. Hurst met with employees from Jarvis Associates on numerous occasions to review and sign the revised plats. She chose to bring her adult children along instead of her attorney. She was shown the revisions to the plat. She testified that she was informed that "[the

engineers] moved things back and moved things around" after the Preliminary Plat. There is no evidence that Mrs. Hurst was prevented from consulting with her attorney before signing the Final Plat or the Revised Final Plat. There is no evidence that Mrs. Hurst was prevented from carefully reviewing the plats before she signed them. Moreover, Mrs. Hurst admits by her own testimony that she was neither pressured nor deceived in any way when she signed the Revised Final Plat. In fact, Mrs. Hurst and her attorney executed a lease in which the description of Tract 2 was taken directly from the Revised Final Plat. The lease for Tract 2, signed on 14 January 1998, was for a *forty-year term* and specifically referenced the Revised Final Plat.

The Hursts also allege that Rawls committed unfair acts. They argue that the meetings between Mrs. Hurst and various Jarvis Associates employees was an attempt by Rawls' counsel to circumvent Rule 4.2 of the Revised Rules of Professional Conduct. This rule prohibits a lawyer from communicating about the subject of his representation of a client with a person the lawyer knows is represented by another lawyer in the matter. The Hursts also contend that Rawls and its engineers' prepared legal documents in violation N.C.G.S. § 84-4, which makes it unlawful for anyone except a licensed attorney to practice law.

We find the Hursts' arguments regarding violations of Rule 4.2 and N.C.G.S. § 84-4 unfounded. It is true that the Hursts were represented by counsel, but there is no evidence that Rawls' counsel used Jarvis Associates for the purposes of circumventing the rules. Moreover, Jarvis Associates was an engineering and surveying firm and they did exactly what they were hired to do, prepare plats. The Hursts failed to prove that the acts and practices of Rawls and its' agents were unfair. Absent proof of unfair or deceptive practices, the Hursts' claim of injury and damages must also fail.

Accordingly, we conclude that the trial court's order denying the Hursts' summary judgment motion and granting summary judgment in favor of Rawls is affirmed.

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

IN THE MATTER OF THE ESTATE OF MARY CROUSE WHITAKER; LUCY W. WRENN AND VERLIE W. BARKER, CAVEATORS v. OMA W. HOLYFIELD, INDIVIDUALLY AND EXECUTRIX OF THE ESTATE OF MARY CROUSE WHITAKER, RESPONDENT

No. COA00-914

(Filed 19 June 2001)

1. **Wills— undue influence—testamentary capacity—conclusory affidavits—summary judgment**

The trial court did not err by granting summary judgment for respondent on the issues of testamentary capacity and undue influence in an action arising from a petition to set aside a will where the caveators' affidavit failed to set forth specific facts showing that the decedent was incapable of executing a valid will at the time, notwithstanding her alleged mental condition in the years surrounding the will's execution, and failed to present specific facts showing that the will was executed solely as a result of respondent's fraudulent and overpowering influence. Conclusory statements of opinion do not meet the requirement of specific evidence.

2. **Wills— existence and validity of will—appropriately determined by jury**

The trial court did not err in an action arising from a contested will by entering judgment on the issue of devisavit vel non, which requires a finding of whether the decedent made a will and whether that will is before the court, where the jury was presented with testimony from respondent's witnesses, caveators presented no evidence to the jury, and the jury returned a verdict for respondent.

Appeal by caveators from judgment entered 25 October 1999 by Judge Clarence W. Carter and 30 May 2000 by Judge Peter McHugh in Surry County Superior Court. Heard in the Court of Appeals 25 April 2001.

W. David White, for respondent-appellee.

Franklin Smith, for caveators-appellants.

TYSON, Judge.

Lucy W. Wrenn and Verlie W. Barker (collectively "caveators") appeal the entry of judgment in favor of respondent, Oma W.

Holyfield ("respondent"). We affirm the trial court's initial grant of summary judgment in favor of respondent, reserving the issue of *devisavit vel non*. We find no error in the trial court's subsequent entry of judgment for respondent following a jury verdict in respondent's favor on the remaining issue of *devisavit vel non*.

I. Facts

Caveators and respondent are sisters. Their mother, Mary Crouse Whitaker ("Whitaker") died testate on 8 July 1997. Whitaker's will, executed 17 May 1994, left the estate to respondent to the exclusion of caveators. The bulk of the estate was comprised of a partial interest in 29 acres of land and 35 acres inherited from Whitaker's deceased husband.

On 7 May 1999, caveators filed a petition to set aside Whitaker's will. The petition alleged, *inter alia*, (1) that respondent exerted undue influence on Whitaker, (2) that Whitaker lacked capacity to know her heirs and to determine how to devise her property, and (3) that respondent directed the manner in which Whitaker drafted her will. Respondent moved for summary judgment on 19 July 1999.

The trial court reviewed affidavits submitted by both parties prior to ruling on respondent's summary judgment motion. Caveators submitted a single, joint affidavit in support of their petition. The affidavit alleged that Whitaker "became unable to make reasonable decisions, or distinguish between her daughters" following the death of Whitaker's husband in 1973. The affidavit contained various statements about Whitaker's general mental state, that she "often times did not know what she was doing," and that Whitaker had delusions that people were stealing from her. Caveators further testified in the affidavit that Whitaker "came under the influence of [respondent] and all her activities including her feeding was controlled by [respondent]."

Respondent submitted an affidavit from Janice Harris ("Harris"), an employee of the law office which drafted Whitaker's will. Harris testified that she spoke with Whitaker by telephone on more than one occasion. Whitaker told Harris that she had three surviving daughters, caveators and respondent. Whitaker expressed to Harris that she wanted to devise all of her property to respondent, because respondent had continually cared for Whitaker. Whitaker discussed with Harris the nature of her property and the deeds to her land.

Harris testified that she met with Whitaker alone regarding the proposed will. Harris testified that she read aloud each paragraph of the proposed will to Whitaker, and explained each provision to her. Harris again asked Whitaker whether it was her intent to devise all of her property to respondent. Whitaker told Harris that was her desire, since caveators had not helped her in the manner that respondent had. Harris testified that Whitaker's intent was clear, that Whitaker was competent, and that she knew the nature of her act and extent of her property. Harris further testified that respondent never prevented Harris from talking to Whitaker, or otherwise interfered with the drafting of Whitaker's will.

Respondent also submitted her own affidavit. Respondent testified that caveators continually pressured Whitaker to sell her land, and arranged potential buyers for the property. Respondent testified that Whitaker made all of her own financial decisions, purchased her own groceries, and paid her own bills up until her death. Respondent stated that Whitaker was capable of discussing family matters and the nature and extent of the land she owned. Respondent testified that Whitaker never asked for respondent's advice nor sought her opinion in making a will. Whitaker did tell respondent that she wished to leave the entire estate to respondent, since respondent had continually assisted Whitaker, and caveators had not.

On 25 October 1999, the trial court granted summary judgment for respondent, reserving the issue of *devisavit vel non*. A jury trial was held on this remaining issue at the 22 May 2000 term of the Surry County Superior Court. The jury found that the document offered by respondent as Whitaker's will was "in every essential part thereof the will of Mary Crouse Whitaker" and that the will was "executed according to the requirements of the law for a valid attested will." The trial court entered judgment in favor of respondent on 30 May 2000. Caveators appeal.

Caveators assign error to the trial court's initial grant of summary judgment as to all issues except *devisavit vel non*, and to the trial court's subsequent entry of judgment following a jury verdict for respondent. We affirm the trial court's ruling and find no error in the trial court's entry of judgment on the verdict.

II. Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact and where the movant is entitled to judg-

ment as a matter of law. *Hummer v. Pulley, Watson, King & Lischer, P.A.* 140 N.C. App. 270, 278, 536 S.E.2d 349, 354 (2000). The presumption is that "every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *In re Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000), *disc. review denied*, 353 N.C. 375, —— S.E.2d —— (2001) (citation omitted).

A. Testamentary Capacity

[1] "A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *Matter of Will of Buck*, 130 N.C. App. 408, 412, 503 S.E.2d 126, 130 (1998), *affirmed*, 350 N.C. 621, 516 S.E.2d 858 (1999) (citing *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960)).

In *Buck*, this Court noted that the caveators had presented "ample evidence . . . indicative of testator's declining mental and physical health in the months preceding his execution of the proffered will." *Id.* at 413, 503 S.E.2d at 130. However, we held that the caveators could not establish lack of testamentary capacity where there was no specific evidence "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." *Id.* (citation omitted) (emphasis supplied). We stated:

> In the present case, caveator presented only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which her witnesses based their opinions as to his mental capacity. However, her evidence, while showing testator's weakened physical and mental condition in general, did not negate his testamentary capacity at the time he made the will, i.e., his knowledge of his property, to whom he was giving it, and the effect of his act in making a will. Therefore, caveator's evidence was insufficient to make out a *prima facie* case of lack of testamentary capacity

Id.; *see also, Matter of Will of Maynard*, 64 N.C. App. 211, 227, 307 S.E.2d 416, 428 (1983), *disc. review denied*, 310 N.C. 477, 312 S.E.2d

885 (1984) (recognizing that "the insane person during a lucid interval can make a valid will.").

In *Sechrest, supra*, the caveators presented evidence that the testatrix failed to recognize the natural objects of her bounty because the caveators were not included in the will. *Sechrest*, 140 N.C. App. at 473, 537 S.E.2d at 518. The caveators also presented evidence that the testatrix lacked testamentary capacity because she was "almost always drunk" and made mathematical errors in calculating employee pay. *Id.*

Holding that a directed verdict for the propounder was proper, this Court noted that such "evidence notwithstanding, caveators have put forth no evidence that at or near the time testatrix executed the May 1994 Will, she was mentally unequipped to do so." *Id.* We noted the trial court's finding that, " 'a lunatic, an absolute lunatic, can make a valid will when he's in a lucid moment.' " *Id.* Moreover, the caveators failed to show that the testatrix did not recognize the natural object of her bounty where "the evidence indicates that she not only acknowledged them as such, she explained . . . that she did not want to leave them anything, because [her husband] had already provided for them in setting up their educational trust." *Id.*

The present case is analogous. The only evidence presented by caveators to rebut the presumption of Whitaker's capacity was their joint affidavit. Caveators' affidavit contains various statements regarding Whitaker's overall mental health from 1973 until her death in 1997. The only mention of the actual execution of the will was a statement that Whitaker "was not competent in our opinion to manage her affairs before the year of 1990 and she certainly was not able to manage her business affairs in 1990 and in the month of May, 1994 and on May 17, 1994."

This conclusory statement of opinion does not meet the requirement of specific evidence establishing that Whitaker did not understand her property, to whom she wished to give it, and the effect of her act in making a will at the time the will was executed. Such conclusions in an affidavit, as opposed to statements of fact, are not properly considered on a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e) ("affidavits shall set forth such facts as would be admissible in evidence"); *Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 208, 381 S.E.2d 698, 701 (1989) (portions of affidavit containing conclusions as opposed to statements of fact properly stricken); *Butler v. Berkeley*, 25 N.C. App. 325, 332, 213

S.E.2d 571, 575 (1975) ("mere conclusions of the pleader are not to be considered in opposition to or in support of a motion for summary judgment.").

As in *Buck*, caveators here "presented only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [caveators] based their opinions as to [her] mental capacity." *Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130. Caveators also testified in their affidavit that Whitaker's will "did not even mention either of us . . . . We were left out completely."

As stated in *Sechrest*, such evidence fails to show that a testatrix failed to recognize the natural object of her bounty where the evidence indicates "that she not only acknowledged them as such, she explained . . . that she did not want to leave them anything . . . ." *Sechrest* at 473, 537 S.E.2d at 518. Both respondent's and Harris' affidavit establish that Whitaker knew the identity of her daughters, knew the identity of the caveators, and that Whitaker affirmatively expressed her desire to disinherit caveators because they "had not done anything for her."

In sum, caveators' affidavit fails to set forth specific facts showing that Whitaker was incapable of executing a valid will at the time she did so, notwithstanding her alleged mental condition in the years surrounding the will's execution. *See Maynard*, 64 N.C. App. at 227, 307 S.E.2d at 428 ("the insane person during a lucid interval can make a valid will."). Respondent, as the moving party, has satisfied her burden of showing that there was no genuine issue of material fact as to Whitaker's testamentary capacity.

B. Undue Influence

We also hold that the trial court properly granted summary judgment on the issue of respondent's alleged undue influence over Whitaker. "In the context of a will caveat, '[u]ndue influence is more than mere persuasion, because a person may be influenced to do an act which is nevertheless his voluntary action.' " *Sechrest*, 140 N.C. App. at 468, 537 S.E.2d at 515 (quoting *Buck* at 413, 503 S.E.2d at 130). "The influence necessary to nullify a testamentary instrument is the 'fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.' " *Id.* at 468-69, 537 S.E.2d at 515 (quoting *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99,

103-04, *disc. review denied and review dismissed*, 348 N.C. 693, 511 S.E.2d 645 (1998)).

Factors relevant to the issue of undue influence include:

> '1. Old age and physical and mental weakness. 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision. 3. That others have little or no opportunity to see [her]. 4. That the will is different from and revokes a prior will. 5. That it is made in favor of one with whom there are no ties of blood. 6. That it disinherits the natural objects of [her] bounty. 7. That the beneficiary has procured its execution.'

Id. at 469, 537 S.E.2d at 515 (quoting *In re Andrews*, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980)).

In *Matter of Will of Prince*, 109 N.C. App. 58, 63, 425 S.E.2d 711, 714 (1993), we held that the evidence presented was insufficient to warrant submission of the issue of undue influence to a jury. The caveator presented evidence that the testatrix was old and at times suffered with memory loss; that the propounder, the testatrix's brother, assisted testatrix with her affairs; that the propounder's former daughter-in-law made an appointment for the testatrix with the attorney; and that the propounder drove the testatrix to see her attorney and sat in the conference she had with her attorney. *Id.* at 63, 425 S.E.2d at 714-15. The caveator also presented evidence that the testatrix did not make provisions in her will for her son and her two grandchildren; that on occasions the testatrix expressed to others that she was afraid of the propounder; and that the propounder was a beneficiary under the will. *Id.* at 63, 425 S.E.2d at 715.

In holding that such evidence was insufficient to support an inference of undue influence, we stated that the evidence "fails 'to support an inference that the will was the result of an overpowering influence exerted by propounder of testatrix which overcame testatrix's free will and substituted for it the wishes of propounder, so that testatrix executed a will that she otherwise would not have executed.' " *Id.* (quoting *In re Coley*, 53 N.C. App. 318, 324, 280 S.E.2d 770, 774 (1981)).

The evidence of undue influence presented by caveators here consisted of statements in their joint affidavit. The evidence included the statement that Whitaker "was easily swayed by the daughter in her presence at a particular time and on a particular occasion"; that

she was "easily talked into anything"; that respondent saw Whitaker daily; and that Whitaker "came under the influence of [respondent] and all her activities including her feeding was controlled by [respondent]." Caveators further stated that it is "our opinion that this Will was drafted pursuant to the instructions of our sister, [respondent]."

Caveators failed to carry their burden of presenting specific evidence that Whitaker's will was the result of an "overpowering" and "fraudulent influence" exerted by respondent which overcame Whitaker's free will. The only statement in caveators' affidavit alluding to any influence of respondent in the execution of the will was a statement that "[i]t is further our opinion that this Will was drafted pursuant to the instructions of our sister, [respondent]."

Again, such conclusory statements of opinion are not evidence properly considered on a motion for summary judgment. *See Butler, supra*; *Ward, supra*. Caveators failed to present evidence of the factors relevant to showing undue influence as enumerated in *Sechrest*. Caveators did not show that Whitaker executed the will in respondent's home and subject to respondent's "constant association and supervision." Caveators presented no evidence to rebut Harris' affidavit that she and Whitaker were alone when Harris explained the will provisions to Whitaker and asked Whitaker's intent in devising her property. Caveators did not rebut Harris' testimony that Harris and Whitaker were alone when Whitaker executed the will, and that Whitaker did not execute the will at respondent's home.

Caveators did not present evidence that they or others had little, if any, opportunity to visit or speak with Whitaker. Caveators' affidavit states that caveators visited with Whitaker weekly from 1973 until her death in 1997. Whitaker's will was not different from a prior will, nor did it revoke a prior will. The will was in favor of a blood relative. Caveators failed to present specific evidence as to how respondent procured execution of the will.

In sum, caveators failed to present specific facts showing that the will was executed solely as a result of respondent's fraudulent and overpowering influence over Whitaker. We hold that the trial court did not err in entering summary judgment for respondent on the issues of testamentary capacity and undue influence. Whitaker was entitled by law to disinherit caveators. *See, e.g., Ladd v. Estate of Kellenberger*, 314 N.C. 477, 483, 334 S.E.2d 751, 756 (1985) ("The law in North Carolina does not prohibit parents from disinheriting chil-

dren."); *Kidder v. Bailey*, 187 N.C. 505, 122 S.E. 22, 23 (1924) (citations omitted) ("the right of the testator to omit the heir from his will is not to be denied or curtailed.").

III. *Devisavit Vel Non*

[2] The trial court did not err in entering judgment in favor of respondent on the issue of *devisavit vel non*. " 'Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether any of the scripts before the court is that will.' " *Dunn*, 129 N.C. App. at 325, 500 S.E.2d at 102 (quoting *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987)).

The jury was presented with testimony from respondent's witnesses. Caveators presented no evidence to the jury. The jury returned a verdict finding that the document offered by respondent as Whitaker's will was "in every essential part thereof the will of Mary Crouse Whitaker" and that the will was "executed according to the requirements of the law for a valid attested will." The jury appropriately determined the issue of *devisavit vel non*. The trial court properly entered judgment on the jury's verdict in favor of respondent.

No error.

Judges WALKER and HUNTER concur.

RICH, RICH & NANCE, A NC GENERAL PARTNERSHIP, PLAINTIFF v. CAROLINA CONSTRUCTION CORPORATION, DEFENDANT

No. COA00-96

(Filed 19 June 2001)

Vendor and Purchaser— real estate sale contract—availability fee after lots sold—rule against perpetuities

The trial court erred by awarding plaintiff specific performance of the obligations under the addendum of the parties' real estate sale contract requiring defendant to pay plaintiff an availability fee of $600.00 on each of the thirty seven lots, into which the parcel of land may or may not ultimately be divided, after each lot was sold because: (1) the purported lien was not a vested

interest since at the time of its creation plaintiff's right to payment did not amount to an immediate right of present enjoyment or a present fixed right of future enjoyment; and (2) plaintiff's interest in the property is void since it violates the rule against perpetuities by failing to set a time limit when these conditions must be met.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 31 August 1999 by Judge Cy A. Grant in Superior Court, Pasquotank County. Heard in the Court of Appeals 15 February 2001.

Trimpi, Nash & Harman, L.L.P., by John G. Trimpi, for plaintiff-appellee.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Rich, Rich & Nance (plaintiff) instituted this action on 15 June 1998 seeking specific performance of an agreement set forth in an addendum to a real estate sale contract.

Plaintiff owned a parcel of land consisting of 11.89 acres commonly known as "Walking Horse Subdivision," which had preliminary, but not final plat approval. Plaintiff entered into a contract with LFM Properties (LFM) on 5 August 1994, wherein LFM agreed to purchase the property at a price of $75,000.00. Pursuant to discussions of the parties regarding the ultimate use of the property, plaintiff anticipated that at some date in the future, LFM would convey the property to Carolina Construction Corporation (defendant), which would ultimately develop and subdivide the property into thirty-seven lots for single-family residences. Accordingly, on 29 August 1994, the parties executed the following addendum to the contract between plaintiff and LFM:

> At the close of each of the 37 (thirty seven) lots of Walking Horse subdivision, LFM Properties and or Carolina Construction Corporation, whomever is owner, agrees to pay to Rich, Rich and Nance the sum of $600.00 (Six Hundred Dollars) per lot as an availability fee. These fees shall survive any and all listing agreements and shall remain as a lien against the lots until they are paid. The sale or transfer of these lots from LFM Properties to

> Carolina Construction Corporation is exempt from the fee until such time as Carolina Construction Corporation sells the property improved or unimproved.

The addendum further provided that:

> Upon the subject property being developed by LFM Properties, or its successor in interest, a Declaration of Restrictive Covenants shall be recorded with the subdivision plat. The Declaration shall refer to the above-mentioned fee agreement and provide record notice thereof.

Lucien O. Morrisette, a principal stockholder of LFM and defendant, signed the addendum on behalf of each corporation.

Plaintiff and LFM subsequently modified the sale contract in terms of the acreage conveyed and responsibilities in connection with the drainage. The $75,000.00 purchase price and the $600.00 per lot availability fee remained unchanged. Plaintiff and LFM closed the sale of the property on 28 April 1995.

LFM conveyed the property to defendant on 30 May 1997. Defendant subdivided the property into thirty-eight lots and changed the name of the development to Carolina Village. On 22 April 1998, defendant sold one of the lots in the subdivision, but failed to pay plaintiff the $600.00 availability fee, as required by the addendum. When plaintiff thereafter demanded the fee payment, defendant refused, indicating that it was not bound, and therefore, would not honor the agreement contained in the addendum.

Plaintiff filed an action against defendant for specific performance of the obligations under the addendum. The matter was tried before the trial judge on 2 August 1999. At the time of trial, defendant had sold nine lots in the subdivision without paying any of the availability fees. The trial court, after considering all the evidence, entered a judgment awarding plaintiff $5,400.00, the fees due for the nine lots sold. The court further ordered defendant to "pay the balance of $16,800.00 when and as each of the 28 additional lots in Carolina Village are sold by paying to plaintiff the sum of $600.00 upon the closing of each lot sale[.]" Additionally, the judgment provided that "[i]n the event defendant sells the entire tract without selling each of the 28 remaining lots, then the entire balance then due would become immediately payable." Defendant moved pursuant to Rules 59 and 60 of the Rules of Civil Procedure for reconsideration and for relief from

the court's decision, which motions the court denied. Defendant gave timely notice of appeal to this Court.

Defendant contends that the fee arrangement contained in the addendum is unenforceable for several reasons. However, because we believe that plaintiff's interest in the property is void, in that it violates the rule against perpetuities, we limit our discussion to this dispositive issue.

The rule against perpetuities provides that:

> [N]o devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest.

Coble v. Patterson, 114 N.C. App. 447, 452, 442 S.E.2d 119, 121 (1994). Where the interest or right does not refer or relate to a "life in being," also known as a "validating life," the perpetuities period is said to be "in gross," which means the period is simply twenty-one years. *Rodin v. Merritt*, 48 N.C. App. 64, 67, 268 S.E.2d 539, 541 (1980). The validity of the interest is measured from the execution of the contract. *Id.* at 68, 268 S.E.2d at 542. Thus, if at the moment of conveyance, there is any possibility that the interest will neither vest nor fail within the perpetuities period, the interest is void. *Coble*, 114 N.C. App. at 452, 442 S.E.2d at 121.

The rule against perpetuities applies only to non-vested or contingent future interests. *Thornhill v. Riegg*, 95 N.C. App. 532, 536, 383 S.E.2d 447, 449 (1989). "A future interest is vested 'when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment.' " *Id.* (quoting *Joyner v. Duncan*, 299 N.C. 565, 569, 264 S.E.2d 76, 82 (1980)). A future interest is contingent, or has yet to vest, when it is "*either* subject to a condition precedent (in addition to the natural expiration of prior estates), *or* owned by unascertainable persons, *or both*." *Rawls v. Early*, 94 N.C. App. 677, 680, 381 S.E.2d 166, 168 (1989) (quoting T. Bergin & P. Haskell, *Preface to Estate in Land and Future Interests* at 73 (1984) (emphasis in original)).

In the instant case, plaintiff purports to retain a lien in the amount of $600.00 on each of the thirty-seven lots into which the parcel may or may not ultimately be divided. We conclude that the purported

"lien" was not a vested interest, because at the time of their creation, plaintiff's right to payment did not amount to an "immediate right of present enjoyment or a present fixed right of future enjoyment." *Thornhill*, 95 N.C. App. at 536, 383 S.E.2d at 449 (quoting *Joyner*, 299 N.C. at 569, 264 S.E.2d at 82). The liens were subject to several conditions precedent: (1) LFM had to convey the property to defendant; (2) Defendant had to develop the property and divide it into thirty-seven individual lots (and construct houses on each); and (3) Defendant had to convey each of the thirty-seven lots to a subsequent purchaser. The agreement sets no time within which these conditions must be met, and thus, creates a right that is perpetual in nature. Moreover, while the law imposes a reasonable time for performance of the obligations under a contract, *see Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E.2d 472 (1952), a reasonable time for performing the obligations under the present agreement is not necessarily within the twenty-one year perpetuities period. *Rodin*, 48 N.C. App. at 68, 268 S.E.2d at 541.

In *Village of Pinehurst v. Regional Investments of Moore*, 330 N.C. 725, 412 S.E.2d 645 (1992), our Supreme Court held that a right of first refusal to purchase sewage and water systems, which right was not limited in duration, violated the rule against perpetuities. In response to plaintiff's contention that the rule had no place in business transactions, the Court noted:

> We do not believe we should make an exception to the rule because the real property which the plaintiff desires to purchase is used in the operation of a business. If a restraint on alienation is bad, we see no reason why it is made good because it is part of a commercial transaction or the property is used for business purposes.

Id. at 729, 412 S.E.2d at 646-47. The underlying purpose of the rule being to prevent the restraint on alienation, we believe that the perpetual encumbrance on the property which plaintiff seeks to enforce is the sort of impediment to marketability that the rule was meant to prevent. Therefore, we hold that plaintiff's interest under the addendum must fail, and entry of judgment in plaintiff's favor was error.

For the foregoing reasons, we reverse the judgment of the trial court and remand this matter for entry of judgment in favor of defendant.

Reversed and remanded.

Judge MARTIN concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

I respectfully dissent from the majority's opinion as I would hold that the Rule Against Perpetuities ("RAP") does not render the contract and addendum in this case void. The majority applies the RAP to void a contract provision for "deferred compensation" found in a land sales contract. I would hold that the deferred compensation fee arrangement does not violate the RAP because: (1) the RAP does not apply because there is no restraint on alienation or marketability of the property as proscribed by the Rule, and (2) it is inequitable to allow defendant to own and sell the property acquired by deed from plaintiff, yet avoid an essential term of the acquisition.

1. No Restraint on Marketability or Alienation

> [W]hen one attempts to sort out the applications of the Rule to interests other than the traditional future interests associated with gratuitous transfers, he quickly encounters a set of seemingly contradictory holdings. In contrast to the usual perpetuities cases on gifts, wills and trusts, in which a doctrinaire application of the Rule usually results in the correct 'answer', in the commercial interest cases a logical approach based on the face of the Rule does not always yield a predictably correct result. Rather, one must look to some ad hoc reasons behind the black letter of the rule.

Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. Rev. 727, 804 (1979) (emphasis supplied).

The underlying reason behind the Rule Against Perpetuities is "the protection of society by allowing full utilization of land." *Village of Pinehurst v. Regional Investments of Moore*, 330 N.C. 725, 732, 412 S.E.2d 645, 648 (1992) (Meyer, J., dissenting). "The rule evolved to prevent property from being fettered with future interests so remote that the alienability of the land and its marketability would be impaired, preventing its full utilization." *Id.* (emphasis supplied) (citation omitted). In *Rodin v. Merritt*, 48 N.C. App. 64, 68, 268 S.E.2d

539, 542, *disc. rev. denied*, 301 N.C. 402, 274 S.E.2d 226 (1980), this Court wrote:

> The Rule grew up as a limitation on family dispositions of property, and the measuring stick of lives in being plus 21 years is well adapted to disposition of property by will and other family gift transactions. However, it is difficult to perceive that the same reasons for its creation would have any application to today's sophisticated, arms-length commercial real estate transactions. We find it difficult to believe that either lives in being or 21 years have much relevance to business and their affairs.

Cf. Village of Pinehurst, supra, (a preemptive right will not be excluded from the RAP because the transaction is commercial in nature). Applying these principles to the present case, it is clear that the addendum to the contract providing for the "deferred compensation fee" to be paid upon the sale of each lot, does not affect the alienability or marketability of the property.

The trial court made the following findings of fact:

> 4. Defendant executed the addendum calling for the $600.00 per lot fees at the advice of its attorney in anticipation that it would acquire the property from LFM Properties and build residential houses on that portion of the property which could be developed.
>
> * * *
>
> 6. At the time of closing on April 25, 1995 the parties mutually agreed and intended that the $600.00 fee would be paid when each of the 37 lots sold.
>
> * * *
>
> 9. On April 22, 1998 defendant conveyed a lot and did not pay plaintiff the sum of $600.00 dollars as required by the agreement.
>
> 10. On April 22, 1998 defendant did not intend to pay plaintiff this $600.00 per lot fee on any of the lots it sold or would sell in the subdivision now known as Carolina Village.
>
> * * *
>
> 12. Nine lots have been sold thus far in the first phase of the subdivision.

The parties clearly contemplated and agreed to the fee as a method for payment of deferred compensation to the plaintiff. The require-

ment that defendant pay the "deferred fee" to plaintiff upon the sale of each lot does not hinder defendant's ability to market or alienate the lots. Based on these facts, I would hold that the RAP is inapplicable to this "deferred compensation fee" arrangement.

Such a holding is consistent with our Supreme Court's holding in *Village of Pinehurst, supra.* In *Village of Pinehurst* the Supreme Court held that a municipality's preemptive right to purchase certain water and sewer systems was void under the RAP. The municipality argued, *inter alia,* that "there should be an exception to the application of the Rule Against Perpetuities . . . because the preemptive right is for the purchase of a business." *Village of Pinehurst,* 330 N.C. at 728, 412 S.E.2d at 646. Rejecting this argument, the Supreme Court held that "[i]f a restraint on alienation is bad, we see no reason why it is made good because it is part of a commercial transaction or the property is used for business purposes." *Id.* at 729, 412 S.E.2d at 646-47 (emphasis supplied). A preemptive right, like the one in *Village of Pinehurst,* is a "restraint on the alienability of property in that it has the potential to deter would-be buyers by creating uncertainty and unwillingness to invest time and energy into purchasing the burdened property." *Village of Pinehurst v. Regional Investments of Moore: Perpetuating the Rule Against Perpetuities in the Realm of Preemeptive Rights-North Carolina Refuses to Accept an Exception to the Rule,* 71 N.C. Law Rev. 2115, 2130 (1992). In the present case, the deferred fee arrangement does not impose a similarly offensive "restraint on alienation" on the defendant. It is merely an agreed upon means to compensate plaintiff for the purchase of its property.

Further, in *Smith v. Mitchell,* 301 N.C. 58, 62, 269 S.E.2d 608, 611 (1980), our Supreme Court wrote:

> the policy absolutely favoring alienability has always conflicted with another common law tenet that one who has property should be able to convey it subject to whatever condition he or she may desire to impose on the conveyance. *Id.* at p. 2380. *See also* J. Webster, *Real Estate Law in North Carolina* § 344 at 432 (1971).
>
> Faced with this tension, the law has evolved in such a way that some direct restraints on alienation are permissible where the goal justifies the limit on the freedom to alienate, 4 *Restatement of the Law of Property, Introductory Note, supra* at p. 2380, or where the interference with alienation in a particular case is so

negligible that the major policies furthered by freedom of alienation are not materially hampered, *id.* Thus the general rule is that a restraint on alienation which provides that the property cannot be alienated, a disabling restraint, Simes & Smith, supra at 1131, *Restatement of the Law of Property* § 404, is *per se* invalid, Simes & Smith, *supra* at § 1137; *Restatement of the Law of Property* § 406, while restraints which provide only that someone's estate may be forfeited or be terminated if he alienates, or that provides damages must be paid if he alienates, may be upheld if reasonable. *Restatement of the Law of Property* § 406. (emphasis supplied).

2. Estoppel

Recognizing a quasi-estoppel argument to bar the application of the RAP, the *Smith* Court wrote:

> In *Pure Oil Co. v. Baars*, 224 N.C. 612, 31 S.E.2d 854 (1944), the grantor deeded land to defendants but retained an option to repurchase. Defendants asserted the option was void [as violative of the RAP]. The Court upheld the option and refused to void it because it was 'an integral part of the transaction and it would be inequitable to allow the defendants to claim the property under deed . . . and at the same time annul the essential terms of its acquisition. If the option is to go out so must the deed which induced it.'

Smith, 301 N.C. at 63, 269 S.E.2d at 612; *Cf. Village of Pinehurst*, 330 N.C. at 730, 412 S.E.2d at 647 ("Assuming estoppel can bar the application of the rule against perpetuities, the benefits accepted must be more substantial than were accepted in this case to support an estoppel."). In the present case, defendant accepted the deed to the property from plaintiff and benefitted from the sale of portions of the property to others. The trial court found that defendant had alienated nine of the thirty-seven lots without payment of the agreed upon fees to the plaintiff. Defendant now wishes to avoid one of the essential terms of its acquisition of the property.

The majority's holding is contrary to precedent, and inequitable to plaintiff. I would hold that the deferred compensation fee arrangement does not violate the RAP because: (1) it is not a restraint on alienation or marketability of the property as proscribed by the Rule, and (2) it is inequitable to allow defendant to own and to sell the property acquired from plaintiff, yet avoid an essential term of the acquisition.

After review, I find all of defendant's assignments of error without merit. Therefore, I dissent from the majority's holding and would affirm the decision of the learned trial court.

GREGORY N. THOMAS, EMPLOYEE, PLAINTIFF v. B.F. GOODRICH, EMPLOYER; SELF-INSURED (GATES MCDONALD, SERVICING AGENT), DEFENDANT

No. COA00-656

(Filed 19 June 2001)

1. Workers' Compensation— findings of fact—record on appeal—sufficiency of evidence

The Court of Appeals is precluded from reviewing the Industrial Commission's findings of fact and the Commission's findings of fact are deemed to be supported by competent evidence in the record, because: (1) the record on appeal does not contain any evidence or a transcript of the proceedings relied upon by the deputy commissioner in making an opinion and award; and (2) the record on appeal does not contain any transcript of proceedings relied upon by the Industrial Commission in making its opinion and award even though the record does indicate the Commission received evidence during a hearing on the matter.

2. Workers' Compensation— request for credit—lifetime permanent disability payments—deductions

The Industrial Commission did not err by concluding that defendant employer could not receive credit under N.C.G.S. § 97-42 for its payments of permanent disability to plaintiff employee that were supposed to be made directly to plaintiff's attorney for attorney fees, because: (1) generally deductions to an employee's award under N.C.G.S. § 97-42 must be made by shortening the period that payments are due, and it is not possible to shorten the period of payments when an employee receives an award of permanent disability to be paid during his lifetime; and (2) although an award of a deduction in the amount of the employee's payment in order to compensate the employer would not violate N.C.G.S. § 97-42, the Commission made alternative findings of fact and conclusions of law to support its denial of defendant's motion for a deduction.

3. Workers' Compensation— request for credit—lifetime permanent disability payments—failure to follow dictates of opinion and award

The Industrial Commission did not abuse its discretion by denying defendant employer's request for a credit under N.C.G.S. § 97-42 based on the Commission's conclusion that defendant should bear the entire cost of its failure to follow the dictates of the opinion and award of 26 February 1990 requiring defendant to pay every fourth permanent disability payment directly to plaintiff's attorney for attorney fees instead of to plaintiff employee, because: (1) the parties do not dispute that defendant mailed every fourth payment directly to plaintiff rather than to plaintiff's counsel; (2) plaintiff did not have the mental ability to realize that his receipt of every fourth check was not in accordance with the provisions of the opinion and award; and (3) the Commission's findings of fact demonstrate the denial of a credit was based on a reasoned decision.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 19 January 2000. Heard in the Court of Appeals 15 May 2001.

Wallace and Graham, P.A., by Barbara L. Curry, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice PLLC, by Clayton M. Custer and Christopher A. Kreiner, for defendant-appellant.

GREENE, Judge.

B.F. Goodrich (Defendant) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 19 January 2000.

The record shows that Gregory N. Thomas (Plaintiff) suffered a compensable injury on 3 June 1986 while employed by Defendant. In an opinion and award filed 26 February 1990, a deputy commissioner of the North Carolina Industrial Commission concluded Plaintiff was totally and permanently disabled as a result of his compensable injury. Pursuant to the 26 February 1990 opinion and award, Defendant was ordered to pay Plaintiff "compensation for total disability for the remainder of his life, return to work, or change of condition, whichever first occurs, at the rate of $197.34 per week begin-

ning from 3 June 1986." Additionally, the 26 February 1990 opinion and award contained the following provision:

> 3. A reasonable attorney['s] fee of twenty-five (25%) percent of the compensation due [P]laintiff is approved for [P]laintiff's counsel and shall be paid as follows: twenty-five (25%) of the lump sum due [P]laintiff shall be deducted from that sum and paid directly to [P]laintiff's counsel. Every fourth compensation check, thereafter, shall be deducted from the sum due [P]laintiff and paid directly to [P]laintiff's counsel.

Subsequent to entry of the 26 February 1990 opinion and award, Defendant began making weekly payments to Plaintiff in the amount of $197.34. Although the 26 February 1990 opinion and award ordered Defendant to send every fourth check to Plaintiff's counsel, Defendant forwarded every check, including every fourth check, directly to Plaintiff. Defendant continued to pay Plaintiff in this manner until January 1996, which resulted in Plaintiff receiving $15,195.18 in funds that Defendant should have forwarded to Plaintiff's counsel rather than to Plaintiff. On 8 January 1996, Defendant "changed servicing agents and the new servicing agent began sending every fourth compensation check directly to [P]laintiff's attorney."

On 4 October 1996, Plaintiff filed a motion with the Industrial Commission requesting that Defendant be compelled to pay to Plaintiff's counsel all attorney's fees due under the 26 February 1990 opinion and award that remained unpaid. In an order filed 27 November 1996, the executive secretary of the Commission ordered:

> that [D]efendant pay to [P]laintiff's counsel all attorney['s] fees due pursuant to the February 26, 1990 [o]pinion and [a]ward and subsequent Orders, which have not been paid within thirty (30) days of this Order. Plaintiff's counsel should have received every fourth check from the entry of the [o]pinion and [a]ward and continuing.

Defendant did not appeal the 27 November 1996 order. In compliance with the 27 November 1996 order, on 10 February 1997, Defendant forwarded to Plaintiff's counsel attorney's fees in the amount of $15,195.18. However, on 28 February 1997, Defendant sent a letter to the executive secretary of the Industrial Commission stating that Plaintiff, as a result of receiving funds that should have been forwarded by Defendant to Plaintiff's counsel, received "an overpayment of temporary . . . benefits." Also in the letter, Defendant inquired as to whether it was "allowed a credit for this money paid and how [it]

should go about taking this credit from [Plaintiff's] future payments." In a letter of response dated 7 May 1997, the executive secretary informed Defendant that she was "not inclined to award a credit for attorney['s] fees" and that, should Defendant wish to pursue this matter, it should file a Form 33 request for a hearing.

On 27 May 1998, Defendant filed a Form 33 request for a hearing on the issue of whether it was entitled to "a credit for all amounts paid to both . . . [P]laintiff and his attorney." On 19 January 2000, subsequent to a hearing on this issue during which the parties presented evidence, the Commission filed an opinion and award containing the following pertinent findings of fact:

> 5. Instead of sending every fourth compensation check directly to [P]laintiff's counsel for attorney's fees pursuant to the February 26, 1990 [o]pinion and [a]ward, [D]efendant sent each compensation check, including every fourth check, directly to [P]laintiff, who cashed them and spent the money. There was nothing on the checks to indicate to [P]laintiff that the money did not belong to him. Additionally, [P]laintiff is functionally illiterate and has reading and writing abilities at the third grade level and a Beta IQ of 72.
>
> . . . .
>
> 12. The $15,195.18 paid by [D]efendant to [P]laintiff during the period 1990 through 1995 by sending checks for $197.34 every week instead of every three out of four weeks (with the fourth week's check to be sent directly to [P]laintiff's attorney) was not due and payable to [P]laintiff at the time it was paid.
>
> 13. The $15,195.18 [D]efendant paid [P]laintiff's attorney pursuant to [the executive secretary's] November 27, 1996 Order was due and payable at the time it was paid because [D]efendant had not made payment of every fourth check directly to [P]laintiff's counsel as required by the February 26, 1990 [opinion and award].

The Commission then made the following pertinent conclusions of law:[1]

1. Although the Commission classified paragraph numbers 3 and 4 as "CONCLUSIONS OF LAW," these paragraphs contain findings of fact as well as conclusions of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (conclusions of law are reached through the exercise of judgment or the application of legal principles and findings of fact are reached through logical reasoning based on the evidentiary facts).

2. Since this is a case of lifetime disability, it is impossible to "shorten the period during which compensation must be paid[.]"[] To the extent the . . . Commission grants a credit to [D]efendant, such credit would "reduc(e) the amount of the weekly payment" and thus be in violation of . . . N.C. Gen. Stat. § 97-42. . . .

3. It would not be fair to make [P]laintiff repay the $15,195.18 to [D]efendant. The only way the . . . Commission could accomplish this would be to permit . . . [D]efendant to reduce [P]laintiff's compensation, which is already below the poverty level[.] . . .

4. As between [D]efendant and [P]laintiff, [D]efendant should bear the responsibility for its failure to pay every fourth check to [P]laintiff's attorney as directed in the [o]pinion and [a]ward of February 26, 1990. Plaintiff did not have the mental ability to realize that his receipt of every fourth check was not in accordance with the provisions of the [o]pinion and [a]ward of February 26, 1990.

Based on its findings of fact and conclusions of law, the Commission ordered the following:

Defendant is not entitled to a credit pursuant to N.C. Gen. Stat. § 97-42 against future compensation payments to [P]laintiff. Alternatively, the . . . Commission in its discretion determines that, as between [P]laintiff and [D]efendant based on the facts of this matter, [D]efendant should bear the entire cost of its failure to follow the dictates of the [o]pinion and [a]ward of February 26, 1990, and no credit is awarded.

The issues are whether: (I) Defendant preserved for appellate review the issue of whether the Commission's findings of fact are supported by competent evidence in the record; (II) an employer can receive a credit pursuant to N.C. Gen. Stat. § 97-42 when the employee has received an award of permanent disability; and (III) the Commission abused its discretion by denying Defendant's request for a credit pursuant to N.C. Gen. Stat. § 97-42.

I

[1] Defendant argues several of the Commission's findings of fact are not supported by competent evidence in the record.

Appellate review of the Commission's findings of fact is limited to whether the findings of fact are supported by competent evidence. *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). When a party challenges the Commission's findings of fact based on insufficiency of the evidence, the record on appeal must contain all evidence necessary for review of the findings, including all relevant transcripts of proceedings. N.C.R. App. P. 9(a)(1)(e). When such relevant evidence is not made part of the record on appeal, this Court is precluded from reviewing the Commission's findings of fact; therefore, the findings of fact are "deemed to be supported by competent evidence." *See Britt v. Britt*, 49 N.C. App. 463, 469, 271 S.E.2d 921, 926 (1980); *In re Estate of Barrow*, 122 N.C. App. 717, 722, 471 S.E.2d 669, 672 (1996).

In this case, the record on appeal does not contain any evidence or a transcript of the proceedings relied upon by the deputy commissioner of the Industrial Commission in making its 26 February 1990 opinion and award. Additionally, the record on appeal does not contain any transcript of proceedings relied upon by the Commission in making its 19 January 2000 opinion and award, though the record indicates the Commission received evidence during a hearing on this matter. This Court is therefore precluded from reviewing the Commission's findings of fact. Thus, the Commission's findings of fact are deemed to be supported by competent evidence. This assignment of error is, therefore, overruled.

II

[2] Defendant argues the Commission erred by concluding Defendant could not be awarded a credit because any credit would " 'reduc(e) the amount of weekly payment' and thus be in violation of . . . N.C. Gen. Stat. § 97-42." We agree.

N.C. Gen. Stat. § 97-42 provides in pertinent part:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. *Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment.*

N.C.G.S. § 97-42 (1999) (emphasis added). Generally, deductions to an employee's award which are allowed by the Commission pursuant to section 97-42 must be made by shortening the period during which payments are due. *Id.* When, however, an employee receives an award of permanent disability to be paid during his lifetime, it is not possible to "shorten[] the period during which compensation must be paid." Thus, when a deduction is allowed in such a case, the Commission may order the employer to reduce the amount of the employee's payments in order to compensate the employer for the deduction. *See, e.g., Johnson v. IBM*, 97 N.C. App. 493, 494-95, 389 S.E.2d 121, 122 (affirming opinion and award of the Commission which allowed employer to deduct funds pursuant to section 97-42 from an employee's award of permanent disability), *disc. review denied*, 327 N.C. 429, 395 S.E.2d 679 (1990). To hold otherwise would preclude an employer from seeking a deduction under section 97-42 in any case involving an award of permanent disability. We, however, do not believe the Legislature intended such a result. *See Gray v. Carolina Freight Carriers*, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992) (noting the policy of section 97-42 is "to encourage voluntary payments by the employer while the [employee's] claim is being litigated and he is receiving no wages").

In this case, the Commission erred by concluding an award of a deduction to Defendant would violate section 97-42 because it would " 'reduc(e) the amount of weekly payment' " made to Plaintiff pursuant to Plaintiff's award of permanent disability. Nevertheless, because the Commission made alternative findings of fact and conclusions of law to support its denial of Defendant's motion for a deduction, this error does not require reversal.

III

[3] Defendant argues the Commission erred by denying its request for a credit under N.C. Gen. Stat. § 97-42 based on its conclusion that "[D]efendant should bear the entire cost of its failure to follow the dictates of the [o]pinion and [a]ward of February 26, 1990." We disagree.

Payments are due and payable under section 97-42 when the employer has accepted the plaintiff's injury as compensable and initiated payment of benefits, "*so long as* the payments [do] not exceed the amount determined by statute or by the Commission to compensate [the] plaintiff for his injuries." *Moretz v. Richards & Associates*, 316 N.C. 539, 542, 342 S.E.2d 844, 846 (1986). If payments made by an

employer are due and payable, the employer may not be awarded a credit for the payments under section 97-42. *Id.* at 541, 342 S.E.2d at 846. When, however, an employer makes payments that are not due and payable, the Commission may in its discretion award the employer a credit for the payments pursuant to section 97-42. *Johnson*, 97 N.C. App. at 495, 389 S.E.2d at 122 (whether to allow employer a credit under section 97-42 is within the discretion of the Commission); *Moretz v. Richards & Associates*, 74 N.C. App. 72, 75, 327 N.C. 290, 293 (1985) ("The language of [section] 97-42 clearly indicates that a credit . . . is not *required* to be granted[;] [r]ather, the language places the decision of whether to grant a credit within the sound discretion of the . . . Commission."), *modified on other grounds and affirmed*, 316 N.C. 539, 342 S.E.2d 844 (1986). Thus, this Court's review of the Commission's decision to grant or deny a credit for payments made by an employer that were not due and payable "is strictly limited to a determination of whether the record affirmatively demonstrates a manifest abuse of discretion" by the Commission.[2] *Mortez*, 74 N.C. App. at 76, 327 S.E.2d at 293; *see State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) ("trial court may be reversed for an abuse of discretion only upon a showing that its ruling could not have been the result of a reasoned decision").

In this case, the parties do not dispute that Defendant mailed every fourth payment directly to Plaintiff rather than to Plaintiff's counsel. Additionally, the Commission found as fact that "[P]laintiff is functionally illiterate and has reading and writing abilities at the third

2. Defendant argues in its brief to this Court that pursuant to *Tucker v. Workable Company*, 129 N.C. App. 695, 501 S.E.2d 360 (1998), the standard of review of the Commission's decision to grant or deny a credit under section 97-42 is not "a wholly discretionary standard." We disagree. *Tucker* does not overrule well-established law that the Commission may, *in its discretion*, grant or deny a credit under section 97-42. *See Johnson*, 97 N.C. App. at 495, 389 S.E.2d at 122; *Moretz*, 74 N.C. App. at 75, 327 S.E.2d at 293. Rather, the teaching of *Tucker* is that the Commission abused its discretion when it disallowed a credit for the purpose of penalizing the employer for failing "to abide by the law and rules of the . . . Commission." *Tucker*, 129 N.C. App. at 703, 501 S.E.2d at 366.

We acknowledge the North Carolina Supreme Court held in *Foster v. Western-Electric Co.*, 320 N.C. 113, 117-18, 357 S.E.2d 670, 673 (1987), that an employer should be allowed a "credit for the amount paid [to an employee pursuant to a private disability plan] as against the amount which was subsequently determined to be due the employee under workers' compensation" when the amount paid under the private disability plan was not "due and payable." Thus, it is an abuse of discretion for the Commission to deny a credit under section 97-42 in such cases. Nevertheless, in the case *sub judice*, Defendant does not seek a credit for payments made to Plaintiff pursuant to a private benefits plan prior to Plaintiff's award of permanent disability; thus, the holding of *Foster* is not applicable to the facts of this case.

grade level and a Beta IQ of 72"; "[a]s between [D]efendant and [P]laintiff, [D]efendant should bear the responsibility for its failure to pay every fourth check to [P]laintiff's attorney as directed in the [o]pinion and [a]ward of February 26, 1990"; and "Plaintiff did not have the mental ability to realize that his receipt of every fourth check was not in accordance with the provisions of the [o]pinion and [a]ward of February 26, 1990." These findings of fact demonstrate the Commission's opinion and award denying Defendant's request for a credit was based on a reasoned decision; thus, the Commission did not abuse its discretion by denying Defendant's request for a credit. Accordingly, the Commission's 19 January 2000 opinion and award is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. DARRICK BELFIELD

No. COA00-595

(Filed 19 June 2001)

1. **Evidence— witness testimony—defendant smoked crack cocaine in front of children—opened the door to testimony**

The trial court did not err in an aiding and abetting case involving robbery and murder by allowing defendant's girlfriend to testify that defendant smoked crack cocaine in front of the parties' two children, because defendant opened the door to questions regarding whether and why the girlfriend did not leave her children at home with defendant when she went out.

2. **Constitutional Law— right to remain silent—incriminating information elicited from another**

Even though defendant invoked his Fifth Amendment privilege to remain silent, the trial court did not commit plain error in an aiding and abetting case involving robbery and murder by allowing defendant's girlfriend to testify that defendant never sought medical assistance or help for the victim and refused to allow his girlfriend to do so, because: (1) the Fifth Amendment

privilege is a personal privilege adhering to the person and not to the information that may incriminate him; and (2) defendant's invocation of his Fifth Amendment privilege is irrelevant when the evidence sought to incriminate defendant came from his girlfriend, who did not invoke her Fifth Amendment privilege.

3. Evidence— card written by girlfriend to defendant—probative value outweighed by prejudicial effect

The trial court did not abuse its discretion in an aiding and abetting case involving robbery and murder by denying defendant's motion to introduce into evidence a card written to him by his girlfriend while the two were in jail awaiting trial in an effort to attack the girlfriend's statement that she was afraid of defendant, because: (1) the trial court gave both sides ample opportunity to argue their positions on the admissibility of the card and concluded under N.C.G.S. § 8C-1, Rule 403 that the evidence's probative value was outweighed by the prejudicial effect; (2) the trial court stated it would allow defendant to explore his relationship with his girlfriend; and (3) the trial court allowed defense counsel to inquire of his girlfriend the nature of the writings and the content, and in fact allowed all of the writings except the particular card at issue which contained lipstick marks and vulgar sexual language.

4. Criminal Law— aiding and abetting—advising jury of maximum sentence

Although the trial court erred in an aiding and abetting case involving robbery and murder by disallowing defense counsel to advise the jury of the maximum sentence defendant could receive if found guilty, there was no prejudicial error because the evidence of defendant's guilt was overwhelming and this error was insignificant by comparison.

Appeal by defendant from judgments entered 9 June 1999 by Judge James E. Ragan, III in Northampton County Superior Court. Heard in the Court of Appeals 18 April 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Leonard G. Green, for the State.

Charles A. Moore for defendant-appellant.

HUNTER, Judge.

Darrick Belfield ("defendant") appeals the jury verdicts finding him guilty of aiding and abetting his girlfriend, Betty L. Williams ("Ms. Williams"), in the armed robbery and murder of Jerry A. Belfield ("the victim"). We find no error.

The bulk of the State's evidence came from Ms. Williams, the principal defendant in the charges at issue. Defendant and Ms. Williams lived together just across a field from the victim. The State's evidence revealed that the two often "borrowed" money from the victim to buy crack cocaine which they both smoked. Ms. Williams was afraid of defendant "because he had physically assaulted her on several occasions when they argued . . . ." At trial, Ms. Williams testified that on 15 May 1998, she went over to the victim's house and exchanged sexual favors to borrow money from him, as she had done many times before. She further testified that later that same day, defendant threatened her with bodily harm if she did not go back to the victim's house and borrow more money from him. Then, after arguing with her, defendant got a bat from his kitchen and followed Ms. Williams to the victim's house—threatening her all the way. When the two arrived outside the victim's home, defendant instructed Ms. Williams to hit the victim with the bat and get some money from him. When she stood there hesitating, defendant handed Ms. Williams the bat and pushed her towards the victim's back door.

When she arrived at the victim's door, Ms. Williams knocked and the victim let her in. Upon stepping inside, she asked the victim if she could have a cigarette, to which he said "yes" and proceeded to go to his bedroom to get one. Ms. Williams then followed the victim to his bedroom and while his back was turned toward her, she hit him in the back of the head once with the bat. The victim dropped to the floor. Ms. Williams then took $150.00 out of his wallet, exited using the back door of the trailer through which she entered and gave the money to defendant who had been waiting outside the trailer for her the entire time. Neither defendant nor Ms. Williams called 9-1-1 to gain assistance for the victim—who subsequently died from the blow to the head. At the conclusion of his trial, the jury found defendant guilty on both counts of aiding and abetting, and the trial court sentenced defendant to 90 to 117 months imprisonment for the aiding and abetting robbery with a dangerous weapon conviction, and 210 to 261 months imprisonment for the aiding and abetting second degree murder conviction.

[1] In the record, defendant preserved eighteen assignments of error. However, he brings forward only four arguments before this Court. Therefore, any assignment not argued is deemed abandoned. N.C.R. App. P. 28(b)(5). Defendant first alleges the trial court committed error by allowing Ms. Williams to testify that defendant smoked crack cocaine in front of the parties' two children. It is defendant's contention that this testimony tends to prove defendant is of bad character and therefore, is inadmissible being both irrelevant and highly prejudicial. We are unconvinced.

Defendant is correct that, pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999):

> 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. . . .*

Id. However, we need not reach defendant's argument that the testimony was inadmissible pursuant to this statute. Instead, we find the testimony was admissible because defendant "opened the door" to the testimony. The record reveals that in an effort to show that Ms. Williams trusted defendant, on cross-examination defense counsel inquired of Ms. Williams:

> Q. How many children do you and [defendant] have?
>
> A. 2.
>
> Q. How old are they?
>
> A. 5 and 6.
>
> . . .
>
> Q. And those times you would be [away from home] on some of those occasions, those children would be home with [defendant] would they not?
>
> A. No.
>
> Q. You wouldn't leave those children home with him when you'd go out there and stay all night and he would come looking for you?

A. No.

. . .

A. I would leave them at my Mom's house. He would go over there and get them from there. He would go get the boys where I leave [sic] them at Mom's house and he would go over there and get the boys hisself [sic] and take them back with him, but I don't leave them there with him.

Then, on re-direct, the State inquired of Ms. Williams as to whether the reason she left her children with her mother was because defendant "smoked crack cocaine while the children were in the house[.]" Ms. Williams answered, "[y]es."

The law has long been that, even where

th[e] type of testimony is not allowed[,] . . . when a party first raises an issue, it opens the door to questions in response to that issue and cannot later object to testimony regarding the subject raised. *See State v. Norman*, 331 N.C. 738, 742, 417 S.E.2d 233, 235 (1992).

Middleton v. Russell Group, Ltd., 126 N.C. App. 1, 23-24, 483 S.E.2d 727, 740, *disc. review denied*, 346 N.C. 548, 488 S.E.2d 805 (1997). Therefore, because defense counsel opened the door to questions regarding whether and why Ms. Williams did not leave her children at home with defendant when she went out, we hold that defendant cannot now argue that the trial court's allowance for response to such questions was error. Defendant's assignment is overruled.

[2] Defendant's second assignment of error is that the trial court committed plain error by allowing Ms. Williams to testify that defendant never sought medical assistance or help for the victim and refused to allow her to do so. Defendant contends that because he invoked his Fifth Amendment privilege, this portion of Ms. Williams' testimony—elicited by the State to prove defendant acted with malice in helping Ms. Williams commit the crimes—violated his Constitutional right to remain silent. We disagree.

We note that all of the cases cited by defendant in his brief deal with this issue arising when a prosecutor attempts to *compel a defendant, who has invoked his privilege, to incriminate himself.* However, that is not the case *sub judice.* Our Supreme Court has long held

that *the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him.* As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458, 57 L. Ed. 919, . . . (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it *necessarily does not proscribe incriminating statements elicited from another.* Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*," *Holt v. United States*, 218 U.S. 245, 252-53, . . . 54 L. Ed. 1021 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

* * *

The divulgence of potentially incriminating evidence against [defendant] is naturally unwelcome. But . . . [t]he basis complaint of [defendant] stems from the fact of divulgence of the . . . incriminating information, not from the manner in which or the person from whom it was extracted. Yet such divulgence, where it did not coerce the accused h[im]self, is a necessary part of the process of law enforcement . . . .

Lowder v. Mills, Inc., 301 N.C. 561, 585-86, 273 S.E.2d 247, 261 (1981) (emphasis added) (quoting *Couch v. United States*, 409 U.S. 322, 328-29, 34 L. Ed. 2d 548, 554-55 (1973)). Thus, because in the case *sub judice*, the evidence sought to incriminate defendant came from Ms. Williams—who did not invoke her Fifth Amendment privilege—and not from defendant, defendant's invocation of his own privilege is irrelevant, being personal to him and not reaching Ms. Williams. *Id.* Therefore, it was proper and necessary for the State to seek to gain the incriminating evidence against defendant from Ms. Williams.

[3] Defendant's third assignment of error is that the trial court erred by denying defendant's motion to introduce into evidence a card written to him by Ms. Williams while the two were in jail awaiting trial. It is defendant's contention that the card was relevant as to Ms. Williams' credibility, because although Ms. Williams testified she was afraid of defendant, the card she sent stated she would always be his friend and indicated she wanted to have sexual relations with him. We are unpersuaded by defendant's argument.

The record reflects that the trial court allowed defense counsel and the State to argue their positions on allowing or disallowing admission of the evidence. It was defendant's contention that because the card stated Ms. Williams still loved him, it then went to prove that she must have been lying and could not also be afraid of him. However, the trial court determined that the evidence was inadmissible, concluding that "any probative value this would have is clearly outweighed by the prejudicial, by the prejudicial effect, so I'm not going to allow it." The trial court did state that the defense would be allowed to explore defendant's relationship with Ms. Williams.

Under Rule 403 of the North Carolina Rules of Evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (1999). Further, the decision regarding "[w]hether or not to exclude evidence under Rule 403 is within the discretion of the trial court and will not be overturned absent an abuse of discretion." *State v. Underwood*, 134 N.C. App. 533, 538, 518 S.E.2d 231, 237 (1999), *writ improvidently allowed*, 352 N.C. 669, 535 S.E.2d 33 (2000).

In the case at bar, the record clearly reflects the trial court gave both the State and defense counsel ample opportunity to argue their positions on the admissibility of the card. Additionally, defense counsel argued to introduce the many other cards and letters written by Ms. Williams to defendant while the two were in jail. Consequently, the trial court allowed the defense to inquire of Ms. Williams the nature of the writings and the content, and in fact, the trial court allowed all of the writings to be admitted into evidence except for the particular card at issue, which contained lipstick marks and vulgar sexual language. From the record, we do not believe that excluding the one writing from Ms. Williams to defendant prejudiced the defendant's opportunity to prove or disprove that Ms. Williams was afraid of him. Instead, we agree with the State that the card's "probative value [wa]s lost in [its] lurid nature . . . ." Thus, we find no abuse of discretion in the trial court's refusal to admit the card into evidence.

[4] Defendant's final assignment of error is that the trial court erred in disallowing defense counsel to advise the jury of the maximum sentence defendant could receive if found guilty. In support of his argument, defendant cites *State v. Walters*, 294 N.C. 311, 240 S.E.2d 628 (1978), in which our Supreme Court held:

> G.S. 84-14 provides, in part: "In jury trials the whole case as well of law as of fact may be argued to the jury." *This statute secures to counsel the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried. State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976); *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). *Accord, State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977). Counsel may exercise this right by reading the punishment provisions of the statute to the jury, though he "may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the [prescribed punishment]." *State v. Britt, supra*, [285 N.C.] at 273, 204 S.E.2d at 829. "Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely." *Id.*
>
> Thus the trial court erred in denying defense counsel the right to inform the jury of the punishment prescribed by law for second degree murder, voluntary manslaughter and involuntary manslaughter. . . .

Id. at 313-14, 240 S.E.2d at 630 (emphasis added).

Contrarily, the State argues that *Walters, supra*, is distinguishable because in that case, "there was evidence to support a conviction for either second degree murder, voluntary or involuntary manslaughter." Thus, it is the State's contention that because the present defendant was charged with only two offenses, neither of which contain any lesser included offenses, defendant "was either guilty of aiding and abetting second degree murder, or no murder at all. Likewise, he was either guilty of aiding and abetting robbery with a dangerous weapon, or no robbery at all."

In our view, it is clear that defendant had a statutory "right to *inform* the jury of the punishment prescribed for the offense for which defendant [wa]s being tried[,]" regardless of what the offenses were or how many of them there were. *Id.* at 313, 240 S.E.2d at 630

(emphasis in original). In this regard, we do not see the difference between *Walters* and the present case. Thus, we hold that the trial court erroneously denied defendant the right to read to the jury the punishment prescribed under the Structured Sentencing Act for the charged offenses. Nevertheless, we must now decide whether the error was prejudicial to defendant.

> Mere technical error does not entitle defendant to a new trial. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 274 (1971). The burden is on the appellant to show prejudicial error amounting to the denial of some *substantial* right. *Kennedy v. James*, 252 N.C. 434, 113 S.E.2d 889 (1960). . . .

Id. at 314, 240 S.E.2d at 630 (emphasis added).

> In cases where evidence of a defendant's guilt is overwhelming and the error complained of is insignificant by comparison, we have held, and rightly so, that such insignificant error could not have contributed to the conviction and was therefore harmless. . . .

Id. at 315, 240 S.E.2d at 631.

In the case at bar, the transcript of counsels' arguments to the jury (and any objections attached thereto) is not included in the record before this Court. However, the record does reflect Ms. Williams' testimony in which she plainly asserted that defendant had instructed and encouraged her to hit the victim over the head and take his money—for the purpose of being able to purchase more crack cocaine. Ms. Williams' testimony further reflected that defendant threatened her with bodily harm if she failed to do as she was told. Months later, when defendant was arrested on a completely unrelated charge, defendant told Deputy Sheriff Griffin that he went to the victim's house with Ms. Williams and that after she went inside "he heard a loud thumping noise, accompanied by a sound like someone moaning." This evidence was substantial in not only placing defendant at the scene of the crime, but also in corroborating Ms. Williams' testimony that defendant was aware of and involved in the crime. We, therefore, hold that this "evidence of [] defendant's guilt [wa]s overwhelming and the error complained of is insignificant by comparison . . . ." *Id.* Thus, the insignificant error, being harmless, could not have contributed to defendant's conviction. *Id.* Quoting our United States Supreme Court, our North Carolina Supreme Court said it best, "Defendant[] cannot expect the impossible—a perfect trial.

Lutwak v. United States, 344 U.S. 604, 97 L. Ed. 593, . . . [(1953)]. What [he is] entitled to expect is a trial that is fair and free from prejudicial error. This [he] received . . . ." *State v. Grant*, 19 N.C. App. 401, 414, 199 S.E.2d 14, 23 (1973).

No error.

Judges WALKER and TYSON concur.

STATE OF NORTH CAROLINA, EX REL. MICHAEL F. EASLEY, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY; LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., UNITED STATES TOBACCO COMPANY, DEFENDANT-APPELLEES, AND E. MICHAEL LATTA, C. ROLAND YOUNG, TERESA W. YOUNG, DENNIS R. YOUNG, JAMES R. BURGIO, JOHN M. BYRNS, JR., GEORGE JONES AND STEVE THOMPSON, CITIZENS AND TAXPAYERS, FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, INTERVENOR PLAINTIFF-APPELLANTS

No. COA00-445

(Filed 19 June 2001)

1. Appeal and Error— preservation of issues—order dealing with intervention and sanctions—additional arguments not considered

Additional arguments were not considered on appeal where the order appealed from dealt only with motions to intervene and sanctions.

2. Parties— intervention—after final judgment

The trial court did not abuse its discretion in an action which resulted in a trust to benefit tobacco growers and quota owners by finding that a motion to intervene was not timely where the intervenors failed to demonstrate the extraordinary and unusual circumstances or to make the strong showing of entitlement and justification necessary under case law to warrant granting a motion to intervene after a final judgment has been entered.

Judge GREENE concurring.

Appeal by intervenor plaintiffs from order entered 13 December 1999 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 24 April 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General James C. Gulick, for plaintiff-appellee.

Hunton & Williams, by A. Todd Brown, for defendant-appellees Philip Morris Incorporated, Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company), Lorillard Tobacco Company, and R.J. Reynolds Tobacco Company.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Urs R. Gsteiger, for defendant-appellee Liggett Group Inc.

Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts and Peter G. Pappas, for defendant-appellee United States Tobacco Company.

Boyce & Isley, PLLC, by G. Eugene Boyce and Philip R. Isley, for intervenor plaintiff-appellants.

McGEE, Judge.

Intervenor plaintiffs (intervenors) appeal the trial court's order denying intervenors' motion to intervene in the above-captioned case. For the reasons stated below, we affirm the trial court's order.

Plaintiff filed its complaint against defendants on 21 December 1998, seeking compensatory and injunctive relief for violations of Chapter 75 of the North Carolina General Statutes. Approximately an hour later, the trial court filed a Consent Decree and Final Judgment (Phase I) and an order dismissing with prejudice all plaintiff's claims against defendants. Among other forms of relief, Phase I directed the creation of a non-profit corporation to control fifty percent of all monies received under Phase I to benefit tobacco-dependent regions of North Carolina, subject to the North Carolina General Assembly's approval of the creation of the non-profit corporation prior to 15 March 1999. The trial court also retained jurisdiction over all future proceedings contemplated under Phase I.

On 15 March 1999, the trial court extended the deadline for the General Assembly to approve the creation of the non-profit corporation described in Phase I, and subsequently acknowledged legislative approval of the non-profit corporation on 19 March 1999. The trial

court formally approved the non-profit corporation as created by plaintiff on 9 July 1999.

The trial court entered a consent order on 19 August 1999 to create a private trust to benefit tobacco growers and quota owners in North Carolina and other states (Phase II) as part of its continuing jurisdiction under Phase I. The trial court approved the trust and retained jurisdiction to interpret, implement, administer and enforce the trust agreement.

On 4 November 1999, intervenors moved to intervene under N.C. Gen. Stat. § 1A-1, Rule 24 on behalf of all North Carolina taxpayers and simultaneously filed a complaint alleging numerous constitutional and statutory violations in the implementation of both Phase I and Phase II. Intervenors seek to have all monies disbursed under Phase I deposited directly into the State Treasury, and to have the private trust of Phase II be adjudged a "Common Fund for the benefit of such Class, Sub-Class or Classes of taxpayers and citizens of the State of North Carolina as may under all the circumstances be found entitled thereto by the Court, after due notice and opportunity to such persons and entities to be heard." Intervenors also moved for sanctions against plaintiff's attorneys on 17 November 1999 for failure to include the original summonses with the official court record and for statements made to the news media that intervenors' attorneys had moved to intervene solely "for the sake of a fee[.]"

Following a hearing, the trial court denied intervenors' motion to intervene on 13 December 1999. The trial court found that intervenors' motion was untimely because they had failed to show any acceptable justification for their delay in filing. The trial court further found that intervention would seriously prejudice and delay the rights of the original parties, and that the interests of intervenors and all citizens of North Carolina had been fairly represented and adequately served by plaintiff. The trial court also denied intervenors' motion for sanctions as moot. Intervenors appeal.

[1] As a preliminary matter, plaintiff moves to dismiss intervenors' appeal, or to strike portions of intervenors' brief and appendix, for violations of the North Carolina Rules of Appellate Procedure. *See Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984) ("The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal."). Plaintiff asserts that intervenors improperly argued matters not before this Court on appellate review and based those arguments on matters not in the

record, in violation of N.C.R. App. P. 9 and 28. Because the order appealed from deals only with intervenors' motions to intervene and for sanctions, we decline to consider any additional arguments raised by intervenors in their brief before this Court. *See* N.C.R. App. P. 3(d). However, plaintiff's motion to dismiss intervenors' appeal is denied pursuant to N.C.R. App. P. 2.

[2] N.C. Gen. Stat. § 1A-1, Rule 24 (1999) requires that an application to intervene be "timely." In *Procter v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999) (citing *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985)), our Court stated:

> The question of whether an application to intervene is timely is left to the discretion of the trial court who will consider the following factors: (1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances. In situations where a judgment has been entered, motions to intervene are granted only upon a finding of "extraordinary and unusual circumstances" or a "strong showing of entitlement and justification."

We therefore review for abuse of discretion the trial court's finding that intervenors' motion to intervene was untimely. "Appellate review of matters left to the discretion of the trial court is limited to a determination of whether there was a clear abuse of discretion." *Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999) (citing *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985)).

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White at 777, 324 S.E.2d at 833 (citation omitted).

In *Procter*, the petitioner sought a particular interpretation of a local zoning ordinance. At the petitioner's hearing before the respondent, the intervenors formally opposed the petitioner's interpretation. The respondent declined to adopt the petitioner's interpretation, and the petitioner appealed to the trial court. After a hearing,

the trial court announced its intention to adopt the petitioner's interpretation. Upon learning that the respondent did not plan to appeal the trial court's decision, the intervenors moved to intervene five days after the trial court's announcement and the day before the trial court entered its order. The trial court denied the motion as untimely.

Our Court reversed the *Procter* trial court holding that, due to the unusual circumstances in the case, the intervenors' motion was timely filed. We noted that the intervenors had been involved in the ongoing proceedings and had made their opposition to the petitioner's interpretation known. The respondent had represented the intervenors' interests up until the respondent's decision not to appeal the trial court's order. Upon learning of the respondent's decision not to appeal, the intervenors acted in a timely manner by moving to intervene in order to have standing to appeal.

In the present case, intervenors were not involved in the underlying case. They assert in their motion to intervene that plaintiff has failed to represent their interests throughout the process and since at least Phase I. They acknowledge that information about the underlying case has been widely available through the news media. Yet intervenors did not seek out counsel until 13 September 1999 and did not file their motion to intervene until nearly two months later. Intervenors' motion was ultimately filed more than ten months after the order in Phase I was entered and seventy-seven days after the entry of the order in Phase II.

Intervenors argue that the rule against intervening after final judgment should not apply to them because it would be unreasonable to require intervenors to have filed their motion during the single hour between the filing of plaintiff's complaint and the entry of final judgment. Furthermore, they argue that since they oppose not the settlement but its post-judgment implementation, a post-judgment motion to intervene is appropriate. Because the trial court has retained jurisdiction over Phase I and Phase II, and because payments have only recently begun and will continue for some twenty-five years, intervenors contend that the resolution of the underlying case is anything but "final" and therefore that their motion to intervene is timely.

The trial court found that intervenors failed to justify their delay in filing the motion to intervene. Intervenors contend that their delay was reasonable in light of the incomplete court record in the underlying case. However, though intervenors seek to explain their delay

through the missing original summonses, they nonetheless filed their motion to intervene before the summonses had been found, suggesting that the inclusion of the summonses within the court record was not ultimately necessary to the filing of their motion.

The trial court also found that intervenors' intervention would seriously prejudice the interests of the original parties to the action. Intervenors argue that because payments are spread out over an extended period of time, a delay now will have minimal impact. Plaintiff, on the other hand, presented to the trial court an affidavit from then-Governor James B. Hunt, Jr. asserting that intervention would significantly prejudice the rights of plaintiff and of all those who would benefit under Phase I and Phase II.

Intervenors counter that denial of their motion to intervene would greatly prejudice them, in that denial of access to justice prejudices all citizens. Intervenors also assert that, if not blocked, any payments made under Phase II to out-of-state entities will be permanently lost to North Carolina taxpayers. Though intervenors acknowledge that they could proceed in separate, independent suits challenging the constitutionality of Phase I and Phase II payments, they argue that such an approach would be inefficient and wasteful as compared with a single definitive answer through the present case.

Finally, intervenors contend that numerous constitutional and procedural irregularities render the underlying case appropriate for intervention. Intervenors argue that the unusual circumstances throughout the case favor a finding that their motion to intervene was timely, although they fail to indicate how the various unusual circumstances they describe relate to the issue of timeliness.

After careful consideration of intervenors' arguments as to each of the factors under *Procter*, we conclude that the trial court did not abuse its discretion in finding untimely intervenors' motion to intervene. Intervenors have failed to demonstrate the "extraordinary and unusual circumstances" or to make the "strong showing of entitlement and justification" necessary under *State Employees' Credit Union* and *Procter* to warrant the granting of a motion to intervene after a final judgment has been entered. The trial court entered a final judgment in the present case more than ten months before intervenors filed their motion to intervene, and intervenors failed to present to the trial court an adequate excuse for their delay.

We affirm the trial court's order denying intervenors' motion to intervene. In addition, because intervenors are not parties to the

underlying case, we affirm the trial court's holding that intervenors' motion for sanctions is moot.

Affirmed.

Judge CAMPBELL concurs.

Judge GREENE concurs with a separate opinion.

GREENE, Judge, concurring.

I fully concur with the majority and write separately only to address intervenors' argument that its motion to intervene was timely because it was filed within seventy-seven days after the entry of the 19 August 1999 Consent Order (Phase II). Phase II was not the result of a new complaint; rather, it was a consequence of the single complaint filed by the State and, indeed, was contemplated in the 21 December 1998 Consent Decree and Final Judgment (Phase I). Thus, the timeliness of intervenors' motion must be judged in the context of Phase I. In that context, there was more than a ten-month delay in the filing of the motion to intervene, and I agree with the majority that intervenors have offered no acceptable excuse for the delay. Clearly, there is nothing to support a finding of extraordinary and unusual circumstances or a strong showing of justification for failure to request intervention sooner, *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985), the showing required when a party seeks to intervene after entry of judgment.

STATE OF NORTH CAROLINA v. ENOL MILIEN, DEFENDANT

No. COA00-511

(Filed 19 June 2001)

Search and Seizure— investigative stop—object thrown from car—defendant handcuffed during search for object—probable cause

The trial court did not err by denying defendant's motion to suppress evidence resulting from an investigative stop where defendant was seen burying a plastic bag containing a rocky, off-white substance in the woods on 16 December; defendant dug up

the plastic bag on 18 December immediately after being told that a drug dog would be brought to the woods; he left the area in his car and, upon realizing that he was being followed, sped up and threw a white plastic bag from the car; defendant stopped only when officers turned on their siren, not when they turned on their blue light; officers did not formally arrest defendant but handcuffed him while searching for the bag; and defendant was arrested after the bag was found about 15 minutes later. Whether there was a de facto arrest or merely an investigatory detention, the facts and circumstances within the drug agents' knowledge and of which they had reasonably trustworthy information were sufficient to warrant the reasonable belief that defendant had committed or was committing an offense.

Appeal by defendant from judgments entered 13 July 1999 by Judge Henry W. Hight, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 18 April 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General, Robin P. Pendergraft, for the State.

Kelly K. Daughtry, for defendant-appellant.

HUDSON, Judge.

Defendant was charged and convicted on one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation and was sentenced to two consecutive terms of imprisonment. Defendant appeals, assigning error to the trial court's denial of his motion at trial to suppress certain evidence and testimony. We find no error.

The evidence presented at trial tended to show the following. On the morning of 16 December 1998, Chad Thompson, a narcotics investigator with the Johnston County Interagency Drug Task Force (the task force), was conducting surveillance in the area surrounding the Herring Mobile Home Park (the mobile home park). Thompson was positioned in the woods about two steps from a dirt path located in the mobile home park and he was dressed in camouflage. At approximately 8:45 a.m., a two-tone beige 1980's Chevrolet Impala automobile arrived and parked in Lot W-3 in the mobile home park within Thompson's view. Defendant exited the car and walked on the dirt path until he was directly in front of Thompson. Defendant took a couple of steps into the woods directly across from Thompson.

Defendant was wearing a brown jacket and a baseball cap. From a distance of six steps, Thompson witnessed defendant pull from the breast pocket of his jacket a plastic bag containing approximately two or three ounces of an off-white, rocky substance. Defendant dug a small hole and buried the bag. He then stood up and walked back to the trailer on Lot W-3. Thompson subsequently communicated what he had witnessed to Agent Angela Bryan.

Two days later, on the morning of 18 December 1998, Thompson met with Agent Bryan, Agent Fish, Officer Jones, Lieutenant Somogyi and Marty Benson, the captain of the task force. They went to the mobile home park where Thompson and Fish, both dressed in camouflage, positioned themselves in the same spot in the woods where Thompson had been two days earlier. Later that morning, Benson and the three other agents went into the mobile home park to a location approximately 150 to 200 yards from where Thompson and Fish were positioned. They spoke with several men, including defendant, for ten or fifteen minutes. The men consented to a pat-down search, but no controlled substances were found. Benson then told the men that he was going to get a drug dog to search the wooded area. Benson and the other agents then returned to their vehicles.

Thereafter, Thompson saw the same automobile pull into Lot W-3, and saw defendant come down the path wearing the same jacket and baseball cap. Defendant went to the precise spot where he had buried the bag two days earlier, dug up the bag, and placed it in his jacket pocket. He then walked back out to the car and drove away. Thompson and Fish contacted the others to tell them defendant was in his car leaving the mobile home park. The four other agents—Benson in an undercover van with Somogyi, and Bryan in a second vehicle with Jones—positioned their two vehicles near the entrance to the mobile home park. Benson spotted the Chevrolet occupied by a single individual and followed in the van for about a mile until the Chevrolet turned into a private drive. The Chevrolet and the undercover van were driving at approximately five to ten miles per hour and the van was approximately 25 to 30 feet behind the Chevrolet at this point. Immediately after Benson made the turn into the private drive behind the Chevrolet, the Chevrolet sped up. Then the driver threw a white plastic bag about the size of a baseball out of the passenger window into the wooded area to the side of the road. Benson then activated his blue light, but the Chevrolet did not stop. Benson activated his siren and the Chevrolet stopped. Benson instructed Somogyi to go search for the plastic bag that had been thrown into

the woods. Bryan arrived at the scene alone, having dropped off Jones at the beginning of the private drive. Defendant got out of the car, the agents introduced themselves, patted down defendant, and handcuffed him, but defendant was not formally placed under arrest at this time. Benson then left defendant in Bryan's custody and went to search for the plastic bag. The plastic bag was found after approximately 15 minutes. Defendant was then placed under arrest.

During the trial, defendant moved to suppress the admission of evidence resulting from the investigative stop and detention of defendant. The trial court denied defendant's motion. The trial court subsequently entered an order embodying its findings and conclusions on defendant's motion to suppress. The factual findings in the order pertaining to the incident on 18 December 1998 are an accurate summary of the evidence presented at trial, and defendant does not assign error to these findings. The order includes the following conclusions as a matter of law:

> 33. That the collective knowledge of the Officers (the acts witnessed by Agents Thompson and Fish) provided to Captain Benson and known to him at the time he began following the Defendant, the actions of the Defendant in trying to elude the Agents, speeding up when the blue light was turned on, discarding an object from his vehicle, all provide sufficient exigent circumstances from which the Officer could form the reasonable suspicion that criminal activity was being engaged in by the Defendant.
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> 34. That such reasonable suspicion was sufficient to allow Captain Benson and Officer Somogyi to make an investigative stop of the Defendant's vehicle and to detain the Defendant for a reasonable period of time.
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> . . .
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> 38. That none of the constitutional rights, either State or Federal, of the Defendant were violated by the stop of his motor vehicle or handcuffs being placed on the Defendant.
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> 39. That the detention of the Defendant was for a legitimate purpose and was limited in scope and duration.
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> . . .
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> 41. That the Defendant's objection should be overruled and denied.

In reviewing the denial of a motion to suppress, we must determine whether the findings of fact are supported by competent evidence in the record, and whether the findings, in turn, support the ultimate conclusion of law. *See State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000). Because defendant does not challenge the factual findings in the order, we need only determine whether the trial court's ultimate conclusion, denying defendant's motion to suppress, was supported by the findings of fact. We find no error in the order denying the motion to suppress and therefore affirm the judgments.

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. This mandate is applicable to the states through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). Evidence obtained by an unlawful search or seizure is inadmissible at trial. *See id.* Although there is no "litmus-paper test" for determining what constitutes a "seizure" for Fourth Amendment purposes, *see Florida v. Royer*, 460 U.S. 491, 506, 75 L. Ed. 2d 229, 242 (1983), it is clear that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry v. Ohio*, 392 U.S. 1, 16, 20 L. Ed. 2d 889, 903 (1968). Thus, there is no question that defendant here was "seized" for Fourth Amendment purposes.

Acts which constitute "seizures" of a person for Fourth Amendment purposes may very generally be divided into two categories: (1) arrests and (2) investigatory stops. *See Graham v. Connor*, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 454 (1989) (holding that excessive force claims arising in context of arrest or investigatory stop invoke protections of Fourth Amendment against unreasonable seizures); *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980) (explaining that Fourth and Fourteenth Amendments' prohibition of unreasonable searches and seizures governs all seizures, including traditional arrests as well as seizures involving only a brief detention short of traditional arrest); Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 22 (2d ed. 1992). It is well-established that a formal arrest always requires a showing of "probable cause." *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111, 43 L. Ed. 2d 54, 64 (1975). An investigatory stop, on the other hand, at least at its inception, does not require probable cause; rather, it is only necessary that, given the totality of the circumstances, "the detaining officers [] have a particularized and objective basis for suspecting the

particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 629 (1981). This standard has also been described as a "reasonable suspicion of criminal activity." *Royer*, 460 U.S. at 498, 75 L. Ed. 2d at 237.

In situations involving an investigatory stop, once it is determined that the initial stop was justified at its inception by a reasonable suspicion of criminal activity, it must further be determined whether the subsequent detention of the defendant following the stop is "reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Sharpe*, 470 U.S. 675, 682, 84 L. Ed. 2d 605, 613 (1985) (quoting *Terry*, 392 U.S. at 20, 20 L. Ed. 2d at 889).

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Royer, 460 U.S. at 500, 75 L. Ed. 2d at 238. Where the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause, even in the absence of a formal arrest. *See Sharpe*, 470 U.S. at 685, 84 L. Ed. 2d at 615; *State v. Russell*, 84 N.C. App. 383, 389, 352 S.E.2d 922, 926, *disc. review denied*, 319 N.C. 677, 356 S.E.2d 784, *cert. denied*, 484 U.S. 946, 98 L. Ed. 2d 363 (1987); Farb, *Arrest, Search, and Investigation* 23.

Here, the trial court appears to have determined that the detention of defendant, prior to his formal arrest, did not constitute a *de facto* arrest and that, therefore, only a showing of a reasonable suspicion of criminal conduct was necessary to justify this period of detention, rather than the higher standard of probable cause. Because the trial court determined that the lesser standard of reasonable suspicion was satisfied, the trial court denied defendant's motion to suppress.

Defendant does not argue that the circumstances were insufficient to justify the investigatory stop in the first place. However, defendant argues that by placing defendant in handcuffs for approximately 15 minutes while conducting a search for the plastic bag, the

detention of defendant "exceeded the scope allowed for an investigative stop" and therefore required probable cause. Defendant further argues that prior to the time the bag was retrieved, there was no probable cause, and, for this reason, the detention was unreasonable and violated defendant's constitutional rights. Thus, defendant concludes, the denial of his motion to suppress constitutes reversible error. We believe it is unnecessary to determine whether the seizure amounted to a *de facto* arrest requiring probable cause, or merely an investigative detention requiring only reasonable suspicion of criminal activity, because even assuming *arguendo* that the seizure constituted a *de facto* arrest requiring probable cause, there was probable cause under the circumstances.

The existence of probable cause depends upon "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *State v. Bright*, 301 N.C. 243, 255, 271 S.E.2d 368, 376 (1980) (alterations in original) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964)). Factors which a court may consider in determining whether probable cause exists include, but are not limited to: (1) the defendant's suspicious behavior, *see State v. Bridges*, 35 N.C. App. 81, 239 S.E.2d 856 (1978); (2) flight from the officer or the area, *see State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984); (3) the discovery of what appears to be illegal contraband in the possession of the defendant, *see State v. Patrick*, 88 N.C. App. 582, 364 S.E.2d 450 (1988); and (4) a defendant's apparent effort to conceal evidence by throwing what appears to be illegal contraband from a car after realizing police presence, *see State v. Willis*, 61 N.C. App. 23, 300 S.E.2d 420, *modified and aff'd*, 309 N.C. 451, 306 S.E.2d 779 (1983).

A pertinent example of circumstances sufficient to establish probable cause is found in *State v. Harrington*, 283 N.C. 527, 196 S.E.2d 742, *cert. denied*, 414 U.S. 1011, 38 L. Ed. 2d 249 (1973). In *Harrington*, the defendant accompanied officers out of a restaurant at the officers' request and then ran from the officers and tossed away an aluminum wrapper. The Supreme Court held that under these circumstances the officers had reasonable ground to believe that a crime was being committed in their presence (i.e., probable cause), and were therefore justified in pursuing defendant, placing him under arrest, retrieving the aluminum wrapper (which was found to contain 36 bindles of heroin), and searching defendant's automobile subse-

quent to his arrest. Because there was probable cause, the items found by the officers pursuant to the defendant's arrest, including the 36 bindles of heroin, were held admissible at trial.

Here, the unchallenged findings in the trial court's order establish the following facts: defendant was seen burying a plastic bag containing a rocky, off-white substance in the woods near the trailer home park on 16 December 1998; on 18 December 1998, immediately after being told by drug agents that a drug dog would be brought to the woods, defendant was seen digging up the plastic bag that had been buried in the woods and leaving the trailer home park in his car carrying the bag in his pocket; when defendant realized that he was being followed, he sped up and threw a white plastic bag out of the car window; when the drug agents first turned on their blue light, defendant did not stop his car; defendant only stopped his car once the agents turned on their siren. We believe that at the time defendant was handcuffed, the facts and circumstances within the drug agents' knowledge and of which they had reasonably trustworthy information were sufficient to warrant the reasonable belief that defendant had committed or was committing an offense. Because there was probable cause, the seizure of defendant, whether a *de facto* arrest requiring probable cause or merely an investigatory detention requiring a reasonable suspicion of criminal activity, was not unreasonable, and any evidence resulting from that seizure was admissible at trial. Thus, the trial court properly denied defendant's motion to suppress.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

DELMER D. PRESSLEY, PLAINTIFF v. SOUTHWESTERN FREIGHT LINES, AND LIBERTY MUTUAL INSURANCE CO., DEFENDANTS

No. COA00-750

(Filed 19 June 2001)

1. Workers' Compensation— occupational disease—coccidioidomycosis—increased exposure than general public

The Industrial Commission did not err by awarding plaintiff truck driver workers' compensation benefits for an occupational disease under N.C.G.S. § 97-53 for his contraction of coccid-

ioidomycosis and finding that plaintiff's work as a truck driver required him to travel to California where he had an increased risk of being exposed to the disease compared to the general public, because: (1) the term "general public" pertains to the general public of North Carolina; and (2) coccidioidomycosis is not generally contracted in North Carolina.

2. Workers' Compensation— occupational disease—coccidioidomycosis—exposure during course and scope of employment

The Industrial Commission did not err by concluding that there was competent evidence to support its finding that plaintiff truck driver likely was exposed to the occupational disease of coccidioidomycosis in October 1991 while in the course and scope of his employment, because: (1) the fungus is not present in the soil in North Carolina but solely in the southwestern United States, including California where plaintiff's employer required him to carry goods; and (2) although it is possible to be exposed to the spores and have asymptomatic infection which might not become symptomatic until one to three weeks later, plaintiff did not visit his brother who lives in Arizona during his trips in October 1991.

Appeal by defendants from opinion and award entered 17 February 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 April 2001.

Richard B. Harper for plaintiff-appellee.

Roberts & Stevens, P.A., by Elizabeth N. Rich, for defendant-appellants.

MARTIN, Judge.

Defendants appeal from an opinion of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for an occupational disease. Plaintiff, a long distance truck driver, initiated this action by filing a Form 18, Notice of Accident to Employer, alleging that he contracted coccidioidomycosis in October 1991 while carrying goods for defendant Southwestern Freight Lines between Los Angeles and Bakersfield, California. He alleged that he contracted the disease by exposure to dust-born fungus or mold. Defendants denied liability on the grounds plaintiff "does not suffer from a compensable occupational disease." Following a hearing, the

deputy commissioner filed an opinion and award on 30 March 1998 concluding plaintiff "has not sustained an occupational disease within the meaning of the Workers' Compensation Act" because he failed to prove that the "disease was characteristic of and peculiar to his employment as a truck driver, and was not an ordinary disease of life to which the general public would be equally exposed."

The Full Commission reversed on appeal, finding in pertinent part:

> 5. . . . A biopsy performed on a lymph node removed from plaintiff's chest showed the presence of a coccidioidomycosis fungus organism. This organism lives in the soil and sand found in the southwestern United States, including Arizona, New Mexico, and southern California. It does not grow in North Carolina or in any state east of the Mississippi River. The organism can become airborne and inhaled, leading to infection in humans.
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> . . .
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> 7. Plaintiff contracted coccidioidomycosis due to exposure to the organism which causes the disease while traveling in the southwestern United States. It is most likely that plaintiff inhaled the organism while in the course of his truck driving for defendant-employer. Plaintiff faced no real risk of exposure to this disease in North Carolina.
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> . . .
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> 10. Plaintiff's work as a truck driver, which required him to travel to an area of the country where he could be exposed to the coccidioidomycosis fungus, placed him at an increased risk of contracting the disease when compared to the general public not so employed.

The Commission concluded, *inter alia*:

> 1. Plaintiff has sustained an occupational disease within the meaning of the Workers' Compensation Act. Plaintiff contracted the disease of coccidioidomycosis due to exposure to fungus spores in the southwestern United States while traveling in the course of his employment with defendant-employer. N.C. Gen. Stat. § 97-53(13).
>
> 2. In determining whether plaintiff's occupation placed him at an increased risk over that of the general public of contracting a dis-

ease, it need not be shown that the disease originates exclusively from the occupation in question. Rather it must be demonstrated that the conditions of the employment resulted in a hazard which is not present in employment generally. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979). In this case, but for the employment-related requirement of travelling [sic] through an area where he was exposed to the fungus, plaintiff would not have contracted the disease. Members of the general public who do not face a like requirement in their occupations are not subject to the same risk; therefore plaintiff faced an increased risk of contracting coccidioidomycosis than that of the general population in North Carolina.

3. Proof of causal connection between a disease and an employee's occupation may consist of the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history. *Id.* In the instant case, plaintiff's sole avenue of exposure came while driving through the infested area of the southwest as required by his employment. Persons whose employment does not require them to travel to the infested areas of the country are not so exposed. Accordingly, there is essentially no exposure to the general public as a result of their jobs outside of such employment. Lastly, there is no history of the disease in plaintiff's medical records prior to the work-related exposure. For these reasons, the causal connection between plaintiff's employment and the disease has been adequately established, and plaintiff is entitled to compensation under the Act.

The Commission awarded plaintiff benefits for temporary total disability, temporary partial disability and for on-going medical care.

Our review of the Full Commission's opinion and award is limited to whether the findings of fact are supported by any competent evidence in the record and whether those findings support the Commission's conclusions of law. *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 535 S.E.2d 602 (2000). Defendants argue there was not competent evidence in the record to support the Commission's findings of fact, and that the findings do not support the conclusion of law that plaintiff sustained a compensable occupational disease within the meaning of the Workers' Compensation Act.

G.S. § 97-53 enumerates the compensable occupational diseases under the Act. The Section specifically enumerates twenty-seven diseases; coccidioidomycosis is not among those diseases. However G.S. § 97-53(13) additionally provides compensability for:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

At issue in the case before us is whether plaintiff's contraction of coccidioidomycosis fits within this provision as a compensable occupational disease.

The burden is on the plaintiff to show that he suffered a compensable occupational disease under G.S. § 97-53(13). *Norris v. Drexel Heritage Furnishings, Inc./Masco*, 139 N.C. App. 620, 534 S.E.2d 259 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001). Our courts have held the plaintiff must prove the following elements: (1) the disease is characteristic of and peculiar to persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) "the disease is not an ordinary disease of life to which the public is equally exposed;" and (3) there is a causal connection between the disease and the plaintiff's employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981).

[1] Defendants first argue that plaintiff failed to prove the first and second elements listed above, and accordingly there was not competent evidence to support the Commission's finding that "[p]laintiff's work as a truck driver, which required him to travel to an area of the country where he could be exposed to the coccidioidomycosis fungus, placed him at an increased risk of contracting the disease when compared to the general public not so employed." The Supreme Court has stated:

> [T]he first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation."

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (quoting *Booker v. Duke Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979)). As defendants correctly point out and we now re-emphasize, the statute employs an "increased risk" test and not a positional, or "but for", analysis. *See Minter v. Osborne Co.*, 127 N.C. App. 134, 487 S.E.2d 835, *disc. review denied*, 347 N.C. 401, 494 S.E.2d 415 (1997).

The dispositive issue in this case is what is meant by the term "general public." The deposition testimony of plaintiff's treating physicians established that plaintiff's risk of exposure to the disease as a truck driver did not exceed that of the general public living or traveling in the southwestern United States; however, the risk of exposure did exceed that of the general public of North Carolina because the spores are not present in the soil in North Carolina.

The statute does not define what is meant by the term "general public" and our courts have not previously interpreted its scope. If a statute "is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978). In *Booker v. Duke Medical Center*, the Supreme Court stated "[t]he clear intent of the General Assembly in enacting the current version of G.S. 97-53(13) was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases." 297 N.C. at 469, 256 S.E.2d at 196. The Court then borrowed language from various other jurisdictions in interpreting the "characteristic of" and "peculiar to" language of the provision. *Id.* at 472-73, 256 S.E.2d at 198-99. However, in the case before us, we find little guidance from other jurisdictions in interpreting the meaning of our "general public" provision because the jurisdictions appear to be divided. In *Montgomery v. Industrial Commission of Arizona*, 173 Ariz. 106, 109, 840 P.2d 282, 285 (1992), for example, the Court of Appeals of Arizona interpreted a similar test as referring to the general public of Arizona. The court held that the plaintiff, who was bitten by a tick that carried Lyme disease while traveling on business in California, successfully met his burden of proof because the evidence: (1) established that Lyme disease does not exist in Arizona and, (2) "indicated that any exposure to Lyme disease that he experienced in connection with his employment would exceed that of Arizona's general population." In *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 19 Cal.2d 622, 630, 122 P.2d 570, 574 (1942), however, the Supreme Court of California held that coccidioidomycosis was a compensable

disease because the plaintiff was able to show that "the risk to which he was subjected by his employment was not the same *as that of the public in the endemic area* inasmuch as the great majority of the inhabitants there possessed an immunity" which the plaintiff lacked. (emphasis added). *See also* 1 A. Larson, *The Law of Workman's Compensation* § 5.05 at 5.23 to -24 (2000).

Therefore, we turn to other canons employed by the courts in interpreting the Workers' Compensation Act. *Deese v. Southeastern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140, *reh'g denied*, 306 N.C. 753, 303 S.E.2d 83 (1982). First, the Act is to be construed liberally, and benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions. *Id.* at 277, 293 S.E.2d at 143. Second, a liberal construction should not "extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation.' " *Id.* Third, "the judiciary should avoid 'ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.' " *Id.* at 278, 293 S.E.2d at 143 (quoting *Shealy v. Associated Transport*, 252 N.C. 738, 741, 114 S.E.2d 702, 705 (1960)). Finally, "the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal." *Id.*

Applying the above principles to the facts of this case, we interpret the term "general public" as pertaining to the general public of North Carolina. This interpretation employs a liberal construction in favor of the employee, and is consistent with the determination made by the Industrial Commission which we view as persuasive. Moreover, this interpretation does not enlarge the ordinary meaning of this term. The American Heritage College Dictionary defines "general" as "concerned with, applicable to, or affecting the whole or every member of a class or category." *The American Heritage College Dictionary* 566 (3rd ed. 1997). It defines "public" as "[o]f, concerning, or affecting the community or the people." *Id.* at 1106. In this case, we are simply defining the scope of the class, category or community as that of the general public of North Carolina. In light of this interpretation, the Commission's finding of fact that plaintiff's work as a truck driver placed him at an increased risk of contracting the disease when compared to the general public not so employed is supported by the evidence showing that coccidioidomycosis is not generally contracted in North Carolina.

[2] Defendants next argue there is no competent evidence in the record to support the Commission's finding that plaintiff most likely was exposed to the organism while in the course and scope of his employment. It is undisputed that the fungus is not present in the soil in North Carolina but solely in the southwestern United States; therefore, plaintiff was exposed to the fungus while traveling in the southwest. However, defendants contend that there is evidence in the record that plaintiff has visited a brother who lives in Arizona and plaintiff could have been exposed to coccidioidomycosis during those visits. They point to Dr. Washburn's testimony that it is possible for a person to be exposed to the spores and have an asymptomatic infection which might not become symptomatic for years. However, Dr. Washburn also testified:

> If they're going to become symptomatic in the reasonably near future from it, then they become symptomatic in one to three weeks. So that he would fit the incubation period if he had been in California two weeks before he started feeling poorly.

Moreover, plaintiff testified that he did not visit his brother during his trips in October 1991. In light of this testimony, we hold there is competent evidence in the record to support the Commission's finding as to causation. The findings of fact support its conclusions of law that plaintiff's coccidioidomycosis is compensable.

Affirmed.

Judges THOMAS and BIGGS concur.

IN THE MATTER OF THE APPEAL OF: CHARLES D. OWENS AND JOHN F. PADGETT D/B/A FOREST CITY ASSOCIATES FROM THE DECISION OF THE RUTHERFORD COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING PROPERTY TAXATION FOR 1994

No. COA00-686

(Filed 19 June 2001)

1. Taxation— ad valorem—valuation method—income rather than cost method

The Property Tax Commission did not err in its review of a property valuation by finding no probative evidence of the cost approach or by accepting the income approach to valuing these

properties where there was substantial evidence in the record supporting the Commissions's decision and the taxpayers did not meet their burden of proving that the method of valuation used by the Commission was illegal or arbitrary and produced a value substantially higher than the true value.

2. Taxation— ad valorem—valuation method—yield capitalization income approach

The Property Tax Commission did not err by upholding a county's valuation of property based solely on a "yield capitalization income approach." There is no exclusive technique that must be used in an income approach as long as the decision to accept a valuation method is based on substantial evidence in the record. In this case, market data was properly used to establish the rate of return on investment using the yield capitalization method. Moreover, the taxpayers failed to provide two of the necessary elements for the analysis for which they contended.

3. Constitutional Law— due process—property tax valuation—notice of valuation method

There was no due process violation in a property tax valuation review where the taxpayers contended that the county used a valuation method not disclosed to them until the hearing, but the matter was heard on remand, both parties were aware of the valuation methods being advocated by the other, and both were allowed an opportunity to persuade the Property Tax Commission of the proper method.

Appeal by taxpayers from judgment entered 2 March 2000 by North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 20 April 2001.

J. Thomas Davis for appellant-taxpayer.

Shelley T. Eason and Walter H. Dalton, for appellee-Rutherford County.

BRYANT, Judge.

The preliminary procedural history and facts for this case are set forth in our previous decision, *In re Appeal of Owens*, 132 N.C. App. 281, 511 S.E.2d 319 (1999).

On remand, the Property Tax Commission (Commission) reviewed the transcript and evidence presented at its 1997 hearing. The Commission affirmed Rutherford County's (County) revaluation of taxpayers' property. Specifically, the Commission found that: no probative evidence was offered as to the cost and comparable sales approach; at the time of the general appraisal, there was a lack of comparable sales in the County and surrounding areas; the parties stipulated for the record that a market approach was not an appropriate method to determine the value of taxpayers' property subject to this appeal; even though the Commission considered all three approaches to value, the income approach is most reliable to determine the values of taxpayers' property; the yield capitalization approach is more appropriate in determining the value of the subject properties than the direct capitalization method because there were no comparable sales available in the County or the surrounding areas, and the direct capitalization approach could not be employed without comparable sales; the County's use of the yield capitalization approach was proper; and the County's appraisals of the subject nine parcels did not substantially exceed the true value in money of the subject properties as of 1 January 1994.

Further, the Commission determined that the taxpayers failed to produce competent, material and substantial evidence: 1) that the County used an arbitrary or illegal method to appraise the subject properties, and 2) that the County's values substantially exceeded the fair market values of the subject properties. Taxpayers appealed to this Court on 25 March 2000.

Taxpayers make four arguments on appeal, all challenging the Commission's findings regarding valuation of the property. This Court's review of a final decision of the Commission is governed by N.C.G.S. § 105-345.2, which states:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or

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

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Pursuant to N.C.G.S. § 105-345.2(b), this Court will review the decision of the Commission analyzing the 'whole record' to determine whether the decision has a rational basis in evidence. *See In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979) ("The []whole record[] test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence."). The reviewing court is not afforded unlimited discretion to substitute its decision for that of the Commission. *Id.* Even if the evidence is susceptible to supporting alternate rational decisions, the decision of the Commission will not be disturbed if that decision is based on substantial evidence from the record. *See Mendenhall v. North Carolina Dep't of Human Resources*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995) ("This standard, the []whole record[] 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.").

It is the responsibility of the Commission to determine the weight and credibility of the evidence presented. *In re Southern Railway*, 59 N.C. App. 119, 123, 296 S.E.2d 463, 467, *rev'd on other grounds*, 313 N.C. 177, 328 S.E.2d 235 (1985). It is presumed that *ad valorem* tax assessments are correct and that the tax assessors acted in good faith in reaching a valid decision. *In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981). To overcome those presumptions, the taxpayer carries the burden to show that an illegal or arbitrary method of valuation was used, *and* that the assessed value substantially exceeds the properties fair market value. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975) (emphasis added).

For property tax purposes, "[a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in

money." N.C.G.S. § 105-283. All real property located in a particular county must be appraised at its true value—the fair market value—at least every eight years in that county's general reappraisal. N.C.G.S. § 105-286. The true value is the price willing and financially able buyers would pay to purchase the property from a willing seller. N.C.G.S. § 105-283.

The relevant portions of N.C.G.S. § 105-317 provide, the elements to be considered in the appraisal of real property as:

> (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.
>
> (2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

Our courts have recognized three approaches to valuing real property in accordance with the requirements of N.C.G.S. § 105-317(a)—the cost approach, the comparable sales approach, and the income approach. *See In re Appeal of Strough Brewery*, 116 N.C. App. 178, 186, 447 S.E.2d 803, 807 (1994); *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992).

I.

[1] The taxpayers assert that the Commission erred in finding no probative evidence of the cost approach method. They contend that the cost approach should be used to establish a limitation on the valuation of the property.

The evidence in the record reveals that the County presented evidence of value under the three valuation approaches recognized by our courts. The County introduced out-of-county sales for considera-

tion under the sales comparison approach. In addition, the County's expert, Charles Long, testified that the County's property cards "lend themselves to a cost approach methodology but are adjusted through the income approach and compared with the sales comparison approach". Ultimately, Long testified that in his expert opinion, the income approach was the most reliable indicator of value for taxpayers' properties.

On cross-examination, Long suggested that the value determined by the cost approach should support the value derived from the income approach. He added that the difference between the County's and the taxpayers' assessment of the cost for the improved property, may stem from the fact that the taxpayers did not include evidence of "soft costs" in their evidence.

There appears to be substantial evidence in the record supporting the Commission's decision to accept the income approach to valuing the properties. It is the duty of the Commission to weigh and determine the credibility of evidence submitted for its consideration. Therefore, this Court will presume the assessor's determination of value and method of valuation to be valid unless the decision is unsupported by substantial evidence. The taxpayers have not met the burden of proving that the method of valuation used by the Commission was illegal or arbitrary *and* that the method produced a substantially higher value than the true value. *See Amps*, 287 N.C. at 563, 215 S.E.2d at 762. Therefore, we find the Commission's decision to use the income approach to valuing taxpayers' property to be proper.

II.

[2] Next, taxpayers argue that the Commission committed reversible error by upholding the County's valuation of the taxpayers' property based solely on a "yield capitalization income approach" to valuation to the exclusion of cost and other factors. We disagree.

In an earlier opinion, this Court stated that there is no exclusive technique that must be used in an income approach to value. *In re Appeal of Owens*, 132 N.C. App. at 287-90, 511 S.E.2d at 323. Rather, we accept the principle enumerated in the treatise, *The Appraisal of Real Property*, recognizing two basic types of income approach—direct capitalization and yield capitalization. 132 N.C. App. at 287-88, 511 S.E.2d at 323-24. As long as the Commission's decision to accept this method of income approach valuation is based

on substantial evidence from the record, that decision will not be disturbed on appeal.

Taxpayers assert that the County used a 12% equity yield (market rate) instead of the 21% return on investment that the taxpayers hoped to receive. Further, they contend that the County should have used the taxpayers' actual expenses, as indicated in Exhibits 5(a) and 5(c) to do a direct capitalization determination of value.

In income valuation for property tax purposes, values are derived from market data, and reflect the typical practices in an area. *In re Southern Railway*, 313 N.C. 177, 190, 328 S.E.2d 235, 244 (1985). If actual data, rather than market data, was used for valuation purposes, our courts could potentially "penalize the competent" and reward the incompetent by increasing or decreasing appraised values depending upon past management performance. *See In re Pine Raleigh Corp.*, 258 N.C. 398, 403, 128 S.E.2d 855, 859 (1963). In the instant case, market data was properly used to establish the rate of return on investment using the yield capitalization method.

In addition, the Commission properly disregarded taxpayers contention to use a direct capitalization method. It appears from the record that the taxpayers failed to provide either a suggested capitalization rate or a figure to be used for market expenses—which are two of the necessary elements for a direct capitalization analysis. *See* 132 N.C. App. at 285, 511 S.E.2d at 322 ("Under the income approach method, the value of property is determined by dividing the net income by an appropriate capitalization rate. . . . After accepting the Taxpayer's income as market income and adjusting the annual gross income of the properties for expenses and vacancy, the resulting net income was capitalized into an indication of market value for each of the subject properties."). Therefore this Court finds that the Commission's decision allowing the County's use of the yield capitalization method was correct.

III.

Third, taxpayers contend that the Commission committed reversible error by allowing the County's application of a "yield capitalization income approach" to value the taxpayers' property. Taxpayers are essentially pursuing the same argument as presented for issue two. For the reasons enumerated in issue two, we uphold the Commission's decision to allow the County's application of the yield capitalization method income approach to value property.

IV.

[3] Lastly, taxpayers assert that the Commission committed reversible error by allowing the County to use a method of valuation that was not disclosed to the taxpayers until the hearing of this matter. Taxpayers contend that N.C.G.S. § 105-317(b) and Article I, Section 19 of the North Carolina Constitution require that the method of valuation used by the County must be disclosed in a meaningful time and manner to satisfy any inherent due process concerns. Although the case at bar has come before this Court on two separate occasions concerning the method of valuation used by the County, this is the first time taxpayers raise a due process issue. We do not believe this issue to be properly before this Court, but will provide a cursory review of the issue.

The Supreme Court of North Carolina has stated the fundamental premises of procedural due process are notice and the opportunity to be heard. *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998). "Moreover, the opportunity to be heard must be at a meaningful time and in a meaningful manner." *Id.*

The taxpayers contend that their property tax records suggested that the County was using a cost approach to valuing their properties. Thus, the taxpayers presented their case based on the conclusion that the County was utilizing the cost approach. Taxpayers assert that after they presented their case, the County advanced a method of valuation different from the cost approach. Thus, taxpayers argue their constitutional right to procedural due process was violated.

On remand from this Court's decision on 16 February 1999, taxpayers were given an opportunity to present evidence to the Commission advocating the cost method of valuation. The Commission also considered evidence from the County advancing the income method of valuation. On remand, both parties were aware of the valuation methods being advocated by the other party and both parties were allowed opportunity to persuade the Commission as to the proper method of valuation. Analyzing the facts in this case, this Court finds that the taxpayers were afforded sufficient procedural due process protections of an opportunity to be heard at a meaningful time and in a meaningful matter.

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

DEBRA RILEY, PLAINTIFF-APPELLANT v. LINDA DEBAER AND TIM MILLER, DEFENDANTS-APPELLEES

No. COA00-675

(Filed 19 June 2001)

Emotional Distress— negligent infliction—summary judgment

The trial court erred by granting summary judgment in favor of defendants on plaintiff's negligent infliction of emotional distress (NIED) claim based on the trial court's use of an erroneous standard in a prior Court of Appeals case requiring plaintiff to show defendant's conduct was extreme and outrageous to satisfy the first element of NIED, because: (1) an allegation of ordinary negligence will suffice as the first prong in a claim of NIED; (2) the trial court was bound by the retroactive application of our Supreme Court's interpretation of the elements necessary to establish a NIED claim, which includes an allegation of ordinary negligence along with the allegation that severe emotional distress was the foreseeable and proximate result of such negligence; and (3) recent Court of Appeals decisions have excluded the extreme and outrageous conduct requirement.

Appeal by plaintiff from judgment entered 9 March 2000 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 April 2001.

Browne, Flebotte, Wilson and Horn, P.L.L.C., by Martin J. Horn, for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by William P. Daniell, for defendants-appellees.

BRYANT, Judge.

Plaintiff was employed as a manager of a Family Dollar Store. On 1 October 1990, she sustained a shoulder injury while retrieving a box from an overhead shelf. Plaintiff experienced pain in her left shoulder, arm and neck as a result of the injury. Plaintiff sought treatment with orthopaedic surgeon Dr. William Somers, on 11 October 1990. Dr. Somers prescribed physical therapy, however, physical therapy did not improve plaintiff's condition. Plaintiff also received injections into her left shoulder, but her condition did not improve as a result of the injections.

On 5 June 1991, plaintiff underwent surgery to repair a labral tear in her shoulder. Although plaintiff regained the motor strength in her shoulder, she continued to experience pain in her neck and shoulder. Plaintiff underwent additional shoulder surgery on 16 March 1992, but the pain in her left shoulder continued.

Dr. Somers, on 7 November 1991, referred plaintiff to neurologist Dr. Alan Finkel for evaluation and management of her shoulder pain. Dr. Finkel referred plaintiff to psychologist Dr. Helen Rogers for management of depression related to her chronic pain and for evaluation of cognitive dysfunction which she suffered following a seizure in July 1993. Plaintiff began treatment with Dr. Rogers commencing 10 August 1993, and has continued to receive Drs. Finkel and Rogers' services.

Plaintiff received temporary total disability benefits following her 5 June 1991 surgery. In 1993, Aetna Insurance Company (Aetna), the worker's compensation carrier for the Family Dollar Stores, referred plaintiff to Atlantic Behavioral Health Systems, Inc. (Atlantic), a vocational rehabilitation specialist, for evaluation of plaintiff's capabilities and to assist plaintiff in finding appropriate employment. Atlantic employees Linda DeBaer, a certified vocational rehabilitation specialist, and Tim Miller worked most closely with plaintiff during her evaluation.

Plaintiff was enrolled in an Atlantic program titled 'Job Club'. The program assisted injured workers in returning to the workforce. Plaintiff met with employees of Job Club in February 1994 and began participating in the program on 8 March 1994.

On 1 March 1994, plaintiff and DeBaer met with Dr. Somers to discuss appropriate jobs for the plaintiff. Dr. Somers approved plaintiff to seek light sedentary employment. Dr. Finkel advised DeBaer that plaintiff would be starting a new medication regimen and during the first few days she would need to be absent from Job Club. Neither Drs. Finkel nor Rogers advised Atlantic that plaintiff should not participate in Job Club.

While participating in Job Club, plaintiff interviewed for several positions. After interviewing for a job as an appointment setter for a photography studio, plaintiff was offered a position, however, she did not accept the offer.

Aetna determined that plaintiff had failed to accept a job offer within her capabilities and that she had sabotaged other job inter-

views. On 5 April 1994, Aetna unilaterally terminated plaintiff's worker's compensation benefits. On 3 May 1994, the Industrial Commission (Commission) allowed Aetna to cease payment of temporary total disability compensation to plaintiff. On 21 March 1996, the Commission entered an opinion and award stating that the termination of temporary total disability compensation had been improperly granted, and awarded plaintiff past and future benefits. The Commission also awarded plaintiff attorney's fees for the wrongful termination of benefits. Upon appeal to this Court, the Commission's opinion and award was upheld, except the award of attorney's fees was found to be inappropriate.

On 7 April 1997, plaintiff commenced this action in the District Court Division of Durham County, pursuing the claim of negligent infliction of emotional distress (NIED) against defendants Linda DeBaer and Tim Miller individually and Atlantic Behavioral Health Systems, Inc., now doing business as Carolina Rehabilitation, and previously doing business as Total Rehabilitation, Inc. (Total Rehab). Plaintiff contended that defendants were both personally negligent and professionally negligent in their pursuit of plaintiff's vocational rehabilitation.

Defendants filed an answer on 27 October 1997 alleging that plaintiff failed to state a claim upon which relief could be granted pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. In addition, defendants denied plaintiff's claims of NIED and negligence. Plaintiff made a motion to amend the complaint and submitted an amended complaint on 8 October 1999, which more completely detailed the claim of NIED.

On 3 September 1999, defendants made a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, based on the pleadings, responses to written discovery and depositions taken. Superior Court Judge Howard E. Manning, Jr. entered his order on 9 March 2000 granting defendants' motion for summary judgment. Judge Manning based his ruling solely on the NIED standard announced in *Lorbacher v. Housing Authority of City of Raleigh*, 127 N.C. App. 663, 493 S.E.2d 74 (1997). Because *Lorbacher* is not the appropriate standard, we reverse the decision of the trial court granting summary judgment for the defendants.

I.

The plaintiff makes several arguments on appeal, however, we only address plaintiff's first argument as it is the dispositive issue on

appeal. Plaintiff contends that the trial court erred in relying upon *Lorbacher* as controlling authority concerning the issue of NIED.

Supreme Court decisions that change existing law are presumed to apply retroactively absent compelling reasons for limiting their retroactive effects. *Fowler v. North Carolina Dept. of Crime Control & Public Safety*, 92 N.C. App. 733, 735, 376 S.E.2d 11, 12, *rev. denied*, 324 N.C. 577, 381 S.E.2d 773 (1989). By mere implication, a subsequent decision cannot be held to overrule a prior case, unless the principle is directly involved and the inference is clear and compelling. *Cole v. Cole*, 229 N.C. 757, 762, 51 S.E.2d 491, 494-95 (1949). However, when changes are made retroactive, the changes apply to five categories of cases: (1) cases in which a new rule is announced; (2) cases in which factual event, trial, and appeal are all at an end but in which a collateral attack is brought; (3) cases pending on appeal when a decision is announced; (4) cases awaiting trial; and *(5) cases initiated in the future but arising from earlier occurrences. Alexander v. Quattlebaum*, 135 N.C. App. 622, 624, 522 S.E.2d 88, 90 (1999) (emphasis added).

In March 1997, our Court announced its decision in *Lorbacher*. In that case, Lorbacher was the "Director of Development" for the Raleigh Housing Authority, and partly responsible for supervising employees, visiting construction sites and monitoring for construction compliance. *Lorbacher*, 127 N.C. App. at 667, 453 S.E.2d at 76. On 29 June 1992, Lorbacher lost his driving privileges and consequently, his employment was terminated. However, on 8 August 1992, Lorbacher's employment was reinstated based on his agreement to find transportation for any necessary travel.

As a result of the negligent maintenance of a Walnut Terrace Apartment heating system, two apartment residents died from carbon monoxide poisoning. At a wrongful death trial, Lorbacher gave deposition testimony regarding the Housing Authority's knowledge of the dangerous condition and failure to take any remedial action. Lorbacher was subsequently discharged, supposedly because of his failure to obtain acceptable transportation arrangements that were necessary for the adequate performance of his job. *Id.* Lorbacher brought suit claiming, *inter alia*, negligent and intentional infliction of emotional distress caused by the Housing Authority's wrongful discharge. *Lorbacher*, 127 N.C. App. at 668, 453 S.E.2d at 77. The trial court dismissed Lorbachers' negligent and intentional infliction of emotional distress claims. Lorbacher appealed the dismissal decision to our Court.

The *Lorbacher* Court, announced the standard for a claim of NIED as requiring the plaintiff to show that the defendant: (1) negligently engaged in conduct; (2) it was reasonably foreseeable that the conduct would cause the plaintiff severe mental anguish; and (3) the conduct did cause the plaintiff to suffer severe mental anguish. *Lorbacher*, 127 N.C. App. at 676, 453 S.E.2d at 81.

To satisfy the first element of the NIED, the *Lorbacher* Court required the plaintiff to show the defendant's conduct was extreme and outrageous. *Lorbacher*, 127 N.C. App. at 677, 453 S.E.2d at 82. The Court did not distinguish a plaintiff's burden as to the first element of a NIED claim from the burden a plaintiff must satisfy when asserting an intentional infliction of emotional distress claim. The Court found that the plaintiff did not show that the Housing Authority's conduct was extreme and outrageous, thus the Court affirmed dismissal action as to emotional distress claims.

In 1998, the North Carolina Supreme Court in *McAllister v. Ha*, 347 N.C. 638, 496 S.E.2d 577 (1998), stated that when a plaintiff asserts a claim of NIED, "[a]lthough an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice." *McAllister*, 347 N.C. at 645, 456 S.E.2d at 583 *quoting Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990).

In *McAllister*, plaintiffs had a baby on 8 May 1991. *McAllister*, 347 N.C. at 640, 496 S.E.2d at 580. In June 1991, plaintiffs received a letter from the State Health Department advising them that they needed to be tested for sickle cell disease because of the genetic traits carried by the wife. Plaintiffs went to the medical offices of Khie Sem Ha, M.D., where blood samples were drawn and sent to the State Laboratory of Public Health. Ha told plaintiffs if he found anything of concern in the lab results, he would call them. Plaintiffs never heard from defendant concerning the lab results, although plaintiffs visited him four additional times between June 1991 and September 1993.

In September 1993, the wife became pregnant with plaintiffs' second child, who was born on 27 May 1994. In June 1994, plaintiffs learned that their second child had sickle cell disease. They also learned that the results of the 1991 lab work showed the plaintiff-husband carried the sickle cell trait. Plaintiffs filed suit claiming *inter alia* that Ha was negligent in his duties, and that Ha's actions

amounted to extreme and outrageous conduct resulting in plaintiffs suffering extreme mental distress and financial loss. *McAllister*, 347 N.C. at 641, 456 S.E.2d S.E.2d at 580. The trial court granted Ha's motion to dismiss for failure to state a claim. *McAllister*, 347 N.C. at 640, 456 S.E.2d at 579. This Court, reversed the trial court's order dismissing the emotional distress claim and remanded the case. On discretionary review, the Supreme Court affirmed this Court's decision to reverse.

Although the *McAllister* Court did not directly state that its decision overruled the holding in *Lorbacher*, the same principle is directly involved in both cases and the inference in *McAllister* is clear and compelling—an allegation of ordinary negligence will suffice as the first prong in a claim of NIED.

We must note that both the *Lorbacher* and *McAllister* Courts cited to *Johnson* for their respective definitions for a claim of NIED. *Lorbacher*, 127 N.C. App. at 676, 483 S.E.2d at 81; *McAllister*, 347 N.C. at 645-46, 496 S.E.2d at 582-83 The *Johnson* Court required for a showing of NIED that: 1)the defendant negligently engaged in some act; 2) it was reasonably foreseeable that the conduct would cause the plaintiff severe emotional distress; and 3) the plaintiff did suffer severe emotional distress caused by defendant's negligent act. *Johnson*, 327 N.C. at 307, 345 S.E.2d at 97. The *Johnson* Court further stated that although an allegation of ordinary negligence will suffice, the plaintiff must allege that the severe emotional distress was the foreseeable and proximate result of defendant's negligent actions. *Id.*

In the instant case, plaintiff filed the complaint in April 1997, approximately one month after the *Lorbacher* decision; but the motion for summary judgment was not heard until after the decision in *McAllister*. The trial court was bound by the retroactive application of our Supreme Court's interpretation in *McAllister* of the elements necessary to establish a NIED claim. Absent a compelling reason to limit the retroactive effect of *McAllister*, we reverse the decision of the trial court granting summary judgment based solely on *Lorbacher*.

We also note that more recent Court of Appeals decisions have excluded the extreme and outrageous conduct requirement for a claim of NIED. *See Simmons v. Chemol Corp.*, 137 N.C. App. 319, 325, 528 S.E.2d 368, 371-72 (2000) ("An action for negligent infliction of emotional distress requires a showing that defendant negligently

engaged in conduct, which was reasonably foreseeable to cause, and did in fact cause, plaintiff to suffer severe emotional distress."); *Johnson v. Scott*, 137 N.C. App. 534, 538, 528 S.E.2d 402, 404 (2000) (stating the elements for a claim NIED as: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress") *citing Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. at 304, 395 S.E.2d at 97.

For all of the reasons stated above, the decision of the trial court is

Reversed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

THE TOWN OF HIGHLANDS, A NORTH CAROLINA MUNICIPAL CORPORATION, ON BEHALF OF ITS CITIZENS AND INDIVIDUALLY AS AN OWNER OF PROPERTY IN THE TOWN OF HIGHLANDS; AND DENNIS F. WILSON, PLAINTIFFS v. GROVER WILLIAM EDWARDS, HELEN LOUISE MEISEL, AND VIRGINIA MAE FLEMING; HOWARD WAYNE BROWN AND WIFE, JANIE CRESWELL BROWN; EARL MONROE JONES, TRUSTEE OF THE EARL MONROE JONES TRUST; ARTHUR A. LEWIS AND WIFE, JANE A. LEWIS; JAMES LUTHER RAMEY AND WIFE, MAXINE BROWN RAMEY; LOUIS W. REESE, MARTHA R. LAMB, JOSEPH RONALD REESE AND DANIEL Q. REESE; RANDOLPH T. SHAFFNER AND WIFE, MARGARET RHODES SHAFFNER; ANN KELSEY STEWART; PETER KELSEY STEWART; PETER KELSEY; HARLAN P. KELSEY, III; SETH LOW KELSEY, JR.; JOSEPH RIDGEWAY KELSEY; CHARLES SAWYER; KATHERINE HART ZIMMERMAN; SALLY HART WHITING; JOHN HART, JR.; THE UNKNOWN HEIRS OF SAMUEL T. AND KATHERINE E. KELSEY AND THE CHARLESTON LIBRARY SOCIETY, DEFENDANTS

No. COA00-221

(Filed 19 June 2001)

Highways and Streets— unopened—original map missing

The trial court erred by granting a directed verdict for plaintiffs in a declaratory judgment action seeking a determination of the rights, duties, and liabilities of the parties concerning portions of streets which had never been opened by the Town where

the origin of the Town dated to 1875 when Samuel Kelsey began to sell lots and parcels; a map of the Kelsey property subdivided into lots and streets was filed and recorded in 1944, but there is nothing to show who recorded it or its source and plaintiffs concede that the original map or plat cannot be found; the Town passed a resolution in 1984 accepting the "offer of dedication" contained in the map recorded in 1944 (the Kelsey map) and resolving to open the streets as required; defendants objected and attempted to file notices of withdrawal of the unopened streets; and the Town filed this action. Without the original map or plat used in conveying lots, there is no way to know whether the portions of streets disputed in this case were included. The deeds introduced by plaintiffs do not mention or incorporate the Kelsey map, some of the lot numbers differ from the map, the map contains no ascertainable monuments and few metes and bounds descriptions, and there are discrepancies between the results of the measurements made by the court surveyor and the distances stated in the deeds. The evidence presented by plaintiffs was not manifest as a matter of law and the evidence presented by defendants was sufficient to take the case to the jury.

Appeal by defendants from judgment entered 19 July 1999 by Judge Raymond A. Warren in Macon County Superior Court. Heard in the Court of Appeals 12 January 2001.

Coward, Hicks & Siler, P.A., by William H. Coward, for plaintiffs-appellees.

Jones, Key, Melvin & Patton, P.A., by Richard Melvin, for defendants-appellants.

CAMPBELL, Judge.

The Town of Highlands ("Town") and an individual citizen owning property in the Town (jointly, "plaintiffs") brought a declaratory judgment action seeking a determination as to the rights, duties, and liabilities of the parties concerning portions of certain streets which had never been opened by the Town. Defendants are residents of the Town who owned property which would be affected by the opening of these streets. At the close of all the evidence, the trial court directed a verdict in favor of plaintiffs and entered a judgment in which the court answered three crucial "issues of fact," on which

plaintiffs bore the burden of proof, in favor of plaintiffs.[1] The trial court ruled that there was "only one permissible legal inference" to be drawn from the evidence as to each of these three issues and thus plaintiffs were entitled to an affirmative answer to each as a matter of law. The court then concluded that the unopened portions of the streets in question had been dedicated to the Town and could be opened by the Town without the need for condemnation of rights-of-way. The trial court entered judgment accordingly.

Defendants appealed from this judgment contending that at the very least there were issues of fact which required a jury determination, and that as a result, the trial court erred in directing a verdict for plaintiffs. We agree.

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1. These three issues and the trial court's answers were as follows:

   1. Did S. T. and Katherine Kelsey, during their lifetimes, offer for public use the rights of way as shown on the survey by W. Edward Hall dated March 19, 1998 including the third revision dated October 10, 1998, for 5th Street, 4 1/2 Street and Poplar Street, including the unimproved portions of said rights of way?

      The burden of proof on this issue is on the plaintiffs. On this issue the Court finds that the evidence is almost wholly documentary in nature, that no human party survives from the time of the alleged dedication, that the evidence is credible and that only one permissible legal inference can be drawn from the evidence presented and that evidence proves as a matter of law that the Plaintiffs are entitled to an affirmative answer to this issue.

   2. Did the town of Highlands accept the proposed dedication?

      The burden of proof on this issue is on the Plaintiffs. On this issue the Court finds that the evidence is almost wholly documentary in nature, that no human party survives from the time of the alleged original dedication or the early years of the town, that the evidence is credible and that only one permissible legal inference can be drawn from the evidence presented and that evidence proves as a matter of law that the Plaintiffs are entitled to an affirmative answer to this issue.

   3. At what point in time did the town accept the proposed dedication of 5th Street, 4 1/2 Street and Poplar street, including the unimproved portions of said rights of way?

      On this issue the burden of proof is on the Plaintiffs to show some definite acceptance. The court finds that the evidence is almost wholly documentary in nature, that no human party survives from the time of the alleged original dedication or the early years of the town, that the evidence of early acceptance is credible and that only one permissible legal inference can be drawn from the evidence presented and that evidence proves as a matter of law that the unopened portions of all three streets were accepted as part of the structure of the town and for public use before 1900 and long before the purported resolution of acceptance in 1984.

A motion for directed verdict, requires that the trial court consider the evidence in the light most favorable to the non-movant, and determine whether the evidence is sufficient as a matter of law to be submitted to the jury. *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 169, 510 S.E.2d 690, 696 (1999). "A directed verdict in favor of the party with the burden of proof is proper only when the proponent has established a clear and uncontradicted *prima facie* case and the credibility of his evidence is manifest as a matter of law." *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 481, 337 S.E.2d 114, 116 (1985). With this guiding principle in mind, we turn to the case at hand.

The Town was established in the late 1800's. Its origin dates back to 1875 when Samuel T. Kelsey ("Kelsey") purchased approximately 800 acres of mountain land and began to sell lots and parcels out of this purchase. In 1883 the Town was chartered and eventually assumed the maintenance of those streets which had been opened for use by the public. The streets at issue here, portions of 5th, 4 1/2, and Poplar Streets, were not open then and have never been opened.

At the heart of the controversy is the so-called "Kelsey Map." This map purports to be a map of the original Kelsey property as subdivided into lots and streets. On this map, the disputed portions of 5th, 4 1/2, and Poplar Streets are depicted as part of the streets laid out on the map. The "Kelsey Map" was filed and recorded in the Macon County Register of Deeds in 1944.

There is nothing in the record to show who recorded the "Kelsey Map," and nothing to indicate the source of the map which was recorded. The map contains no surveyor's certification and it appears to be no more than a skeletal layout of the streets and lots as opposed to a metes and bounds plat of these streets and lots. Very few of these lots contain metes and bounds descriptions, and some are not even numbered, but instead contain only a person's name as identification of the lot.

Despite the lack of information authenticating the "Kelsey Map," the Town, in 1984, passed a resolution "accepting" the "offer of dedication of streets, alleys, and rights-of-way" contained in the map and resolving to open the unimproved portions of these streets as required, given the needs of the Town. Defendants objected to this course of action and some of them attempted to file notices of withdrawal of the disputed, unopened streets pursuant to N.C. Gen. Stat. § 136-96. In response, the Town filed the instant suit for declaratory

judgment to determine the respective rights of the parties to the property in question.

We look first at the law regarding dedications. A dedication of property to the public consists of two steps: (1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority. *Cavin v. Ostwalt*, 76 N.C. App. 309, 311, 332 S.E.2d 509, 511 (1985). An offer of dedication can be either express, as by language in a deed, or implied, arising from the "conduct of the owner manifesting an intent to set aside land for the public." *Bumgarner v. Reneau*, 105 N.C. App. 362, 365, 413 S.E.2d 565, 568, *modified and aff'd.*, 332 N.C. 624, 422 S.E.2d 686 (1992). In either case, whether express or implied, it is the owner's intent to dedicate that is essential. *See, Milliken v. Denny*, 141 N.C. 224, 229-30, 53 S.E. 867, 869 (1906); *Nicholas v. Salisbury Hardware & Furniture Co.*, 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958).

Once the offer of dedication is made, it must be accepted to be effective. *Rowe v. Durham*, 235 N.C. 158, 161, 69 S.E.2d 171, 173 (1952). In the case of a municipality, the acceptance must take place in some legally recognized form, either expressly by a resolution, order, or formal ratification, or impliedly by use and control of the area by public authorities for a period of 20 years or more. *Bumgarner*, 105 N.C. App. at 366-67, 413 S.E.2d at 569, *modified and aff'd.*, 332 N.C. 624, 422 S.E.2d 686 (1992). An offer of dedication can be revoked at any time prior to acceptance, but once acceptance is made, it becomes irrevocable. *Cavin v. Ostwalt*, 76 N.C. App. 309, 312, 332 S.E.2d 509, 511 (1985); *Rowe v. Durham*, 235 N.C. 158, 160, 69 S.E.2d 171, 172 (1952).

Plaintiffs claim that Kelsey relied on a map or plat from which he sold the lots, and that this is evidence of his intent to dedicate the streets contained in that map or plat to the public. Generally speaking, "the sale of lots by reference to a map or plat which represents a division of a tract of land into streets and lots constitutes an offer to dedicate such streets to public use." *Andrews v. Country Club Hills*, 18 N.C. App. 6, 8, 195 S.E.2d 584, 585 (1973). However, plaintiffs here have failed to produce the map or plat from which the lots were actually sold. Indeed, plaintiffs concede that the original map or plat and subsequent maps made by the Town as early as 1899, cannot be found. Without this evidence, we have no way of knowing whether the original map used by Kelsey in conveying the lots of the Town included the portions of 5th, 4 1/2, and Poplar Streets that are disputed here.

Plaintiffs have also introduced into evidence 143 deeds showing a "quilt-like pattern of lots with a definite street system in between," which they contend proves the dedication of the contested streets, including the disputed portions. Even with this additional evidence, there is not a sufficient basis for the trial court to have determined all legal inferences in favor of plaintiffs and to have directed a verdict in favor of plaintiffs. In order for this "quilt-like pattern" to have been meaningful, plaintiffs would have had to show how the property described in each deed was placed on the ground, the relationship of the properties to what would be streets running between the lots, and that the disputed portions of 5th, 4 1/2, and Poplar Streets, even though unopened, were intended to have been part of the original scheme of conveyance of these properties and streets as plaintiffs claim.

Plaintiffs further contend that when an individual offers to dedicate a street and the same is accepted, the whole street has been accepted even if only a portion of the street is opened. Assuming *arguendo* that there was an offer of dedication of the streets as contended by plaintiffs (even though the entire street was not opened), we have no definitive proof that the streets in question were ever intended to extend beyond the present boundaries of the opened streets. Kelsey could have just as easily intended for these streets to end at their present termini. " 'There can be no such dedication contrary to the intention of the landowner.' " *Milliken*, 141 N.C. at 230, 53 S.E. at 869 (quoting Leonard A. Jones, *A Treatise on the Law of Easements* § 425, at 335-36 (1898)). "It would be a dangerous invasion of rights of property, after many years and after the removal by death or otherwise of the original parties to the deed and conditions have changed, to impose, by implication, . . . such burdens on land." *Id.* at 231, 53 S.E. at 870. Without proof as to Kelsey's intent, we refuse to speculate on whether or not he intended to dedicate the portions of the streets here at issue.

The Town argues that the "Kelsey Map" and the deeds to the lots of the town prove Kelsey's intent to dedicate the disputed portions of 5th, 4 1/2, and Poplar Streets, which it then "accepted" by the 1984 resolution. Despite the trial court's findings, defendants have shown that there is more than "only one permissible legal inference [that] can be drawn from the evidence presented." First, none of the deeds introduced by plaintiffs mention the "Kelsey Map" or incorporate it by reference. Second, the lot numbers in some of these deeds are different from the lot numbers on the "Kelsey Map" that they supposedly

represent, which tends to indicate that a different map may have been used when conveying the lots. Third, the "Kelsey Map" contained no ascertainable monuments and few metes and bounds descriptions, which also tends to indicate that a different map may have been used in conveying the lots. Finally, there are discrepancies between the results of the measurements made by the court surveyor (W. Edward Hall who prepared the surveys referred to in issue number one) regarding the properties in dispute, and the distances stated in the actual deeds to the property.

As stated above, a directed verdict considers the evidence in the light most favorable to the non-movant (defendants here) to determine if it is sufficient to go to the jury; and a directed verdict in favor of the party with the burden of proof (plaintiffs) is improper unless the evidence is manifest as a matter of law. We find that the evidence presented by plaintiffs was not manifest as a matter of law, and that the evidence presented by defendants was sufficient to require that the case be taken to the jury. We therefore conclude that the trial court erred in directing verdict for plaintiffs, and remand for a jury trial.

Reversed and remanded.

Judges WALKER and HUNTER concur.

JOSEPH OLIVER MORIN, PLAINTIFF-APPELLEE v. DAVID CHARLES SHARP, U.S. TRANSPORT, INC. AND LEGION INSURANCE COMPANY, DEFENDANTS-APPELLANTS

No. COA00-343

(Filed 19 June 2001)

1. Parties— motor vehicle accident—truck owner and driver not available—intervention by insurance company

The trial court did not err by granting plaintiff's motion to allow an insurance company to intervene where the insureds, the owner of a tractor-trailer and the driver, could not be located by the attorney retained by the insurance company. Although an attorney may not represent a client without the client's permission, Rule 24 of the Rules of Civil Procedure provides a means by which an interested party may intervene to protect its interest.

2. Trial— motorcycle-truck accident—driver not found—insurance company intervention—motion to continue denied

The trial court did not abuse its discretion by denying a motion to continue a negligence action arising from an motorcycle accident where the owner of the tractor-trailer and its driver could not be found but their insurance company intervened.

3. Negligence— request for independent medical exam—not timely

The trial court did not abuse its discretion in a negligence action arising from a motorcycle accident by denying the insurance company's motion for an independent medical examination of plaintiff under Rule 35 where the court found that an exam at that point would be untimely.

4. Appeal and Error— preservation of issues—motion in limine—failure to object when questions asked

Defendant in a negligence action arising from a motorcycle accident did not preserve for appeal the issue of whether the court erred by allowing testimony from an insurance company representative despite a motion in limine where defendant-insurance company objected when the witness was called but not when any of the questions were asked.

Appeal by defendants and plaintiff from judgment dated 20 October 1999 by Judge L. Oliver Noble, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 21 February 2001.

Anderson & Associates, P.C., by John J. Korzen; W. Newton Moore; and Long, Parker, Warren & Jones, P.A., by Steve Warren, for plaintiff-appellee.

Dennis, Corry & Porter, L.L.P., by Christopher D. Pixley, for defendants-appellants.

WALKER, Judge.

On 6 July 1996, a motor vehicle accident occurred in Buncombe County, North Carolina involving Joseph Oliver Morin (plaintiff), David Charles Sharp (defendant Sharp) and U.S. Transport (defendant Transport). Plaintiff was riding a motorcycle on Interstate 40 when he was struck by a spare tire weighing approximately one hundred to one hundred and fifty pounds. The tire had rolled off a

tractor-trailer owned by defendant Transport and driven by its employee, defendant Sharp. Upon being struck by the tire, plaintiff remained on his motorcycle which flipped in the air three times. Plaintiff then slid under the motorcycle and across the road for over one hundred feet, sustaining severe injuries to his teeth, back, shoulder, hip and legs, which required multiple surgeries and left him with permanent disabilities.

Plaintiff filed suit on 3 March 1998 alleging negligence and seeking damages from defendants Sharp and Transport. When defendants Sharp and Transport failed to answer or otherwise plead to the complaint, plaintiff obtained an entry of default.

Defendant Transport's liability insurance carrier, Legion Insurance Company (defendant Legion), received notice of the lawsuit on 15 February 1999, after entry of default. After defendant Legion retained attorney William Morris (Morris) to represent defendants Sharp and Transport, he moved to set aside the entry of default.

Thereafter, plaintiff and defendant Legion consented to the setting aside of the entry of default which was done by order on 14 April 1999. At that time, Morris advised plaintiff's counsel that he represented "both the insured and the insurance carrier." The case was peremptorily set for trial beginning on 11 October 1999.

On 6 May 1999, Morris filed an answer on behalf of defendants Sharp and Transport and denied liability. Plaintiff initiated discovery which was sent to Morris in August 1999; however, Morris responded that he was unable to locate defendants. Plaintiff then filed a motion asking that the trial court allow defendant Legion to intervene. The trial court ordered that "any insurance carrier which so desires to intervene and assert any interest it may have in connection with the matters . . . alleged in [p]laintiff's [c]omplaint . . ." could intervene. Defendant Legion filed its own motion to intervene as an additional party defendant which was allowed.

At the conclusion of the trial on 20 October 1999, the jury returned a verdict in favor of plaintiff in the amount of $1,035,167.50. Defendant Legion filed a motion for a new trial, which was denied on 16 November 1999. Defendants Sharp and Legion (defendants) appealed. Defendant Transport is not a party to this appeal.

We first address plaintiff's motion to dismiss the appeal. Plaintiff asserts that this Court is without jurisdiction to hear defendants'

appeal because their notice of appeal fails to designate the orders which address all issues from which defendants appeal. After careful consideration, we deny the motion.

[1] In their first assignment of error, defendants contend the trial court committed reversible error by granting plaintiff's motion to allow intervention because the order prejudicially forced defendant Legion to intervene as a party defendant.

One month before trial, Morris filed a motion to continue the case on the basis that he had been unable to locate defendants Sharp and Transport. In discovery responses filed previously, Morris had stated he was unable to locate defendants Sharp and Transport.

Plaintiff states that the motion to allow intervention by defendant Legion was filed because of his concern that an attorney-client relationship had not been formed between Morris and defendants Sharp and Transport and that any judgment against them would be improper because Morris had no authority to represent them.

At trial, defendant Legion filed its own motion to intervene, stating it was being forced to intervene in order to avoid a default judgment against its insured. Furthermore, the motion stated such intervention would prejudice defendant Legion, as issues of insurance coverage and the availability of insurance would be improperly raised during the trial.

Our Supreme Court in the recent decision of *Dunkley v. Shoemate*, 350 N.C. 573, 515 S.E.2d 442 (1999), held "that a law firm or attorney may not represent a client without the client's permission to do so[.]" *Id.* at 578, 515 S.E.2d at 445. *Dunkley* likewise involved an attorney employed by an insurance carrier who attempted to contact the insured without success and therefore was not authorized to appear on his behalf and defend the lawsuit. *Id.* at 575, 515 S.E.2d at 443. The Supreme Court affirmed this Court's ruling that no attorney-client relationship existed between defendant and the attorney seeking to represent him. *Id.* at 578, 515 S.E.2d at 445. However, the Court noted "Rule 24 of the North Carolina Rules of Civil Procedure provides a means by which an interested party, under certain circumstances, may intervene in a pending lawsuit . . . to protect its interests . . . ." *Id.*

In the instant case, the trial court properly granted plaintiff and defendant Legion's motions to allow defendant Legion to intervene as a party defendant to protect its interests as articulated in *Dunkley*.

After reviewing the record, we fail to see how defendant Legion was forced to intervene or was prejudiced by this intervention. This assignment of error is overruled.

[2] In their second assignment of error, defendants contend the trial court committed reversible error by denying defendant Legion's motion to continue because such denial caused irreversible prejudice to defendants.

The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion. *Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac*, 109 N.C. App. 352, 356, 427 S.E.2d 629, 631 (1993). "The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice." *Id.* The moving party has the burden of proof of showing sufficient grounds to justify a continuance. *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). Defendants rely on *Smith v. Bryant*, 264 N.C. 208, 141 S.E.2d 303 (1965) and *Shankle*, 289 N.C. at 483, 223 S.E.2d at 386, where in each case our Supreme Court held the trial court's denial of a motion to continue was improper. In *Smith*, the trial court permitted the withdrawal of defendant's counsel one day before trial began. *Smith*, 264 N.C. at 211-12, 141 S.E.2d at 306. In *Shankle*, defense counsel withdrew from the case without prior notice to the defendants who had to proceed to trial without an attorney. *Sha*nkle, 289 N.C. at 486, 223 S.E.2d at 388. The Supreme Court ordered a new trial in each case. Defendants contend a new trial should likewise be ordered in this case because defendants Sharp and Transport were not represented by counsel and intervention by defendant Legion was mandated for an improper purpose, all of which "resulted in an extraordinary and excessive verdict." However, the facts in the instant case are distinguishable from the facts in *Smith* and *Shankle*. *Smith*, 264 N.C. 208, 141 S.E.2d 303; and *Shankle*, 289 N.C. 473, 223 S.E.2d 380. Defendants have the burden of proving sufficient grounds for a continuance. *Id.* We find nothing in the record to support an abuse of discretion by the trial court in deciding not to continue the case.

[3] In their third assignment of error, defendants contend the trial court committed reversible error and abused its discretion by denying defendant Legion's motion for an independent medical examination of plaintiff for the following reasons: (1) plaintiff's medical condition was in controversy; (2) the motion was timely filed within the discovery period and seventeen days before trial, providing plain-

tiff ample time to comply; (3) the denial was arbitrary and unreasoned; and (4) the denial prejudiced defendants by causing them to be inadequately prepared for the cross-examination of plaintiff and his expert witness.

Rule 35 of our Rules of Civil Procedure provides in part that when the physical condition of a party is in controversy, the trial court may order the party to submit to a physical examination by a physician, but only for good cause shown and upon notice to all parties, including notice to the person to be examined. N.C. R. Civ. P. 35 (1999). In addition, the request shall specify the time, place, manner, conditions, and scope of the examination and the person by whom it is to be made. *Id.* A trial court's order regarding matters of discovery are generally reviewed under an abuse of discretion standard. *Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 273, 312 S.E.2d 905, 907 (1984).

Regarding the timeliness of the motion, plaintiff points out the motion was filed seventeen days before the trial began and was not calendered and heard until the week before trial. Plaintiff further asserts the trial court correctly denied the motion for the following reasons: (1) defendants never challenged the qualifications or findings of any of plaintiff's physicians whose depositions and reports were presented at trial; (2) defendants failed to offer a reason for delaying their request for the examination; (3) defendants failed to specify the "manner, conditions and scope" of the examination; and (4) compliance with the request would have inconvenienced plaintiff, who would have had to travel two and one-half hours each way for the examination.

After considering defendant Legion's motion and arguments of counsel, the trial court found "at this late date said independent medical exam is untimely[.]" We conclude the trial court did not abuse its discretion in denying defendants' motion for a medical examination.

[4] In their last assignment of error, defendants contend the trial court committed reversible error by allowing plaintiff to elicit testimony on cross-examination from defendant Legion's representative, Larry Von Eschen (Von Eschen), in violation of defendant Legion's motion in limine which had been orally granted by the trial court. The motion in limine precluded plaintiff from:

> eliciting testimony, through deposition or at trial, of Legion representatives until after a period of time sufficient to allow Legion,

> as a newly intervening party, a fair and adequate opportunity to prepare for trial. Legion also moves this [c]ourt for an [o]rder in [l]imine precluding the [p]laintiff in this action from introducing new claims not raised in the complaint or agreed to in the pre-trial order.

Defendants contend this motion was violated because plaintiff's counsel only questioned Von Eschen about the method by which defendant Legion processed claims and handled lawsuits and did not ask of him any questions regarding this accident. Defendants assert plaintiff's strategy in asking these questions was to demonstrate that defendant Legion had acted improperly by not fairly and diligently investigating plaintiff's claim. Defendants further contend this line of questioning was irrelevant and improperly influenced the jury, resulting in prejudicial error which prevented defendants from receiving a fair trial.

A review of the record reveals that when plaintiff called Von Eschen to testify, defendant Legion objected, which was overruled. However, defendant Legion failed to object to any of plaintiff's questions to Von Eschen. Our Supreme Court and this Court have held that even though a motion in limine is granted, appropriate objections must be made at trial to preserve the question of admissibility of the evidence on appeal. *See State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999) (holding defendant failed to preserve for appeal the question of admissibility of evidence that was the subject of the motion in limine where defendant failed to object to evidence when offered at trial); *Nunnery v. Baucom*, 135 N.C. App. 586, 521 S.E.2d 479 (1999) (holding motion in limine is insufficient to preserve question of admissibility of evidence if movant fails to further object when it is offered); and *Martin v. Benson*, 348 N.C. 684, 500 S.E.2d 664 (1998) (holding plaintiffs waived their right to appellate review of the admission of an expert's testimony by failing to object to it at trial). Since defendants failed to object at trial and preserve the issue for appeal, this assignment of error is overruled.

In summary, defendants received a fair trial free of prejudicial error.

No error.

Judges BIGGS and SMITH concur.

SIGMA CONSTRUCTION CO., INC., PLAINTIFF v. GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA00-877

(Filed 19 June 2001)

1. **Open Meetings— school board—attorney-client exception—closed session—in camera review by trial court**

The trial court did not err by dismissing plaintiff contractor's complaint and by concluding that defendant school board complied with the requirements of N.C.G.S. § 143-318.9 to hold closed session meetings to preserve its attorney-client privilege, because the trial court's in camera inspection reveals that defendant did in fact receive legal advice from its attorneys, there was no discussion of any general policy matters, there were no discussions which were not subject to the attorney-client privilege, and release of any part of the minutes of the closed sessions for public inspection would destroy the attorney-client privilege.

2. **Open Meetings— school board—termination of contractor's performance—no debate at meeting prior to vote**

The adoption of a resolution by defendant school board at an open meeting to terminate plaintiff contractor's performance is not subject to challenge under N.C.G.S. § 143-318.9 on the ground that there was no debate at that meeting among the members of the public body prior to their voting on the resolution, because there is nothing in N.C.G.S. § 143-318.9 requiring the solicitation of public comment as a prerequisite to a vote on a pending motion.

Appeal by plaintiff from judgment filed 25 April 2000 by Judge Douglas W. Albright in Guilford County Superior Court. Heard in the Court of Appeals 22 May 2001.

Safran Law Offices, by Perry R. Safran, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips, Jill R. Wilson, and Harold H. Chen, for defendant-appellee.

GREENE, Judge.

Sigma Construction Co., Inc. (Plaintiff) appeals a judgment filed 25 April 2000 in favor of Guilford County Board of Education (Defendant) dismissing Plaintiff's complaint and denying Plaintiff's requests: that the closed session meetings Defendant held on 15 February and 9 March 2000 be declared in violation of the Open Meetings Law; that Defendant's actions taken in the meetings be declared void; for minutes of the closed sessions of Defendant's 15 February meeting; and for attorney's fees and costs.

On or about 13 May 1998, Plaintiff entered into a contract with Defendant (the Contract) for construction of Colfax Elementary School (the Project). Over the course of the performance of the Contract, disputes arose between Plaintiff and Defendant concerning the schedule of the Project, the completion date, and certain milestones.

In a letter sent by facsimile transmittal to Plaintiff on 15 February 2000, Defendant informed Plaintiff that Defendant would hold a school board meeting on 15 February 2000 and would discuss, among other things, the Project and Plaintiff's continued performance. After a motion at the meeting to move to a closed session to consult with attorneys and preserve the attorney-client privilege, Defendant moved to a closed session. After the closed session, a motion was made and adopted in open session by Defendant. There was no discussion on the motion, and its adoption directed that further performance by Plaintiff be terminated. On 28 February 2000, Plaintiff requested minutes from Defendant's 15 February 2000 meeting, including the minutes of the closed session. Defendant supplied Plaintiff with a copy of the minutes of the open session, but Defendant did not provide a copy of the minutes of the closed session, as the closed session minutes were "not 'public records.' "

After Defendant's termination of Plaintiff, Michael D. Priddy (Priddy), Defendant's Associate Superintendent for Auxiliary Services, recommended hiring Weaver-Cooke Construction, L.L.C. (Weaver-Cooke) as the replacement contractor. On 9 March 2000, after meeting in closed session to discuss legal matters, Defendant returned to open session. Priddy submitted a report by his staff recommending Weaver-Cooke be hired as the replacement contractor. In open session, Defendant adopted a resolution that Weaver-Cooke be hired as the replacement contractor on the Project.

Plaintiff filed a complaint on 16 March 2000, alleging Defendant violated N.C. Gen. Stat. § 143-318.9 requiring hearings, deliberations, and actions of public bodies be conducted openly. Plaintiff's complaint requested the trial court enter a declaratory judgment finding Defendant violated N.C. Gen. Stat. § 143-318.9, and any action taken by Defendant in violation of section 143-318.9 was null and void. Plaintiff also requested Defendant produce the minutes of the closed session of the meeting held on 15 February 2000.

In a judgment filed 25 April 2000, the trial court found as fact that:

> 9. Attached to the Affidavit of Dr. Lillie Jones, in a sealed envelope, are true and genuine copies of the minutes of the closed sessions of the meetings held by Defendant on February 15 and March 9, 2000.
>
> 10. The [c]ourt has conducted an *in camera* inspection of the minutes of the closed sessions of the meetings held by Defendant on February 15 and March 9, 2000.
>
> . . . .
>
> 12. Jill R. Wilson and Michael D. Meeker are attorneys retained by Defendant. Both attorneys were present at the February 15 and March 9 closed sessions of the meetings held by Defendant.
>
> 13. Jill R. Wilson and [Michael D.] Meeker attended the closed sessions of the meetings held on February 15 and March 9, 2000 for the purpose of providing legal advice to Defendant.
>
> 14. Defendant held its closed sessions on February 15 and March 9, 2000 for the purpose of consulting with its attorneys in order to preserve the attorney-client privilege.
>
> 15. Defendant did in fact consult with its attorneys and did in fact receive legal advice from its attorneys during the closed sessions of the meeting[s] held by Defendant on February 15 and March 9, 2000.
>
> 16. The [c]ourt's *in camera* inspection of the minutes of the closed sessions held by Defendant . . . did not reveal any entry relating to the discussion or consideration of any general policy matters.

17. The [c]ourt's *in camera* inspection of the minutes of the closed sessions held by Defendant . . . revealed that there was no discussion of any matter which was *not* subject to the attorney-client privilege.

18. [Defendant] was entitled to consult with its attorneys in closed session on those matters which were the subject of the closed sessions held by Defendant . . . .

19. Disclosure of the minutes of the closed sessions of the meetings held by Defendant . . . would destroy the attorney-client privilege for the consultations which occurred.

Based on these findings of fact, the trial court concluded: Defendant complied with the requirements of N.C. Gen. Stat. § 143-318.9; the purpose of the closed session meetings was to preserve attorney-client privilege; Defendant carried the burden of demonstrating the attorney-client exception applied to its closed session meetings; and production of the minutes from the closed sessions would "destroy the attorney-client privilege."

The dispositive issues are whether: (I) the record is sufficient for this Court to review the correctness of the trial court's finding that the closed sessions were entirely related to a proper exercise of Defendant's attorney-client privilege; and (II) the adoption of a resolution by a public body at an open meeting is subject to challenge under section 143-318.9 on the ground there was no debate, at that meeting, among the members of the public body prior to their voting on the resolution.

I

[1] Generally, "it is the public policy of North Carolina that the hearings, deliberations, and actions" of public bodies be conducted openly. N.C.G.S. § 143-318.9 (1999). A school board is a "public body" and therefore must hold its meetings in conformity with the open meetings law. N.C.G.S. § 143-318.10(b) (1999). A public body, however, may hold a closed session to "consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body." N.C.G.S. § 143-318.11(a)(3) (1999). General policy matters, however, may not be discussed in a closed session. *Id.* The public body has the burden of demonstrating the attorney-client exception applies and

must supply some objective indicia that the exception is applicable. *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 575-76, 525 S.E.2d 786, 792, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000). "In camera review by the trial court of the minutes of the closed session provides the easiest and most effective way for the [public] body to objectively demonstrate that the closed session was in fact warranted." *Id.* at 576, 525 S.E.2d at 792. After such *in camera* review, the trial court is to make available for public inspection any portion of the closed session minutes not related to the attorney-client privilege. *Id.* (trial court could redact portion of minutes not subject to public disclosure). The trial court may release for public inspection the portion of the minutes related to the attorney-client privilege only if such release would not "frustrate the purpose of [the] closed session." N.C.G.S. § 143-318.10(e) (1999).

In this case, the trial court reviewed, *in camera*, the minutes of Defendant's closed sessions, and it based its judgment on the contents of those minutes. The trial court found Defendant went into these closed sessions to consult with its attorneys and that during these closed sessions, it "did in fact receive legal advice" from its attorneys, there was no "discussion . . . of any general policy matters," and, indeed, "no discussion of any matter which was *not* subject to the attorney-client privilege." The trial court also found that release of the minutes of the closed sessions would "destroy the attorney-client privilege." As the record on appeal does not contain those minutes, Plaintiff has no basis to contest these findings and they are deemed supported by evidence before the trial court. *See Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997) (appellant has responsibility to provide this Court with record of trial court proceedings necessary to address issues raised on appeal).

Accordingly, the trial court did not err in finding the closed sessions were entirely for the purpose of protecting Defendant's attorney-client privilege, and that a release of any part of the minutes of the closed sessions for public inspection would destroy the attorney-client privilege.

II

[2] Plaintiff, nonetheless, argues that section 143-318.9 was violated when Defendant voted in open session on the motion to terminate Plaintiff's performance, without any public deliberation or an

opportunity for public comment.[1] Admittedly, there was no public debate, among Defendant's members, of the motion to terminate Plaintiff's performance and no public comment was solicited.[2] This, however, was not in violation of section 143-318.9.

There is nothing in section 143-318.9 requiring the solicitation of public comment as a prerequisite to a vote on a pending motion. Furthermore, although section 143-318.9 requires "deliberations" of public bodies "be conducted openly," we do not read this statute to mandate a formal discussion or debate of an issue. Section 143-318.9 simply requires that if there is any discussion or debate of "public business" at an "official meeting," that discussion or debate must occur in a meeting open to the public with "any person . . . entitled to attend." N.C.G.S. § 143-318.10(a), (d) (1999).

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

DON WEBB AND SUSAN WEBB v. DANNY CARROLL McKEEL

No. COA00-810

(Filed 19 June 2001)

1. Interest— post-judgment—tender of payment

The trial court did not err in a personal injury case by allowing defendant's motion in the cause finding that post-judgment interest stopped upon defendant's tender of payment of $89,120 to plaintiffs' counsel even though plaintiffs refused the check since the actual amount due was $89,161.11, because: (1) N.C.G.S. § 1-239(a)(1) states that partial payments are acceptable; (2) N.C.G.S. § 24-5(b) does not require the tender to be exact, but provides that the portion remaining will have interest accrue on

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1. We note this does not affirmatively appear to have been an issue raised in the trial court and, thus, is not properly before this Court. N.C.R. App. P. Rule 10(b)(1). We, however, in our discretion, have chosen to address this argument. N.C.R. App. P. Rule 2.

2. This is not to say that public comment was prohibited, as there is nothing in the record on appeal to suggest any person in attendance at either of the open meetings offered to make a public comment and was denied that opportunity.

it until the balance is paid; and (3) N.C.G.S. § 1-239(c) provides that tender may be made to either the clerk of court or to the judgment creditor.

2. Interest— post-judgment—motion in the cause—jurisdiction

The trial court did not lack jurisdiction in a personal injury case to hear and allow defendant's motion in the cause to stop post-judgment interest upon defendant's tender of payment of $89,120 to plaintiffs' counsel even though plaintiffs refused the check since the actual amount due was $89,161.11 because although clerks of superior court have jurisdiction to compute the amount of interest due, the superior court has jurisdiction to determine whether post-judgment interest goes into the calculation.

Appeal by plaintiffs from judgment entered 14 February 2000 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 26 April 2001.

Rudolf, Maher, Widenhouse & Fialko by M. Gordon Widenhouse, Jr. for plaintiffs-appellants.

Walker, Clark, Allen, Herrin & Morano by Jerry A. Allen and Gay Parker Stanley for defendant-appellee.

THOMAS, Judge.

Plaintiffs Don and Susan Webb appeal from the grant of a motion in the cause in favor of defendant Danny Carroll McKeel. The trial court found that plaintiffs were not entitled to post-judgment interest beyond the date of defendant's attempted tender of payment to plaintiff. For the reasons discussed herein, we modify the trial court's ruling.

Following an automobile accident on 19 March 1992, plaintiffs filed a complaint for personal injuries and loss of consortium against defendant. The case went to trial on 3 February 1997. The jury rendered a verdict for plaintiff Don Webb in the amount of $75,000 but did not award damages for plaintiff Susan Webb's claim of loss of consortium. The trial court entered a judgment for the amount of the verdict plus interest and court costs. Plaintiffs appealed to this Court. The judgment itself, meanwhile, was recorded in the Wilson County Clerk of Superior Court's office. On 2 July 1997, while the appeal was

pending, defendant forwarded a check for $89,120 to plaintiffs' counsel in an attempt to stop the accumulation of additional interest. The actual amount due, however, was $89,161.11. Plaintiffs refused the check, without explanation and did not notify defendant of the shortfall. This Court then dismissed plaintiffs' first appeal for failure to timely serve the record on appeal. Following the dismissal of the appeal, plaintiff demanded payment in the amount of $102,877.79, which included additional interest from the time of defendant's tender. Defendant refused to pay and on 11 December 1999, filed a motion in the cause seeking an order to determine whether defendant's tender of $89,120 cut off the accrual of post-judgment interest. The trial court granted defendant's motion in the cause, finding the post-judgment interest stopped upon the tender of the $89,120. From this order, plaintiffs appeal.

[1] By their first assignment of error, plaintiffs argue the trial court erred in allowing defendant's motion in the cause because the tender was invalid as a matter of law. We disagree.

There is no dispute the tender was $49.11 short. Plaintiffs contend the tender was invalid because defendant sent an amount less than the full amount due. However, N.C. Gen. Stat. § 1-239(a)(1) states "the party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, *or any part thereof*, in cash or by check, to the clerk of the court in which the same was rendered, although no execution has issued on such judgment." (1997). (Emphasis added). Thus, under the plain language of the statute, partial payments are acceptable.

Plaintiffs further argue section 24-5(b) requires the tender to be exact. However, that interpretation is not consistent with a reasonable, textual reading of the statute. Section 24-5(b) provides

> In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

(2000). There is no indication whatsoever that a requirement of exact tender exists. The statute only specifies that the portion remaining

will have interest accrue on it until the balance is paid. To this, we agree and hold that interest did accrue on the $49.11 left unpaid.

Plaintiff further argues the tender was invalid because it was not paid to the Wilson County Clerk of Superior Court. Section 1-239(c) contemplates payment to the judgment creditor as section 1-239(b) does to the clerk. "Upon receipt by the judgment creditor of any payment of money upon a judgment, the judgment creditor shall within 60 days after receipt of the payment give satisfactory notice thereof to the clerk of the superior court in which the judgment was rendered[.]" N.C. Gen. Stat. § 1-239(c). As such, it is again clear by a plain language reading of the statute that tender may be made to *either* the clerk of court or to the judgment creditor. The statute further states that if the judgment creditor does not give notice to the clerk of the receipt of the judgment within sixty days, that creditor may be liable for any loss suffered by the debtor as a result of the failure to notify. Additionally, the creditor would be subject to a civil penalty of $100. Thus, the statute offers protection to a debtor who pays the judgment, rather than take a firm stance against debtors who fall short in their tender.

Plaintiffs cite *Duke v. Pugh*, in which the N.C. Supreme Court stated "[t]o constitute a valid tender the offer must include the full amount the creditor is entitled to receive, including interest to the date of the tender." 218 N.C. 580, 581, 11 S.E.2d 868, 869 (1940). *See also Ingold v. Phoenix Assurance Co.*, 230 N.C. 142, 52 S.E.2d 366 (1949). However, these cases are in direct conflict with the statute at issue which allows partial payments, as aforementioned, and are not directly applicable to these facts. "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). We find the language "may pay the whole, or any part thereof" of section 1-239 a clear and unambiguous expression of the legislature's objective intent for partial or incomplete payments to be valid. The legislature has, in effect, preempted *Duke* and *Ingold* by enacting section 1-239 some twenty years after those holdings. Moreover, the doctrine of *stare decisis* is inapplicable where case law conflicts with a pertinent statutory provision to the contrary. *State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954). Consequently, we are unable to give precedential value to statements made in *Duke* and *Ingold* concerning the validity of partial tenders made to judgment creditors under these facts.

We therefore hold defendant's tender of $89,120 was not invalid, but partial. Plaintiffs should have accepted the partial amount. Because they did not, interest will accrue only against the remaining $49.11 that was not paid. Were we to find for plaintiffs, judgment creditors could refuse tenders that were a mere penny short and later capitalize by collecting interest on the full amount, as opposed to interest on the penny short. Interest, after all, is payment for the use of money. New International Webster's Pocket Dictionary 265 (1st ed. 1997). Had plaintiffs accepted the tender, they would have had the use of $89,120. Thus, they are only entitled to interest on the amount they were not able to use, $49.11.

[2] By plaintiffs' second assignment of error, they argue the trial court lacked jurisdiction to hear and allow defendant's motion in the cause. We disagree.

Plaintiffs contend the clerk of superior court was the only authority with jurisdiction over the enforcement and satisfaction of judgments. Plaintiffs further contend because defendant did not tender payment to the clerk, there was no determination or action by the clerk for which defendant could seek review by the superior court.

A motion in the cause is the appropriate remedy for a defendant where a judgment grants the plaintiff more relief than that to which the plaintiff is entitled. *Federal Land Bank of Columbia v. Davis*, 215 N.C. 100, 1 S.E.2d 350 (1939). Likewise, where there is a legitimate issue as to the substance of a trial court's order, a motion in the cause is appropriate. Sections 1-239 and 1-242 give the clerk jurisdiction to hear motions in the cause when there is a dispute as to the payments rendered. We have already interpreted section 1-239 to mean that debtors are not required to make payments to the clerk of court. Section 1-242 provides

> If payment is made on a judgment docketed in the office of the clerk of the superior court and no entry is made on the judgment docket . . . . any interested person may move in the cause before the clerk, upon affidavit after notice to all interested persons, to have the credit, reversal, or modification entered.

N.C. Gen. Stat. § 1-242 (2000). In the instant case, however, payment was refused. The jurisdiction of the clerk of superior court to enter a judgment in a civil action is limited to specific instances enumerated in the General Statutes. *Boone v. Sparrow*, 235 N.C. 396, 70 S.E.2d 204 (1952). Plaintiffs claim the clerk of court is the only such authority to

determine the amount of interest due. However, defendant's motion in the cause was not to determine the computation of interest, but to determine whether defendant was required to pay post-judgment interest on a judgment entered by that same trial court. Clerks of superior court have jurisdiction to compute the amount of interest due. However, the superior court has jurisdiction to determine whether post-judgment interest goes into the calculation. As such, we hold the superior court correctly assumed jurisdiction of the motion in the cause filed by defendant.

For the above reasons, we modify the trial court's ruling and remand this action for an order consistent with this opinion.

MODIFIED AND REMANDED.

Judges MARTIN and BIGGS concur.

STATE OF NORTH CAROLINA v. LISA STRUM ALLEN

No. COA00-720

(Filed 19 June 2001)

Constitutional Law— double jeopardy—felony child abuse— dismissal after mistrial and end of session

The State's appeal in a felony child abuse case of the trial court's order, entered after the trial ended in a mistrial and court was adjourned sine die, which allowed defendant's N.C.G.S. § 15A-1227 motion to dismiss based on insufficiency of the evidence and defendant's N.C.G.S. § 15A-1414 motion for appropriate relief is not barred by the double jeopardy clause because: (1) a dismissal during a pretrial stage of the proceedings does not prohibit further prosecution of defendant under the double jeopardy clause; (2) the § 15A-1227 motion to dismiss was not timely because it was not made before the end of the session; (3) the § 15A-1414 motion for appropriate relief was not proper because it was not made after a verdict; and (4) defendant's motions thus must be treated as "pretrial" motions, and jeopardy had not attached at the time of the court's order. Furthermore, the trial court was without authority to rule on defendant's motions because they were improper under §§ 15A-1227 and 15A-1414.

Appeal by State from order dated 14 January 2000 by Judge James R. Vosburgh in Johnston County Superior Court. Heard in the Court of Appeals 15 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Amy C. Kunstling, for the State.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for defendant-appellee.

GREENE, Judge.

The State of North Carolina appeals an order dated 14 January 2000 in favor of Lisa Strum Allen (Defendant).

The record shows Defendant was indicted on 26 October 1998 for felony child abuse, pursuant to N.C. Gen. Stat. § 14-318.4(a). Defendant was tried before a jury at the 1 November 1999 criminal session of the Superior Court of Johnston County. At the close of the State's evidence and at the close of all the evidence, Defendant moved to dismiss the charges against her based on insufficiency of the evidence. The trial court denied Defendant's motions. Subsequent to its deliberations, the jury was unable to reach a verdict. On 10 November 1999, therefore, the trial court declared a mistrial. The trial court then asked the parties whether there was "anything" they "would like to put in the record before [it] dismiss[ed] court." Both parties responded they had "nothing," and court was adjourned *sine die*.

On 19 November 1999, Defendant filed a motion for appropriate relief, seeking a dismissal of the charge of felony child abuse. In support of her motion, Defendant stated that "the evidence, at the close of all the evidence, was insufficient to justify the submission of the case to the jury." In a motion filed 29 November 1999, the State moved to dismiss Defendant's motion for appropriate relief on the ground the trial court did not have authority to rule on the motion "since no verdict ha[d] been received." Additionally, on 29 November 1999, a superceding indictment for felony child abuse was issued against Defendant, pursuant to N.C. Gen. Stat. § 15A-646.

In an order dated 14 January 2000, the trial court treated Defendant's "motion for appropriate relief" as two motions: (1) a motion to dismiss made pursuant to N.C. Gen. Stat. § 15A-1227; and (2) a motion for appropriate relief made pursuant to N.C. Gen. Stat.

§ 15A-1414(a).[1] The trial court concluded, in pertinent part, that "[it] should have allowed the motion to dismiss made by . . . Defendant at the close of all the evidence during the trial . . . [and that it] made an error of law by submission of the case to the jury." Additionally, the trial court concluded "that the [26 October 1998] bill of indictment was fatally defective by the omission of necessary statutory allegations with regard to the charge of felon[y] child abuse." The trial court, therefore, dismissed the charge against Defendant with prejudice.

The dispositive issue is whether the State's appeal of the trial court's 14 January 2000 order is barred by the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution and, if not, whether the trial court had authority to rule on Defendant's motions seeking dismissal of the charge against her.

Defendant argues the rule against double jeopardy prohibits her further prosecution; therefore, the State's appeal of the trial court's 14 January 2000 order must be dismissed. We disagree.

Double Jeopardy Clause

The State has a statutory right to appeal a judgment dismissing criminal charges "[u]nless the rule against double jeopardy prohibits further prosecution" of the defendant. N.C.G.S. § 15A-1445(a)(1) (1999); *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994). Generally, the rule against double jeopardy prohibits appellate review of a verdict of acquittal because such review places a defendant twice in jeopardy. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 51 L. Ed. 2d 642, 651 (1977). Additionally, "what constitutes an 'acquittal' is not . . . controlled by the form of the [trial court's] action"; rather, the appellate court must determine "whether the ruling of the [trial court], whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* Thus, a trial court's dismissal of a charge based on insufficiency of the evidence is an "acquittal" for the purposes of the Double Jeopardy Clause, provided the dismissal does not occur during the "pretrial" stage of the proceedings. *Id.* at 575-76, 51

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1. Because the trial court treated Defendant's 19 November 1999 "motion for appropriate relief" as two separate motions, we also treat Defendant's motion as two separate motions.

L. Ed. 2d at 653-54; *Serfass v. United States*, 420 U.S. 377, 391-93, 43 L. Ed. 2d 265, 276-77 (1975) (Double Jeopardy Clause does not bar appeal from pretrial dismissal of indictment). When, however, a dismissal occurs during the "pretrial" stage of the proceedings, the defendant has not been " 'put to trial before the trier of the facts' " and the Double Jeopardy Clause does not prohibit further prosecution. *Serfass*, 420 U.S. at 394, 43 L. Ed. 2d at 278 (quoting *United States v. Jorn*, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 553 (1971)).

In *United States v. Sanford*, 429 U.S. 14, 14-15, 50 L. Ed. 2d 17, 19 (1976), the Supreme Court addressed the issue of whether an appeal was barred by the Double Jeopardy Clause when the trial court declared a mistrial because the jury was unable to reach a verdict and, four months subsequent to the declaration of mistrial, the trial court dismissed the indictment against the defendants on the ground "the Government had consented to the activities which formed the basis of the indictment." The Supreme Court determined that because the trial court's "dismissal of the indictment occurred several months after the first trial had ended in a mistrial, but before the retrial of [the defendants] had begun," the dismissal occurred during the "pretrial" stage of the proceedings. *Id.* at 16, 50 L. Ed. 2d at 20. Thus, the Supreme Court determined the issue before it was governed by *Serfass*. *Id.* Accordingly, pursuant to *Serfass*, the Supreme Court held the Double Jeopardy Clause did not bar an appeal by the United States of the trial court's "pretrial" dismissal of the charge against defendants because jeopardy had not attached at the time of the dismissal.[2] *Id.* Based on the teaching of *Sanford*, we must determine in the case *sub judice* whether the trial court's order dismissing the charge against Defendant occurred during "pretrial" proceedings or after jeopardy had attached in order to determine whether the State's appeal is precluded by the Double Jeopardy Clause.

2. The facts in *Sanford* are distinguishable from cases in which a defendant makes a timely motion to dismiss the charges against her subsequent to a trial ending in jury deadlock, pursuant to the applicable rules of criminal procedure. In *Martin Linen*, 430 U.S. at 565-66, 51 L. Ed. 2d at 647-48, the defendant's trial resulted in a deadlocked jury. Six days after the trial court dismissed the jury, the defendant made a "timely" motion for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. *Id.* Rule 29(c) provides a defendant may bring a motion for judgment of acquittal within 7 days after a jury is discharged without having reached a verdict. Fed. R. Crim. P. 29(c). On appeal from the judgment of acquittal, the *Martin Linen* court found that, in contrast to the judgment in *Sanford*, the judgment of acquittal in *Martin Linen* was not a "pretrial" order. *Martin Linen*, 430 U.S. at 575, 51 L. Ed. 2d at 653-54. The United States, therefore, was precluded by the Double Jeopardy Clause from appealing the trial court's judgment. *Id.* at 576, 51 L. Ed. 2d at 654.

Timing of Dismissal

In this case, the trial court declared a mistrial on 10 November 1999 and court was thereafter adjourned *sine die*. Thus, Defendant's section 15A-1227 motion was not timely because it was not made before the end of the session. N.C.G.S. § 15A-1227(a)(4) (1999) (motion for dismissal based on insufficiency of the evidence may be made "[a]fter discharge of the jury without a verdict and before the end of the session"). Additionally, Defendant's section 15A-1414 motion for appropriate relief was not proper because it was not made after a verdict had been reached. *See State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160 (1990) (motion for appropriate relief is a "*post-verdict*" motion); N.C.G.S. § 15A-1414(a) (1999) (motion for appropriate relief may be made "[a]fter the verdict but not more than 10 days after entry of judgment"). The Defendant's motions, therefore, must be characterized as "pretrial" motions brought "prior to a trial that the Government had a right to prosecute and that . . . [D]efendant was required to defend."[3] *Sanford*, 429 U.S. at 16, 50 L. Ed. 2d at 20. Accordingly, the State's appeal of the trial court's 14 January 2000 order is not barred by the Double Jeopardy Clause.[4]

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3. Defendant argues in her brief to this Court that absent any statutory authority to grant Defendant's motions, the trial court "had the inherent power to so rule." We disagree. The inherent powers of a trial court "are limited to such powers as are essential to the existence of the [trial] court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943). Additionally, for a trial court's power to be inherent " 'it must be such . . . as is not granted or denied to it by the Constitution or by a constitutionally enacted statute.' " *State v. Gravette*, 327 N.C. 114, 124, 393 S.E.2d 865, 871 (1990) (quoting Raymond B. Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 13 (1974)). We acknowledge that the North Carolina Supreme Court has held a trial court "has the inherent authority to order a change of venue" even when the statutory power to change venue does not permit such an order. *See State v. Barfield*, 298 N.C. 306, 320, 259 S.E.2d 510, 524 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled on other grounds, State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Nevertheless, the general rule is that the trial court does not have inherent authority to act in a manner inconsistent with a statute addressing such action. Thus, in the case *sub judice*, the trial court did not have the inherent authority to rule on Defendant's motions when sections 15A-1227 and 15A-1414 specifically provide rules for when such motions can be made and Defendant's motions were not made in compliance with those rules.

4. Defendant argues in her brief to this Court that the State's appeal in the case *sub judice* is analogous to the appeal by the United States in *Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629 (1962). We disagree. In *Fong Foo*, the trial court entered a judgment of acquittal during the Government's presentation of its case-in-chief. *Id.* at 142, 7 L. Ed. 2d at 630. On appeal, the Supreme Court held the Government's appeal of the judgment of acquittal was precluded by the Double Jeopardy Clause. *Id.* at 143, 7 L. Ed. 2d at 631. In contrast to the case *sub judice*, the dismissal in *Fong Foo* occurred after the defendants had been placed in jeopardy and not during the pretrial stage of

See McGraw v. State, 688 So. 2d 764, 771 (Miss.) (holding, pursuant to *Sanford* and *Serfass*, that a defendant's untimely motion for acquittal made subsequent to a jury deadlock must be treated as a pretrial motion and, thus, review of the trial court's judgment granting such motion is not precluded by the Double Jeopardy Clause), *cert. denied*, 522 U.S. 830, 139 L. Ed. 2d 51 (1997). Furthermore, because Defendant's motions were improper under sections 15A-1227 and 15A-1414, the trial court was without authority to rule on these motions; thus, the trial court's 14 January 2000 order is reversed.

Reversed.[5]

Judges TIMMONS-GOODSON and JOHN concur.

MICHAEL STEPHEN KING, PLAINTIFF-APPELLEE v. CAROL P. KING, DEFENDANT-APPELLANT

No. COA99-1597

(Filed 19 June 2001)

1. Constitutional Law— due process—domestic contempt action—not advised of right to counsel—not indigent

A defendant in a domestic action which included a motion for contempt for failure to pay child support was not denied due process because she was not advised of her right to counsel where the record contained sufficient facts from which it could be concluded that she was not indigent. She was not entitled to appointed counsel and her due process rights were not violated by allowing her to proceed pro se.

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the proceedings. *See* Wayne R. LaFave et. al., 5 *Criminal Procedure* § 25.3(d), at 672 (2d ed. 1999) (discussing the distinction between *Sanford*, in which dismissal occurred during the pretrial proceedings, and *Fong Foo*, in which dismissal occurred during trial). Thus, the Supreme Court's holding in *Fong Foo* is not applicable to the facts of the case *sub judice*.

5. We note that the trial court's 14 January 2000 order concludes "the [26 October 1998] bill of indictment was fatally defective." Because the record shows a superceding indictment was issued on 29 November 1999, we do not address the issue of whether the 26 October 1998 bill of indictment was "fatally defective." *See* N.C.G.S. § 15A-646 (1999) (first indictment superceded by second indictment).

2. Constitutional Law— right to counsel—reduction of child support—no liberty interest

The due process rights of a defendant in a domestic action were not violated because she was not advised of her right to counsel regarding her motion to modify her child support obligation. A motion for reduction of child support does not in and of itself present any liberty interest that would be threatened if the movant were to lose.

3. Child Support, Custody, and Visitation— support—motion to modify—decline in income—voluntary—not a changed circumstance

The trial court did not err by denying a motion to modify child support, or by denying a new trial on the issue, where the court found that the decline in income by the moving party (defendant) was voluntary and there was no indication that the needs of the children had changed, so that the change in income was not a changed circumstance.

Appeal by defendant from an order of child custody, child support, contempt and counsel fees filed 30 March 1998, and from an order denying a new trial on these issues entered 7 June 1999, both heard by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 12 February 2001.

James A. Warren, Jr. for plaintiff-appellee.

The Tryon Legal Group, by Jerry Alan Reese, for defendant-appellant.

SMITH, Judge.

This appeal arises from an order filed 30 March 1998 denying defendant's motion for modification of child support, motion for modification of custody, motion to hold plaintiff in contempt, and motion for attorney fees, but granting plaintiff's motion to hold defendant in contempt; and from an order entered 7 June 1999, denying defendant's motion for a new trial (on these same issues) and denying amendment of the 30 March 1998 order.

[1] Defendant's main contention is that she was denied due process of law because she was not advised of her right to have counsel appointed to represent her in the contempt and modification hearings. We conclude defendant was not entitled to appointed counsel,

and that the trial court did not err in allowing defendant to appear *pro se*. To better understand our decision, we review the existing law regarding the right to counsel.

Not every defendant is entitled to the appointment of counsel. This is true in both civil and criminal contexts. Under the requirements of due process, a defendant should be advised of his or her right to have appointed counsel where the defendant cannot afford counsel on his own, and "where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v. Dept. of Social Services of Durham County, North Carolina*, 452 U.S. 18, 25, 68 L. Ed. 2d 640, 648 (1981). Where this liberty interest is not at stake, there is a presumption that the defendant is not entitled to counsel. *McBride v. McBride*, 334 N.C. 124, 127, 431 S.E.2d 14, 17 (1993). For appointment of counsel then, a defendant must show that: (1) he is indigent, and (2) his liberty interest is at stake. Keeping these principles in mind, we will address each claim independently.

First, defendant contends she was denied due process of law regarding the contempt claim against her, because it subjected her to possible imprisonment if she lost. Defendant cites *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993), for this proposition. Although Judge Constangy's 30 March 1998 order did find defendant in contempt, she was not imprisoned. Defendant instead was ordered to make a monthly payment of $60.00 toward her arrearages in addition to her monthly child support obligation. However, since defendant legally could have been imprisoned for contempt, we elect to address this issue.

In *McBride*, the defendant was found in civil contempt for nonpayment of child support, and was ordered held in custody until he "purged" himself of the contempt by paying $1380.46, the full amount of the arrearage he owed. Defendant appealed, claiming he was indigent and had been denied due process of law because he had not been appointed counsel at the trial level. This Court affirmed the trial court based on law existing at the time, distinguishing civil and criminal contempt and the need to appoint counsel. *See Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled by McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). This Court held that because the defendant was allowed to "purge" himself of the civil contempt, he held the keys to the jail and could be released whenever he chose by paying the amount of the arrearage. This Court held that defendant was not entitled to appointed counsel, since his liberty interest was only at stake because he chose to put it at stake by not paying the arrearage.

The case was then appealed to our Supreme Court which held that in the situation where a

> truly indigent defendant is jailed pursuant to a civil contempt order which calls upon him to do that which he cannot do—to pay child support arrearage which he is unable to pay—the deprivation of his physical liberty is no less than that of a criminal defendant who is incarcerated upon conviction of a criminal offense.

McBride, 334 N.C. at 130-31, 431 S.E.2d at 19.

Accordingly, the Supreme Court found that in order to protect the defendant's due process rights when confronted with this situation, the trial court should at the outset: (1) determine how likely it is that the defendant will be incarcerated; (2) if it is likely, the court should inquire of the defendant if he desires counsel, and determine his ability to pay for representation; and (3) if the defendant desires counsel but is indigent at the time, the court is to appoint counsel to represent him. *Id.* at 132, 431 S.E.2d at 19.

We conclude that upon the record before us, Judge Constangy followed these guidelines. He assessed the situation, realized that a contempt charge was pending, and inquired as to what defendant would like to do:

Judge Constangy:	I'm not sure your position in regard to the contempt matter. Are you contending that you are an indigent and requesting appointment of counsel or are you waiving appointment of counsel?
Defendant:	Waiving appointment of counsel and that I am going to represent myself pro se [sic] on these charges.

In addition to specifically stating she did not request counsel, we believe the record contains sufficient facts from which it can be concluded that defendant was not indigent. Defendant stated at trial that "I'm able to cover my bills," "My income is just fine," and "I can live and pay my expenses and the children be clothed and fed and me be clothed and fed making $18,000 a year. It's way above minimum wage, it's a decent living, it's a decent wage and we can be happy."

Although it perhaps would have been better for the court to inquire further as to whether defendant was indigent, we conclude

that the record before us contains sufficient evidence that defendant was not indigent at the time of the hearing, and that defendant's due process rights were not violated by allowing her to proceed *pro se*.

[2] Second, defendant contends that she was denied due process of law, because she was not advised of her right to counsel regarding her motion to modify her child support obligation. Again, we disagree.

As mentioned previously, a defendant must show both indigency, and that a liberty interest is at stake before he must be advised of the right to counsel. We have already concluded from the record that defendant was not indigent. In addition, she has not established that a liberty interest was at stake during the child support modification hearing.

Defendant claims that since she was not advised of her right to counsel and could not afford counsel of her own, she was forced to appear *pro se* in her motion to reduce her child support. By appearing *pro se*, defendant contends that she was "unable to introduce evidence or make timely objection due to her unfamiliarity with the rules regarding civil procedure and evidence," and that she subsequently lost the motion. Furthermore, since her motion to reduce her child support payment was denied, defendant reasons, it follows that she might be unable to make her child support payment in the future, and she may be held in contempt, and therefore imprisoned.

Our Supreme Court has previously rejected similar reasoning in *Wake County, ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95 (1982), *cert. denied*, 459 U.S. 1113, 74 L. Ed. 2d 965 (1983), a suit to determine paternity. In holding the defendant in *Townes* had no right to appointed counsel at a paternity hearing, the Court stated:

> The entire thrust of a civil action under G.S. 49-14 is the determination of whether or not the defendant is the natural father of the illegitimate child in question. Even if he is found to be so, the defendant will not be imprisoned on that basis at the conclusion of the hearing.
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> . . .
>
> It is true that a related threat of actual imprisonment, based *partially* upon a prior determination of paternity, *may* arise in *subsequent* criminal or civil enforcement proceedings . . . [h]owever, it is plain that this uncertain "web of possibilities" concerning

> future sanctions or ramifications does not constitute an immediate threat of imprisonment in the initial civil paternity action itself . . . .

Townes, 306 N.C. at 336, 293 S.E.2d at 98.

Thus, the Supreme Court held the defendant was not entitled to counsel at the paternity hearing since "the necessary menace to personal liberty is clearly absent at that legal stage." *Id.* at 337, 293 S.E.2d at 98. So it is here.

A motion for reduction of child support in and of itself does not present any liberty interest that would be threatened if the movant were to lose. Indeed, defendant here did lose her motion, and she was not subjected to any sort of imprisonment as a result of the hearing.

We now reject the notion that an indigent party is entitled to appointed counsel at a motion for modification of child support, as there is no liberty interest at stake. Furthermore, we hold that this does not violate the party's due process rights.

[3] In addition to her due process claims, defendant contends the trial court erred when it denied her motion to reduce child support in the 30 March 1998 order, and when pursuant to the 7 June 1999 order, it denied her motion for new trial and amendment of the 30 March 1998 order based on this issue.

N.C. Gen. Stat. § 50-13.7 (a) (1999) allows an order for child support to be modified at any time upon a showing of changed circumstances. This Court in *Mittendorff v. Mittendorff*, held:

> A substantial and *involuntary* decrease in a parent's income constitutes a changed circumstance, and can justify a modification of a child support obligation, even though the needs of the child are unchanged. A *voluntary* decrease in a parent's income, even if substantial, does not constitute a changed circumstance which alone can justify a modification of a child support award. A *voluntary* and substantial decrease in a parent's income can constitute a changed circumstance only if accompanied by a substantial decrease in the needs of the child. In determining whether the party has sustained a decrease in income, the party's actual earnings are to be used by the trial court if the voluntary decrease was in good faith. If the voluntary decrease in income is in bad faith,

> the party's earning capacity is to be used by the trial court in determining whether there has in fact been a decrease in income. The burden of showing good faith rests with the party seeking a reduction in the child support award.

Mittendorff v. Mittendorff, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999) (citations omitted).

In his 30 March 1998 order, Judge Constangy found "[t]he court can not [sic] find that the defendant's income has suffered a significant change. Furthermore, the court can not [sic] find that any decline in the defendant's income following the filing of her motion for reduction in child support was involuntary." Although the better practice would have been for the trial court to have found defendant's decline in income to have been voluntary, we believe the finding that the decline was "not . . . involuntary" to be the equivalent.

Since the trial court found defendant's decline in income to be voluntary, it does not constitute a changed circumstance unless the needs of the children have changed. We find no indication that the needs of the children have changed, and no error in the trial court's decision to deny defendant's motion to modify her child support.

As we find no error on the part of the trial court in the 30 March 1998 order, we find no error in the 7 June 1999 denial of defendant's motion for new trial and amendment of the 30 March 1998 order.

Accordingly, finding no violation of defendant's due process rights, and no error on behalf of the trial court, the judgment is upheld.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

CHRISTOPHER S. SAWYER, PLAINTIFF v. FOOD LION, INC., WM. C. VICK CONSTRUCTION CO., COMMERCIAL REFRIGERATION OF VIRGINIA, INC., AND FROSTEMP MECHANICAL, INC., DEFENDANTS

No. COA00-533

(Filed 19 June 2001)

1. **Evidence; Negligence— OSHA regulations—evidence of industry custom—sufficient to survive summary judgment**

OSHA regulations may be used as evidence of custom in the construction industry, which is admissible in proving the requisite standard of care, but is just one factor to be considered by the jury and is not dispositive; however, evidence of an OSHA violation is sufficient to survive a motion for summary judgment.

2. **Negligence— contributory—collapsing scaffold**

The trial court correctly granted summary judgment for defendants in a negligence action brought by a construction worker who was injured when the scaffolding on which he was standing collapsed after a wheel rolled into an uncovered hole. The evidence conclusively showed that plaintiff had knowledge of the uncovered holes, understood the risks associated with this hazard, disregarded those risks by placing his rolling scaffold in close proximity to one of the holes, and failed to take additional safety precautions by failing to set any of the wheel brakes. Plaintiff was contributorily negligent as a matter of law.

3. **Negligence— gross—construction accident—evidence insufficient**

The trial court did not err by granting summary judgment for defendants in an action arising from an injury suffered by a construction worker when his scaffold rolled into an uncovered hole intended for piping where plaintiff contended that defendants were grossly negligent in allowing the holes to remain uncovered, but the negligence was not willful or wanton, or deliberate or wicked in purpose.

Appeal by plaintiff from judgments entered on the 3rd, 7th, and 20th of January, 2000 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 5 February 2001.

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

Poyner & Spruill, L.L.P., by Douglas M. Martin and Rebecca B. Wofford, for defendant-appellee Food Lion, Inc.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Reid Russell, for defendant-appellee Wm. C. Vick Construction Co.

Teague, Campbell, Dennis & Gorham, L.L.P., by J. Matthew Little; and Barber & Associates, P.A., by Sean T. Partrick, for defendants-appellees Commercial Refrigeration of Virginia, Inc., and Frostemp Mechanical, Inc.

CAMPBELL, Judge.

Christopher Sawyer ("plaintiff") was working as an acoustical ceiling installer for Asheville Acoustics. Asheville Acoustics had been hired by the general contractor, Wm. C. Vick Construction Co. ("Vick"), to install ceiling tiles in a new addition to a Food Lion store in Cumberland County.

Ceiling tiles are placed individually by hand, and require the installer to stand on a scaffold and place the tile overhead, fitting it into a ceiling grid. The installation sometimes requires a great amount of pressure in order to set the tile in place, and also may require the installer to lean over the edge of the scaffold. If the installer is not using a stationary scaffold, this pressure and leaning can cause the scaffold to move or roll. The scaffold that plaintiff used was approximately six feet tall and six feet long, and had wheels on each of the four legs so it could be easily moved. Each of the wheels had brakes that could be set so the scaffold would not move while plaintiff was using it.

At the same time that Asheville Acoustics was working on the addition, Commercial Refrigeration of Virginia, Inc.[1] ("Commercial") was also at work, having been hired to install the refrigeration system needed to cool the grocery cases. This work included running copper piping underneath the floor that would carry coolant to the grocery cases.

1. For clarification we note that Frostemp Mechanical, Inc. is also a party to this action. Commercial Refrigeration of Virginia, Inc. and Frostemp Mechanical, Inc. merged, leaving Frostemp Mechanical, Inc. as the surviving corporation.

On 26 March 1996, plaintiff arrived at the worksite and noticed that the holes in the floor, where Commercial had been installing the piping, were uncovered. These holes were approximately two feet long, two feet wide, and twelve to eighteen inches deep. Plaintiff spoke to Vick's job superintendent about the holes, and was warned to be careful. Plaintiff then looked for covers for the holes, but was unable to find any so he began installing the ceiling tiles.

During the installation, plaintiff placed the scaffold so that one of the wheels was approximately eight to ten inches away from an uncovered hole and climbed the scaffold without setting any of the four wheel brakes. While plaintiff was placing a tile in the ceiling grid, the scaffold moved and the wheel rolled into the hole, causing the scaffold to collapse, throwing plaintiff approximately six feet to the floor, and thereby injuring him. Plaintiff brought this suit to recover for his injuries.

The trial judge granted summary judgment for the defendants, finding that in each case there was no genuine issue of material fact, and that summary judgment was proper. Plaintiff has appealed this Court for review.

"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." *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256, 258, 515 S.E.2d 483, 485 (1999), *disc. rev. denied*, 350 N.C. 833, 539 S.E.2d 289 (1999) (citing N.C. Gen. Stat. § 1A-1, Rule 56 (1990)). It requires the lower court to view the evidence in the light most favorable to the non-moving party, meaning the trial judge must accept the non-movant's evidence as true, and draw all reasonable inferences therefrom. *Id.*

It is the movant in a summary judgment motion who bears the burden of proving either: "(1) an essential element of the non-movant's claim is nonexistent, (2) the non-movant cannot produce evidence to support an essential element of his claim, or (3) the non-movant cannot surmount an affirmative defense which would bar his claim." *Taylor v. Ashburn*, 112 N.C. App. 604, 606-07, 436 S.E.2d 276, 278 (1993). If the movant is able to prove any one of these three things, then summary judgment is proper.

At the heart of plaintiff's claim is the alleged negligence by Commercial. Plaintiff contends that Commercial violated the

Occupational Health and Safety Act (OSHA), 29 C.F.R. § 1900 *et. seq.* (2000), when it left the floor holes uncovered, and that taking this evidence in the light most favorable to the movant, this is evidence of Commercial's negligence. We agree.

[1] OSHA regulations may be used as evidence of custom in the construction industry, which in turn, is admissible in proving the requisite standard of care. *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 325, 291 S.E.2d 287, 290 (1982). However, while an OSHA violation is some evidence of a defendant's negligence, it is not dispositive. It is just one factor to be considered and weighed by the jury. Nonetheless, since it does require a jury determination, evidence of an OSHA violation is sufficient to survive a motion for summary judgment.

[2] Despite this finding, we nevertheless uphold the trial court's award of summary judgment, because we find that plaintiff was contributorily negligent in his actions as a matter of law.

In North Carolina, if an issue of contributory negligence is raised as an affirmative defense, and proved, it completely bars plaintiff's recovery for injuries resulting from defendant's negligence. *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998).

We recognize that ordinarily, summary judgment is not proper in actions involving contributory negligence, *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997), since the standard used in contributory negligence cases, that of reasonable care, usually requires a jury determination. *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980). There are instances though, where summary judgment is proper. "[W]here the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury," summary judgment is appropriate. *Diorio v. Penny*, 103 N.C. App. 407, 408, 405 S.E.2d 789, 790 (1991).

Here, plaintiff knew there were holes in the floor, and that they might prove hazardous if he worked around them while they were uncovered. "The doctrine of contributory negligence will preclude a defendant's liability if [plaintiff] actually knew of the unsafe condition or if a hazard should have been obvious to a reasonable person." *Allsup v. McVille, Inc.*, 139 N.C. App. 415, 416, 533 S.E.2d 823, 824 (2000). The undisputed evidence in this case showed

that plaintiff told Vick's supervisor about the problem, and even looked for covers for the holes himself, because he knew the holes might be dangerous.

Despite being armed with this knowledge, plaintiff still decided to place his rolling scaffold only eight to ten inches away from one of the two feet square, twelve to eighteen inches deep holes. Moreover, in addition to placing the scaffold in such close proximity to a hole, plaintiff failed to set any of the four wheel brakes which are designed to prevent the scaffold from moving while in use, and then proceeded to install the ceiling tiles, which required him to lean over the edge of the scaffold and apply pressure to set the tile in place. By his own admission, plaintiff knew that if the scaffold wheels were not locked, such acts could cause the scaffold to move. We further note that failing to lock the wheel brakes so as to prevent the scaffold from moving is in itself an OSHA violation. 29 C.F.R. § 1926.452 (w)(2) (2000).

Under North Carolina law, a person who knowingly exposes himself to a risk which he has an opportunity to avoid may be contributorily negligent as a matter of law. *See, Cobo v. Raba*, 347 N.C. 541, 545-46, 495 S.E.2d 362, 365 (1998) (" 'Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.' ") (quoting *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980)); *Conner v. Continental Indus. Chemicals*, 123 N.C. App. 70, 75, 472 S.E.2d 176, 180 (1996) ("Under North Carolina law, a plaintiff is contributorily negligent if the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for his own safety."); *see also, Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449 (1994); *Diorio v. Penny*, 103 N.C. App. 407, 405 S.E.2d 789 (1991).

We find that the evidence conclusively shows plaintiff had knowledge of the uncovered holes, understood the risks associated with this hazard, disregarded these risks by placing his rolling scaffold in close proximity to one of the holes, failed to take additional safety precautions by failing to set any of the wheel brakes, and that as a result of his actions, plaintiff was injured.

We therefore conclude that plaintiff was contributorily negligent as a matter of law, and that as such, he is precluded from recovering damages for his injuries from Commercial. Thus, plaintiff is also barred from recovering from Vick and Food Lion, since plaintiff's

claims against them were predicated upon the claim against Commercial.

[3] As an additional matter, we note that plaintiff in his brief, also contends that Vick and Food Lion were grossly negligent by allowing the holes in the floor to remain uncovered. A claim for gross negligence, if proved, will overcome a finding of contributory negligence. *Yancy v. Lea*, 139 N.C. App. 76, 79, 532 S.E.2d 560, 562 (2000).

Gross negligence requires a finding that the conduct is willful, wanton, or done with reckless indifference. *Id.* Willful conduct is done with a deliberate purpose. *Id.* Conduct is wanton when it is carried out with a wicked purpose or with reckless indifference. *Id.* Thus, gross negligence " 'encompasses conduct which lies somewhere between ordinary negligence and intentional conduct.' " *Lea*, 139 N.C. at 79, 532 S.E.2d at 562 (quoting *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978)).

We find that the conduct complained of here, wherein Vick's supervisor and Food Lion failed to cover the floor holes, was not willful or wanton, that it was neither deliberate nor wicked in its purpose, and therefore that it does not rise to the level of gross negligence. Accordingly, we conclude this assignment of error is without merit.

As we have found no gross negligence on the parts of Vick or Food Lion, and since plaintiff was contributorily negligent as a matter of law, he is barred from recovery for his injuries. The award of summary judgment by the trial court in favor of all defendants was proper.

Affirmed.

Judges WALKER and HUNTER concur.

CHARLES B. PRENTISS, III, AND MARGARET O. PRENTISS, PLAINTIFFS v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. COA00-711

(Filed 19 June 2001)

Insurance— automobile—Safe Driver Incentive Plan—determination of fault by insurer

The superior court did not err by dismissing a complaint arising from the elimination of plaintiffs' safe driver discount and the imposition of a surcharge for driving points in accordance with the Safe Driver Incentive Plan (SDIP). Although plaintiffs contended that a private insurer's determination of fault is an unconstitutional delegation of judicial power and an unconstitutional civil penalty, plaintiffs brought the action against the insurer who made the at-fault determinations rather than the State, which is enforcing the provision, so that the suit is a challenge to the rates system rather than to the constitutionality of the statute and plaintiffs must first exhaust all administrative remedies. There is no evidence that plaintiffs made any attempt to dispute the at-fault determination under N.C.G.S. § 58-36-1(2) or that plaintiffs sought review under the Administrative Procedure Act. Because the SDIP is required to be approved by the Commissioner of Insurance, the case involves an agency decision subject to the APA. N.C.G.S. § 58-36-65(h).

Appeal by plaintiffs from order entered 28 March 2000 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 19 April 2001.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton, for plaintiff-appellants.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire; and Sonnenschein Nath & Rosenthal, by Mark L. Hanover, for defendant-appellee.

MARTIN, Judge.

Plaintiff Charles B. Prentiss, III, was involved in a two-car motor vehicle accident in Haywood County on 22 September 1997; both cars sustained damage but neither party was injured. Plaintiff was cited for operating a motor vehicle "by failing to see before

turning from a direct line that such movement could be made in safety." The charge was dismissed in the District Court of Haywood County without adjudication.

At the time of the accident, plaintiff was covered by an automobile insurance policy issued by defendant Allstate Insurance Company. Defendant determined that plaintiff was at fault in the accident. Because the property damage exceeded $2,000, defendant eliminated plaintiff's safe driver discount and imposed a premium surcharge for three driving record points in accordance with the North Carolina Safe Driver Incentive Plan. Plaintiffs paid the increased premium under protest.

Plaintiffs filed a class action complaint in Haywood County on 1 February 1999 asserting: (1) a private insurer's determination of fault with the imposition of increased premiums is an unconstitutional delegation of judicial power prohibited by Article IV, Section 1 of the Constitution of the State of North Carolina; (2) the imposition of increased premiums without adjudication of fault is an unconstitutional civil penalty prohibited by Article I, Section 19 of the Constitution of North Carolina; and, (3) the North Carolina Rate Bureau has not provided reasonable means for a person to dispute the insurer's determination of fault as required by G.S. § 58-36-1(2) and § 58-36-65(h). Plaintiffs sought reimbursement of the premium surcharges assessed and other injunctive or equitable relief as appropriate. Defendant removed the action to the United States District Court for the Western District of North Carolina, and filed a motion to dismiss. The magistrate judge issued a memorandum and recommendation, which was adopted by the District Court, and the case was remanded back to state court on 9 November 1999 pursuant to the *Burford* abstention doctrine on the grounds that federal review would disrupt the state's efforts to establish a coherent automobile insurance policy. *Prentiss v. Allstate Insurance Co.*, 87 F.Supp.2d 514 (W.D.N.C. 1999) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L.Ed. 1424 (1943)). On remand to the Haywood County Superior Court, defendant's motion to dismiss the complaint was granted on 28 March 2000. Plaintiffs appeal from the order of dismissal.

The North Carolina Rate Bureau [hereinafter "Bureau"] was created by G.S. § 58-36-1 to "promulgate and propose rates . . . for insurance against theft of or physical damage to nonfleet private passenger motor vehicles." N.C. Gen. Stat. § 58-36-1(3). All companies or other organizations that write insurance in North Carolina must first

subscribe to and become a member of the Bureau. N.C. Gen. Stat. § 58-36-5. The rates proposed by the Bureau are subject to review by the Commissioner of Insurance. N.C. Gen. Stat. § 58-36-65(a). The statute further requires the Bureau to file a Safe Driver Incentive Plan (SDIP) that "distinguishes among various classes of drivers that have safe driving records and various classes of drivers that have a record of at-fault accidents; a record of convictions of major moving traffic violations; a record of convictions of minor moving traffic violations; or a combination thereof; and that provides for premium differentials among those classes of drivers"; this plan also requires the approval of the Commissioner. N.C. Gen. Stat. § 58-36-65(b).

Plaintiffs challenge the insurer's assessment of driving record points pursuant to the SDIP because they contend G.S. § 58-36-65 requires insurers to make determinations that an insured was at-fault in an accident when there has been no adjudication of fault, and that this requirement is an unconstitutional delegation of judicial power. We conclude, however, the underlying substance of plaintiffs' claim is an attack on the rates system, rather than a constitutional challenge to the statute. Instructive to this Court in reaching this conclusion is the fact that plaintiffs have opted to bring the action against Allstate, the insurer who made the at-fault determinations in dispute, instead of suing the State which is enforcing the allegedly unconstitutional provision. Such course of action appears to us inconsistent with plaintiffs' contention that this suit is not a challenge to the rates system but instead a challenge to the constitutionality of a statute.

Thus, because the substance of the claim is an attack on the rates system, we must consider whether the action is properly before the courts. G.S. § 150B-43 provides for judicial review of administrative actions and states:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article.

N.C. Gen. Stat. § 150B-43. This section requires that a plaintiff first exhaust all administrative remedies prior to bringing the matter before the courts. The administrative remedy set out by Chapter 58 for plaintiff in this case is contained in G.S. § 58-36-65(h), which states:

> If an insured disputes his insurer's determination that the operator of an insured vehicle was at fault in an accident, such dispute shall be resolved pursuant to G.S. 58-36-1(2), unless there has been an adjudication or admission of negligence of such operator.

N.C. Gen. Stat. § 58-36-65(h). G.S. § 58-36-1(2) provides "[t]he Bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate or loss costs made by it may be heard in person or by the person's authorized representative before the governing committee or other proper executive of the Bureau." There is no evidence in the record in this case to show any attempt by plaintiffs to dispute the at-fault determination by seeking the recourse provided under the statute, nor is there evidence that plaintiffs have sought review of the determination pursuant to the provisions in Article 3A of the Administrative Procedure Act (APA). *See* N.C. Gen. Stat. § 150B-38.

However, plaintiffs argue they are not required to exhaust their administrative remedies because no agency decision is at issue and the APA, therefore, does not apply. Instead, plaintiffs contend they are challenging a statute enacted by the legislature, and an action by Allstate, a non-agency, in complying with that statute. This Court must, therefore, determine which source has given the insurer the power to make a unilateral determination of an insured's fault: the legislature or an agency.

Plaintiffs contend that G.S. § 58-36-65(h), cited above, requires insurers to make at-fault determinations where there has been no adjudication of the issue. In interpreting a statute, we must "give effect to the intent of the legislature." *Whitman v. Kiger*, 139 N.C. App. 44, 46, 533 S.E.2d 807, 808 (2000), *affirmed*, 353 N.C. 360, 543 S.E.2d 476 (2001). " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *Walker v. Board of Trustees of the North Carolina Local, Governmental Employees' Retirement System*, 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). The plain and definite meaning of the terms of G.S. § 58-36-65(h) make evident that the legislature's intent in enacting this provision was to provide a remedy for an insured to challenge an insurer's at-fault

determination. To hold that the intent of the statutory provision is to require insurers to make at-fault determinations would force us to interpolate additional meaning, which we cannot do.

We agree with defendant that the SDIP is the source of the requirement that insurers make determinations that an insured was at-fault where there has been no adjudication of fault. The SDIP is applied in rating all eligible autos, including private passenger cars and some pickup trucks or vans owned by an individual or household. SDIP Rule 5A. It requires that insurers assess driving record points for various automobile-related convictions. SDIP Rule 5B1a. For example, the rule requires insurers to assess four points where the insured was convicted of "driving a motor vehicle in a reckless manner." SDIP Rule 5B1a(4)(b). A "conviction" is defined under the SDIP as "a plea of guilty, or of nolo contendere or the determination of guilt by a jury or by a court." SDIP Rule 5B, Note (1). In a separate provision, the SDIP requires the assessment of points for accidents where the insured was at-fault. SDIP Rule 5B1b. For example, the rule requires that an insurer assess three points "for each at-fault accident that results in . . . [t]otal damage to all property . . . of $2,000 or more." SDIP Rule 5B1b(1). The rule further provides:

> The phrase "at-fault" means negligent. No points shall be assigned for accidents when the operator of an insured vehicle is free of negligence.

SDIP Rule 5B, Note (3).

Considering the foregoing provisions together, we conclude that the SDIP requires that insurers make determinations of fault in automobile accidents. First, it provides that an insurer *must* assess points for an at-fault accident. Second, an "at-fault accident" must mean one which was not adjudicated by a court because there is a separate provision for convictions. Finally, an insurer cannot assess points where the insured was free of negligence. Therefore, the SDIP rule on its face necessitates that an insurer make a determination of the insured's fault in an accident where the issue was not adjudicated.

Because Chapter 58 requires that the SDIP be approved by the Commissioner of Insurance, we hold that this case involves an agency decision which is subject to the APA. *See North Carolina Reinsurance Facility v. Long*, 98 N.C. App. 41, 390 S.E.2d 176 (1990). We note that our conclusion accords with that reached by the District

Court, which considered a similar argument as it pertained to the *Burford* abstention doctrine. *Prentiss*, 87 F.Supp.2d at 522 (rejecting plaintiffs' claim that federal review would have no impact on a state regulatory scheme because plaintiffs do not find fault with any specific agency action).

Accordingly, we hold that plaintiffs must first exhaust their administrative remedies before seeking judicial review and that the superior court did not err in dismissing the complaint. Therefore, we do not need to address defendant's claim that the suit is also barred by the filed rate and primary jurisdiction doctrines.

Affirmed.

Judges THOMAS and BIGGS concur.

GEORGE W. KANE, III, ADMINISTRATOR OF THE ESTATE OF MEGAN ELLEN KANE, PLAINTIFF v. CROWLEY'S AT STONEHENGE, INC., DEFENDANT

No. COA00-23

(Filed 19 June 2001)

Alcoholic Beverages— restaurant's sale to underage minor— automobile accident—jury instructions—negligence— proximate cause

The trial court did not err in its jury instructions on negligence and proximate cause, and by denying plaintiff's motion for a new trial, in a case involving defendant restaurant's alleged negligence in selling alcoholic beverages to an underaged minor who thereafter was involved in an automobile accident killing his passenger when the minor raced another automobile while the roads were wet and after drinking multiple alcoholic beverages, because: (1) the jury was not restricted to finding in favor of defendant; (2) the jury was instructed that plaintiff need not prove defendant's negligence was the sole proximate cause of the injury; and (3) the trial court specifically stated that it was the restaurant's contention, and that plaintiff denied, that the proximate cause of the passenger's fatal injuries was the minor's intentional conduct. N.C.G.S. § 18B-121.

Appeal by plaintiff from judgments entered 2 March 1999 and 1 April 1999 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 12 February 2001.

Blanchard, Jenkins, Miller & Lewis, P.A., by Philip R. Miller, III, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff's sole contentions on appeal are that the trial court erred in instructing the jury, and later in denying plaintiff's motion for a new trial on this same issue.

This case arose from the events of 30 November 1996, when the car driven by Aaron January (Aaron), in which Megan Ellen Kane (Megan) was a passenger, struck a tree, killing Megan.

Earlier that evening, Aaron, who was under age 21 (the legal age required to consume alcoholic beverages, *see* N.C. Gen. Stat. § 18B-302), went to a friend's house and consumed three or four beers. He then went to Megan's house where he had another beer and a shot of liquor. It was approximately midnight at the time. After leaving Megan's house, Aaron went to Crowley's at Stonehenge, a restaurant, (Crowley's or defendant, interchangeably) to meet some more friends, and while there, consumed two Long Island Iced Teas (a five liquor drink made up of gin, rum, vodka, tequila, and triple sec, containing about three-fourths of an ounce of each liquor). An underaged friend bought the first drink and gave it to Aaron; then when finished with the drink, Aaron went back to the bar with the empty glass and ordered two more, one for himself and one for his friend. At no time was Aaron asked for identification or other proof of his age. Aaron left Crowley's at about 1:30 a.m., and went back to Megan's house. He did not appear drunk, and could walk and drive without problems.

Around 2:45 a.m., Aaron and Megan decided to leave her house and go to a party. Aaron drove, while Megan gave directions. They were turning onto Millbrook Road from Falls of the Neuse Road, heading in the direction of Six Forks Road, when a red BMW came up behind them. Despite the fact that the roads were slightly wet from rain earlier in the evening, the BMW drove extremely close to Aaron's car, so close in fact, that he could not see the BMW's headlights. When

Aaron pulled over into the right-hand lane to let the BMW pass, it accelerated past him, swerved over in front of Aaron's car, then went back into the left-hand lane and continued on. This angered Aaron, and he started to chase the BMW. Unfortunately, while going around a curve in the road, Aaron lost control of the car and hit a tree. Megan was rendered unconscious from the impact, and never regained consciousness.

At issue on appeal is a statement made by the trial court during the jury charge. In charging the jury, the trial court said:

> Crowley's contends and the plaintiff denies that the proximate cause of Megan Ellen Kane's fatal injuries was the intentional conduct of Aaron January, resulting in his conscious decision to unlawfully engage in a chase or speed competition with another motor vehicle, which intentional conduct, to wit: the chase of the red BMW on Millbrook Road resulted in Aaron January losing control of his Chevrolet Camaro, causing it to strike a tree, thereby fatally injuring Megan Ellen Kane.
>
> Crowley's further contends that even if the jury were to find that Crowley's negligently sold or furnished alcohol to Aaron January, which is denied, that Aaron January's intentional conduct of chasing and/or racing another motor vehicle was not foreseeable. Therefore, the alleged sale or furnishing of alcohol to Aaron January was not the proximate cause of Megan Ellen Kane's fatal injuries.

Plaintiff objects to the above language, and argues that although the trial court was only stating a contention, the contention contained an erroneous view or incorrect application of the law, and therefore, plaintiff is entitled to a new trial. Plaintiff cites *Blanton v. Carolina Dairy, Inc.*, 238 N.C. 382, 77 S.E.2d 922 (1953) in support of this argument. According to *Blanton*:

> It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced, and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error . . . . (citation omitted)

Id. at 385, 77 S.E.2d at 925.

In order to hold defendant liable for Megan's death, the burden was on plaintiff to show that defendant negligently sold an alcoholic

beverage to a minor (Aaron January), that this alcohol caused or contributed to his impairment, and that it was foreseeable that an injury such as Megan's might occur as a result of the minor's negligent driving. N.C. Gen. Stat. § 18B-121 (1999).

Plaintiff asserts that as a result of the above contention, the jury might believe that it was precluded from finding in favor of plaintiff if it found Aaron January's conduct to be *intentional*, since the statute requires that in order for the defendant to be liable, the minor's driving must have been *negligent*.

We conclude from the record before us that the trial court correctly explained the laws of North Carolina, and that this contention was neither an "incorrect application" of our laws, nor did it "present an erroneous view" of our laws.

In instructing the jury, the trial court read and explained each of the five issues the jury would need to decide. Regarding the issue on appeal, the trial court stated the issue was whether "Megan Ellen Kane [was] fatally injured as a result of Crowley's at Stonehenge, Inc.'s negligent sale or furnishing of an alcoholic beverage to an underage person," and explained that in determining this issue, the jury would need to decide six sub-issues, for which the plaintiff had the burden of proof. These six sub-issues were: (1) that Crowley's "negligently sold or furnished one or more Long Island Iceteas [sic] to Aaron January"; (2) that Aaron January was underage at the time of sale; (3) that in selling the alcoholic beverage(s) to Aaron January, "Crowley's failed to exercise that degree of care which a reasonable person would have exercised under the same or similar circumstances" (and that here the jury could consider the fact that Aaron was never asked for identification); (4) that Aaron January "became subject to an impairing substance," that alcohol is an impairing substance, and that "a person is [] impaired when he has consumed a sufficient quantity of alcohol that at any relevant time after the driving he has an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath," (here the parties had stipulated that Aaron's blood alcohol level had been 0.145 at the time); (5) that "such impairment was caused or contributed to by consumption of the Long Island Iceteas [sic] that Crowley's sold or furnished to Aaron January"; and (6) that "while so impaired, Aaron January was negligent in the operation of the Chevrolet [Camaro] and that such negligence was a proximate cause of Megan Ellen Kane's fatal injuries." We believe that this was an accurate summation of the plaintiff's burden at trial.

Next, the court instructed the jury on the meanings of negligence and proximate cause.

> *[N]egligence refers to a person's failure to follow a duty of conduct imposed by law.* Every person is under a duty to use ordinary care to protect himself and others from injury. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury. *A person's failure to use ordinary care is negligence.* (emphasis added)
>
> . . .
>
> Ladies and gentlemen, I [also] want to talk to you about proximate cause. The plaintiff, George W. Kane, III, Administrator of the Estate of Megan Ellen Kane, not only has the burden of proving negligence, but also that such negligence was a proximate cause of the fatal injuries to Megan Ellen Kane. Proximate cause, ladies and gentlemen, is a cause which in a natural and continuous sequence produces a person's injury, and is a cause which a reasonable and prudent person could have foreseen could probably produce such injury or some similar injurious result.
>
> There may be more than one proximate cause of an injury. *Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the injury.* (emphasis added)

As evidenced from the above excerpts, the trial court accurately instructed the jury as to both negligence and proximate cause. Also, as shown by the italicized portions, the jury was not restricted to finding in favor of defendant. Based on these instructions, the jury could find that Aaron January was negligent in his "failure to follow a duty of conduct imposed by law" and "failure to use ordinary care," by racing the red BMW, while the roads were wet, and after drinking multiple alcoholic beverages (not to mention while under the legal age to consume alcohol), just as it could find defendant was negligent in selling an alcoholic beverage to a minor in violation of "a duty of conduct imposed by law" and that it "fail[ed] to use ordinary care" by never asking to see Aaron's identification or using other methods to prevent selling alcohol to someone who was underage.

Additionally, the jury was instructed that "plaintiff need not prove that the defendant's negligence was the sole proximate cause of the

injury," further giving the jury ample opportunity to find negligence on the part of both Aaron January and defendant.

Finally, the trial court was very specific in introducing the part of the charge to which plaintiff objects by stating that "Crowley's contends and the plaintiff denies" making it clear that the judge was not presenting his view of the law, but rather a theory of the case from one party's point of view. We conclude that the record shows the trial court gave a clear and accurate explanation of the law and legal terms involved in the case when instructing the jury, and that the court did not misstate or incorrectly apply the law when giving the contentions of the parties. Therefore, the jury's finding that Megan Ellen Kane was not fatally injured as a result of a negligent sale of an alcoholic beverage by Crowley's to an underage person, as well as the trial court's denial of the motion for a new trial, is upheld.

No error.

Chief Judge EAGLES and Judge HUNTER concur.

SUE WOMBLE LOY, PLAINTIFF v. JOSHUA BRANDON MARTIN AND KENNETH MARTIN, DEFENDANT

No. COA00-255

(Filed 19 June 2001)

1. **Appeal and Error— appealability—interlocutory order—partial new trial on issue of damages**

Defendants' appeal from an order granting plaintiff a partial new trial on the issue of damages arising out of an automobile accident is dismissed because: (1) it is an interlocutory order not subject to immediate appellate review; and (2) defendants failed to argue how the order affects a substantial right.

2. **Appeal and Error— appealability—interlocutory order—underlying judgment fixing liability—order reserving issue of damages**

Defendants' appeal from an underlying judgment in an automobile accident case that fixes liability, when there was a second order in the case granting a new trial solely on the issue of dam-

ages, is dismissed because: (1) it is an interlocutory order not subject to immediate appellate review; and (2) defendants failed to argue how the underlying judgment affects a substantial right.

Appeal by defendants from order entered 9 November 1999 and judgment entered 20 October 1999 by Judge J. B. Allen, Jr. in Superior Court, Chatham County. Heard in the Court of Appeals 22 February 2001.

Benjamin Spence Albright for plaintiff-appellee.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for defendants-appellants.

TIMMONS-GOODSON, Judge.

This appeal arises out of a personal injury action filed by Sue Womble Loy ("plaintiff") against Joshua Brandon Martin, a minor, and his father, Kenneth Martin (collectively "defendants"). In her complaint, Loy alleged that Joshua Martin ran a stop sign and collided with her vehicle, causing her severe property damage and personal injury.

Following a trial, the jury returned its verdict finding that Joshua Martin was negligent, that plaintiff was not contributorily negligent, and that plaintiff was entitled to damages in the amount of one dollar. Judgment based upon the jury's verdict was entered on 20 October 1999.

On 8 October 1999, plaintiff moved for a partial new trial on the issue of damages. In response, defendants requested that plaintiff's motion be denied, but argued, in the alternative, that the court grant a new trial on all issues. On 9 November 1999, the trial court set aside the jury's verdict on the issue of damages and granted plaintiff's motion for a partial new trial based solely upon that issue. Pertinently, the court also found the following regarding the issue of the parties' liability: "The issues submitted to the jury are not so intertwined that the entire verdict is tainted and there was sufficient evidence for the jury to properly find as they found on the [issue of plaintiff's and Joshua Martin's liability]."

On 18 November 1999, defendants filed a notice of appeal from the 20 October 1999 judgment as well as from the court's 9 November 1999 order granting plaintiff's motion for a partial new trial.

[1] The threshold issue on appeal is whether the 9 November order and the 20 October judgment are properly before this Court. Concerning the order granting a new trial, section 1-277(a) of our General Statutes provides: "An appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which . . . grants or refuses a new trial." N.C. Gen. Stat. § 1-277(a) (1999). However, this Court has previously held that the aforementioned portion of section 1-277(a) is inapplicable to orders granting partial new trials on the issue of damages. *Insurance Co. v. Dickens*, 41 N.C. App. 184, 187, 254 S.E.2d 197, 198 (1979). Therefore, the trial court's "order granting a new trial solely as to the issue of damages . . . is interlocutory and . . . not subject to immediate appellate review." *Johnson v. Garwood*, 49 N.C. App. 462, 463, 271 S.E.2d 544, 544-45 (1980) (citations omitted).

[2] We now examine whether the underlying judgment fixing the issue of liability is proper for immediate review, given the trial court's order granting plaintiff's partial new trial motion. We first note that there are no North Carolina appellate cases addressing the specific situation presented by the present appeal. However, in *Insurance Co.*, this Court found that an appeal from a trial court's order "accept[ing] the jury's verdict fixing liability" but ordering a new trial solely on the issue of damages was interlocutory and not immediately appealable. *Insurance Co.*, 41 N.C. App. at 186, 254 S.E.2d at 198. We find *Insurance Co.* dispositive of the issue presented *sub judice*.

In *Insurance Co.*, the plaintiff brought a subrogation action seeking recovery of damages to its insureds' home. Following trial, the *Insurance Co.* jury returned a verdict finding that the plaintiff was entitled to subrogation, that the negligence of the defendants caused damage to insureds' home, and that the insureds' damages totaled $200. In one order, the trial court accepted the verdict on the issues of subrogation and defendants' liability, but set aside the verdict on the issue of damages and granted plaintiff's motion for a new trial limited to the issue of damages. The defendants appealed the trial court's order.

This Court found that the order was interlocutory and unappealable, as review of the order in that case would promote "fragmentary, premature, and unnecessary appeals[.]" *Id. see also Schuch v. Hoke*, 82 N.C. App. 445, 447, 346 S.E.2d 313, 315 (1986) (holding that partial summary judgment order fixing liability but reserving issue of damages for trial was interlocutory and not immediately appealable).

Given the trial court's "accept[ance]" of the underlying jury verdict in the order from which the defendants appealed, the *Insurance Co.* Court recognized that the appellants could possibly challenge not only the grant of a partial new trial but also issues concerning the underlying trial proceedings in the premature appeal. However, the Court found that the appellants' right to review of all trial court proceedings was preserved for final review by "duly entered exceptions on appeal from the final judgment." *Insurance Co.*, 41 N.C. App. at 186, 254 S.E.2d at 198.

In accordance with our holding in *Insurance Co.*, we find that, in light of the trial court's order granting a new trial on the issue of damages, the underlying judgment fixing the issue of liability is likewise interlocutory. We note that *Insurance Co.* is slightly distinguishable from the case *sub judice* in that the *Insurance Co.* litigants appealed an order both "accept[ing]" the jury's verdict and granting a partial new trial and not, as in the present case, a separate judgment and order granting a partial new trial. However, given that both the partial new trial order in the case *sub judice* and the order appealed in *Insurance Co.* "accept[ed]" the jury's verdict fixing the issue of liability, we find the cases indistinguishable in substance. *Cf. Bowden v. Latta*, 337 N.C. 794, 797, 448 S.E.2d 503, 505 (1994) (per curiam) (holding that appeal of order granting partial new trial on issue of damages and appeal of underlying judgment based upon issue of contributory negligence was proper where trial court did not accept jury's verdict on issue of liability but granted JNOV on issue of contributory negligence); *Desmond v. City of Charlotte*, 142 N.C. App. 590, 592, 544 S.E.2d 269, 271 (2001) (following *Bowden* given similar facts).

Furthermore, similar to the appeal in *Insurance Co.*, reviewing issues concerning the underlying judgment while the issue of damages remains pending below would contravene the well-established principle that 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." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). Defendants *sub judice* challenge issues concerning the underlying jury verdict, but, like the appellants in *Insurance Co.*, have preserved those issues for final review by properly excepting to alleged errors in the record. For the aforementioned reasons, we conclude that the underlying judgment fixing the issue of liability is likewise interlocutory.

Although the 9 November order granting a partial new trial and the 20 October judgment fixing the issue of liability are interlocutory, they may nonetheless be appealable if so allowed by the exceptions contained in North Carolina Rule of Civil Procedure 54(b) or North Carolina General Statutes sections 1-277 and 7A-27(d). *See* N.C. Gen. Stat. §§ 1A-1, Rule 54(b); 1-277; and 7A-27(d) (1999). Because the trial court did not certify either the order granting a partial new trial or the underlying judgment for immediate review under Rule 54(b), defendants' right to an immediate appeal, if one exists, depends on whether the order and judgment affect a substantial right. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 312 (1999).

Whether an order or judgment affects a substantial right is to be determined on a case-by-case basis. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). A "substantial right" is a right that "itself must be 'substantial' " and that "must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d 812, 815 (1987) (citations omitted); *see also Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978). " '[I]t is the appellant's burden to present argument in his brief to this Court to support acceptance of the appeal.' " *Lee v. Mut. Community Sav. Bank*, 136 N.C. App. 808, 810, 525 S.E.2d 854, 856 (2000) (quoting *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998)).

In the present case, defendants do not address the appealability of either the 9 November order or 20 October judgment in their brief or otherwise on appeal.

> It is not the duty of this Court to construct arguments for or find support for appellant[s'] right to appeal from an interlocutory order; instead, the appellant[s have] the burden of showing this Court that the order deprives the appellant[s] of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). As defendant fails to argue why the order and judgment appealed affect a substantial right, we dismiss these orders as interlocutory and not immediately appealable.

Appeal dismissed.

Judges MARTIN and TYSON concur.

DOYLE DOCKERY, PLAINTIFF v. QUALITY PLASTIC CUSTOM MOLDING, INC., DEFENDANT

No. COA00-973

(Filed 19 June 2001)

1. Employer and Employee— sales commission agreement—ambiguity

The trial court did not err by denying plaintiff employee's motion for partial summary judgment regarding certain commissions on sales to clients recruited by plaintiff based on an employment agreement giving plaintiff five percent commission on "everything he brings in," because the language of the contract is ambiguous and thus susceptible to varied interpretations on its face.

2. Employer and Employee— sales commission agreement—parol evidence—trade usage and practice

The trial court did not err by denying plaintiff employee's motion in limine to exclude defendant employer's evidence regarding trade usage and practice in the plastics molding industry to show the intentions of the parties when they entered into their sales commission agreement, because: (1) parol evidence was admissible to show and make certain the intention behind the contract when the contract was ambiguous; and (2) the general custom in the business or trade may be considered in arriving at the intention of the parties.

3. Employer and Employee— sales commission agreement—jury instruction—employment at will

The trial court did not err by instructing the jury on the doctrine of employment at will in a case involving the interpretation of the parties' sales commission agreement, because plaintiff's counsel's repeated questioning regarding defendant employer's right to terminate plaintiff employee's employment without first paying compensation may have confused the jury on the issues of

plaintiff's right to collect his sales commissions with plaintiff's right to retain employment when the jury calculated plaintiff's damages.

Appeal by plaintiff from judgment entered 11 January 2000 by Judge Ronald K. Payne in McDowell County Superior Court. Heard in the Court of Appeals 23 May 2001.

LeCroy Ayers & Willcox, by M. Alan LeCroy, for plaintiff appellant.

Lynch & Taylor, P.A., by Anthony Lynch, for defendant appellee.

McCULLOUGH, Judge.

On or about 15 August 1997, plaintiff Doyle Dockery filed suit against his former employer, defendant Quality Plastic Custom Molding, Inc., seeking compensation for alleged monies owed to him by defendant as commissions on sales to clients recruited by plaintiff. The undisputed facts are as follows: In 1991, plaintiff agreed to work for defendant as a quality control manager and as a salesman. Plaintiff memorialized with Wayne Buff, defendant's representative, the following employment agreement:

> Doyle Dockery 326.00 per week + 5% commission on everything he brings in after first 17,000 in base pay is passed. + .11 for each mile for car.
>
> Agreement between Wayne & Doyle
> lst Aug 1991

Because defendant business was new, plaintiff agreed to defer payment of his sales commissions in order for the business to invest in needed machinery. In December of 1995, plaintiff requested that his commission be paid, which defendant then calculated as amounting to approximately $10,000.00. Plaintiff disputed this sum, contending that defendant had enjoyed sales in excess of $7.7 million from companies allegedly recruited and established by plaintiff. Plaintiff argued that, pursuant to the employment agreement, he was entitled to five percent of the $7.7 million in sales. Defendant subsequently terminated plaintiff's employment, and plaintiff filed the instant suit.

After filing suit, plaintiff made a motion for partial summary judgment seeking entitlement as a matter of law to a portion of the sales

commissions allegedly owed him by defendant. Finding material facts regarding plaintiff's compensation to be outstanding, the trial court denied plaintiff summary judgment.

Before the jury trial, plaintiff filed a motion *in limine*, seeking to exclude evidence of trade usage and practice proffered by defendant. Plaintiff argued that the above-stated employment agreement between plaintiff and defendant was "defined by the terms of said agreement[,]" and that "[e]vidence of 'common business practices' within the plastics molding business [was] not relevant to the issues of the terms of the contractual agreement[.]" Finding the agreement between plaintiff and defendant to be ambiguous, the trial court denied plaintiff's motion and allowed evidence by defendant regarding trade practices in the plastics molding business. The trial court further instructed the jury that they could consider "all of the evidence put forth on the question [of interpreting the contract] including the parties on the practical construction of their agreement as evidenced by their conduct." The jury subsequently found that plaintiff was only entitled to recover $10,000.00 from defendant, and the trial court entered judgment in favor of plaintiff for said sum. Plaintiff now appeals from this judgment.

[1] Plaintiff argues that the trial court erred in denying plaintiff's motion for partial summary judgment. Plaintiff contends that he is entitled to judgment as a matter of law regarding certain commissions on sales to clients recruited by plaintiff, because the employment agreement between plaintiff and defendant gives plaintiff five percent commission on "everything he brings in." Plaintiff argues that, under the plain and unambiguous terms of the contract, plaintiff is entitled to commissions on all of the sales to clients recruited by plaintiff. Defendant argues that the contract terms are uncertain, and that defendant did not intend for plaintiff to collect commission on *all* business conducted with clients recruited generally by plaintiff, but rather only upon those particular sales secured by plaintiff.

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994). "A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court." *Dept. of Transportation*,

114 N.C. App. at 100, 440 S.E.2d at 864. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury. *Id.* Ambiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties. *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988).

We determine the language "everything he brings in" to be susceptible of varied interpretations on its face, and that both plaintiff's and defendant's interpretations of the contract language are reasonable. Thus, we hold that the trial court properly denied partial summary judgment to plaintiff and overrule this assignment of error.

[2] Plaintiff also argues that the trial court erred in denying his motion *in limine* to exclude defendant's evidence regarding trade usage and practice in the plastics molding industry. The proffered evidence tended to show that commissions paid in the trade are for each individual job and not on the total amount paid by a particular client. Plaintiff contends that the contract was plain and unambiguous, and that the custom of trade usage and practice evidence impermissibly injected a new term into the parties' contract. We disagree. As stated above, we agree with the trial court that the contract was ambiguous on its face. The primary purpose in interpreting a contract is to ascertain the intention of the parties. *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). When a contract is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract. *Id.* Moreover, "the general custom in the business or trade may be considered in arriving at the intention of the parties." *McAden v. Craig*, 222 N.C. 497, 500, 24 S.E.2d 1, 3 (1943). As such, the trial court properly admitted trade usage and practice evidence concerning the agreement between plaintiff and defendant. We also determine the trial court properly instructed the jury that the contract was ambiguous, and that they could consider trade usage and practice in interpreting the agreement. This assignment of error is overruled.

[3] Finally, plaintiff argues that the trial court erred in instructing the jury on the doctrine of employment at will. Plaintiff contends that, since he presented no evidence suggesting that he was illegally ter-

minated from his employment, the instruction confused the jury as to the pertinent issues. We disagree. During cross-examination, plaintiff's counsel repeatedly questioned Wayne Buff regarding defendant's right to terminate plaintiff without paying the sales commissions allegedly owed to plaintiff. Typical of those questions were the following:

> So once—once a manager has gotten a sales representative to bring in over 7.7 million dollars worth of business, they can simply say, "There's the door." And as a result of say [sic] that, just saying that, just terminate them? . . .
>
> * * * *
>
> So what your [sic] stating is that if in the manager's eyes this person has not been as useful as they have been in the past, they have the right to terminate them and not pay them any more commissions?

When plaintiff later protested the inclusion of the employment at will instruction, the trial judge agreed that he normally "wouldn't have given [the instruction], but you-all just got off into that, and that hasn't got anything to do with [the case]." The trial judge added, "I'm just going to tell [the jury] it has nothing to do with the case." The trial judge then instructed the jury as follows:

> And I would also instruct you that under our law in North Carolina that when a contract is not for a term served, that is a definite term, it is considered an employee at will situation, either party may terminate the agreement at any time. That is either the employer or the employee. And you are not to concern yourself as to who may have terminated this arrangement, because that is not determinative of the amount of damages that you would award in this case.

"It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence." *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509, 358 S.E.2d 566, 568 (1987). We determine that the above-stated instruction clarified, rather than confused, the issues for the jury. With plaintiff's counsel's repeated questioning regarding defendant's right to terminate plaintiff's employment without first paying compensation, the jury might have easily confused plaintiff's right to collect his sales commissions with plaintiff's right to retain employment when it calculated plain-

tiff's damages. The trial court foresaw this possibility and correctly instructed the jury on the law of employment at will, thereby avoiding potential confusion. We therefore overrule plaintiff's final assignment of error and affirm the judgment of the trial court.

No error.

Judges WALKER and THOMAS concur.

IN THE MATTER OF: THE APPEAL OF INTERMEDIA COMMUNICATIONS, INC.

No. COA00-862

(Filed 19 June 2001)

Notice; Taxation— faxed letter—sufficient written request

A taxpayer sufficiently complied with the requirement for submitting a written request for a hearing on a valuation by faxing a letter to the Property Tax Commission. N.C.G.S. § 105-342(b) does not prescribe any particular method for submission or delivery of the request and tax statutes are to be strictly construed against the State and in favor of the taxpayer.

Appeal by taxpayer from order entered 18 April 2000 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 25 April 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for State Department of Revenue, appellee.

C.B. McLean, Jr., for Intermedia Communications, Inc., appellant.

TYSON, Judge.

Taxpayer, Intermedia Communications, Inc. ("Intermedia"), a public service company, appeals an order of the North Carolina Property Tax Commission ("Commission") dismissing its appeal to the Commission as untimely. We reverse the order of the

Commission, and hold that Intermedia's notice of appeal was timely filed.

Facts

The parties stipulated to the following facts: In July 1999, the State Department of Revenue ("Department") completed an appraisal of Intermedia's property for the tax year 1999. On 27 July 1999, the Department notified Intermedia by letter of its proposed valuation for 1999. The Department's letter concluded with the following paragraph:

> You are hereby notified, however, that the proposed valuation will become final unless written notice of exception is filed with the Property Tax Commission at the above address within twenty (20) days from the date of this notice.

Intermedia received the letter on or about 28 July 1999.

On 5 August 1999, Intermedia's property tax accountant, Bobby Barnes ("Barnes"), drafted a letter to the Commission stating that Intermedia was "filing a written notice of exception for the 1999 Property tax valuation." Barnes submitted the notice letter by facsimile to the Commission on 6 August 1999. The Commission actually received the facsimile notice letter on 6 August 1999. The original 6 August 1999 facsimile is contained in the Commission's file.

Following the Commission's receipt of the notice letter on 6 August 1999, Barnes contacted the Director of the Property Tax Division, Johnny Bailey ("Bailey"), on various occasions regarding Intermedia's desire to appeal. On 17 August 1999, Barnes met with Bailey regarding the contents of the facsimile. Following the meeting, Barnes mailed to Bailey the original notice letter, dated 5 August 1999, and a copy of Intermedia's annual report. Barnes also mailed a copy of the notice letter and an annual report to the Department. The Department received the materials on 19 August 1999.

On 9 September 1999, Barnes received notice from the Commission that the notice letter was received by the Commission, and was recorded as filed with the Commission on 19 August 1999. The letter further stated that the Commission "does not accept, as properly submitted, documents that are transmitted by facsimile . . . . Accordingly, since the notice was not timely received, the [Commission] has no jurisdiction to consider this matter."

A hearing to determine the timeliness of Intermedia's notice of appeal was held before the Commission on 23 February 2000. On 18 April 2000, the Commission dismissed Intermedia's appeal as untimely. Intermedia appeals.

The facts of this case are not in dispute. The sole issue is whether the Commission's 6 August 1999 receipt of Intermedia's notice letter by facsimile was sufficient to constitute timely receipt of a written notice of exception. We hold that the facsimile did constitute submission of a written request as required by statute, and that the Commission's actual receipt of the notice letter on 6 August 1999 preserved Intermedia's exception as timely.

The controlling statute is N.C. Gen. Stat. § 105-342(b). It provides:

> (b) Appraisal and Apportionment Review.—The appraised valuation of public service company's property and the share thereof apportioned for taxation in this State under G.S. 105-335, 105-336, and 105-337 shall be deemed tentative figures until the provisions of this subsection (b) have been complied with. As soon as practicable after the tentative figures referred to in the preceding sentence have been determined, the Department of Revenue shall give the taxpayer written notice of the proposed figures and shall state in the notice that the taxpayer shall have 20 days after the date on which the notice was mailed in which to submit a written request to the Property Tax Commission for a hearing on the tentative appraisal or apportionment or both. If a timely request for a hearing is not made, the tentative figures shall become final and conclusive at the close of the twentieth day after the notice was mailed. If a timely request is made, the Property Tax Commission shall fix a date and place for the requested hearing and give the taxpayer at least 20 days' written notice thereof. The hearing shall be conducted under the provisions of subsection (d), below.

N.C. Gen. Stat. § 105-342(b) (emphasis added).

G.S. § 105-342(b) does not require that the written request be an original document or a postmarked document. The statute does not prescribe any particular method for submission or delivery of the request. The only statutory requirement for Intermedia to timely appeal the Department's valuation is that Intermedia "submit a written request" to the Commission within 20 days of the 27 July 1999 letter. Intermedia complied with this requirement.

The Commission concedes that it actually received Intermedia's notice letter on 6 August 1999. The evidence further tends to establish that Intermedia knew that the Commission was in actual receipt of the notice letter on 6 August 1999. Barnes and Bailey discussed the notice letter various times after 6 August 1999. Despite such communications, there is no evidence that the Commission immediately informed Intermedia that the 6 August 1999 facsimile submission was insufficient. Rather, the letter was placed in the Commission's file on Intermedia. We hold that Intermedia sufficiently complied with the statutory requirement of submitting a written request to the Commission on 6 August 1999.

We note that the Commission regards all notices of appeal as jurisdictional, and is scrupulous in evaluating whether notices of appeal are timely filed. The Commission argues that a facsimile transmission of a request should not constitute a "submission" under the statute because such "electronic filings do not provide the reliability and objectivity required for jurisdictional documents." However, the Commission may elect to adopt an official policy or rule regarding facsimile or other transmissions. The Commission has the rule-making authority to do so. *See* N.C. Gen. Stat. § 105-291(b) ("The Department may adopt such rules and regulations, not inconsistent with law, as the Department may deem necessary to perform the duties or responsibilities of this Chapter."). The Commission had not adopted any such rule at the time Intermedia faxed its written notice letter.

The Commission further argues that there is no statute or rule that affirmatively allows for submission of a written request by facsimile transmission. However, " '[t]ax statutes are to be strictly construed against the State and in favor of the taxpayer.' " *Matter of Rock-Ola Cafe*, 111 N.C. App. 683, 686, 433 S.E.2d 236, 237 (1993), *disc. review dismissed as improvidently granted*, 336 N.C. 68, 441 S.E.2d 551 (1994) (quoting *Watson Indus. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952)). If an ambiguity exists as to the sufficiency of a facsimile submission, the language of the statute is strictly construed against the Commission. *See, e.g., Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999) ("Significantly, in matters of statutory construction, an ambiguous tax statute shall be strictly construed against the state and in favor of the taxpayer.").

The statutes also expressly allow for filing of notices of appeal with the Commission by "means other than United States mail." G.S.

§ 105-290(g) governs appeals to the Commission from county commissioners and county boards of equalization and review. This statute deems a notice of appeal as "filed" on the date of receipt by the Commission. The statute provides that "[a] notice of appeal submitted to the Property Tax Commission by a means other than United States mail is considered to be filed on the date it is received in the office of the Commission." N.C. Gen. Stat. § 105-290(g) (emphasis added). We further note that the appellate courts of this State accept filing by electronic means, and that "[r]esponses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court." N.C.R. App. P. 26(a)(2).

G.S. § 105-342(b) is the applicable statute that Intermedia was required to follow for appealing the Department's valuation. The statute merely requires that Intermedia "submit a written request" to the Commission. A strict construction of this language against the Commission requires the conclusion that Intermedia complied in all respects with the statute. Intermedia submitted a written notice of exception letter, and the request was submitted to and acknowledged by the Commission within the 20 day time limit.

Reversed.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. BRYANT RENARD FULP, DEFENDANT

No. COA00-846

(Filed 19 June 2001)

Constitutional Law— habitual offender—prior felony conviction—invalid waiver of counsel

An habitual felon defendant carried his burden of showing by a preponderance of the evidence that he had not waived his right to counsel for a prior felony conviction used to support the habitual felony indictment where he had said he "didn't need no lawyer" when asked by a judge in a prior felony proceeding if he wanted a lawyer, but the trial judge did not make findings showing consideration of defendant's age at the time he signed the

waiver, his ninth-grade education, or his time in jail prior to the waiver.

Appeal by defendant from order entered 8 May 2000 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 28 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Kimberly W. Duffley, for the State.

The Teeter Law Firm, by Kelly Scott Lee, for defendant-appellant.

TYSON, Judge.

Bryant Renard Fulp ("defendant") was indicted by the Forsyth County grand jury for felonious possession of stolen goods and for being an habitual felon on 10 March 1997. Defendant subsequently moved to suppress one of the three convictions used to support the habitual felon indictment. Pursuant to G.S. § 15A-980, defendant argued that a 1993 Rockingham County conviction used in the habitual felon indictment was obtained in violation of his right to counsel. The trial court denied the suppression motion on the grounds that defendant could not collaterally attack the prior conviction. On appeal, this Court found that the trial court erred by not resolving the factual conflicts and ruling on the merits of defendant's motion to suppress pursuant to G.S. § 15A-980. This Court vacated the trial court's action and remanded the case for a proper determination of defendant's motion.

On 8 March 2000, the trial court conducted a hearing on defendant's motion to suppress the 1993 conviction. At that hearing, defendant acknowledged that he signed a waiver of rights form on 8 January 1993 when he was seventeen years old. He also admitted that prior to the 1993 conviction, he had been in juvenile court and had been represented by a lawyer. Defendant conceded knowing that he "had a right to a lawyer," but asserted that he never waived his rights to an attorney.

Defendant stated that an assistant district attorney approached him on 4 March 1993 and offered to dismiss one of his pending felony charges and to recommend probation on the remaining charges. When defendant entered the courtroom later that day, Judge Peter M. McHugh asked him if he wanted a lawyer. Defendant testified that he

told Judge McHugh that he "didn't need no lawyer." He explained that "I already talked to the DA. I knew I was getting probation. I knew I was going home. I ain't need no lawyer."

Defense counsel referred the trial court to the court file, which contained a copy of the waiver of rights form which had been signed by defendant, the deputy clerk of Forsyth County Superior Court and Judge McHugh. Defendant argued that there were important discrepancies in the form, and noted that defendant had failed to check either of the two boxes for waiver of assigned counsel and for waiver of all assistance of counsel. Defense counsel also pointed out that the only box checked in the "certificate of judge" section of the form indicated that defendant had "voluntarily, knowingly and intelligently elected in open court to be tried in [the] action . . . without the assignment of counsel."

In an order entered 8 May 2000, *nunc pro tunc* 1 May 2000, the trial made the following findings of fact:

> 1. On Jan. 8, 1993, the defendant . . . executed a "Waiver of Counsel" in case number 92 CRS 9157.
>
> 2. The defendant swore before Deputy Clerk of Superior Court Shelley Newcomb that:
>
> a. He had been fully informed of the charges against him;
>
> b. He had been fully informed of the nature of and the statutory punishment for the charge; and
>
> c. He had been fully informed of the nature of the proceedings against him.
>
> 3. He further swore before Newcomb that he had BEEN ADVISED OF:
>
> a. His right to have counsel ASSIGNED to assist him AND his right to have the ASSISTANCE of counsel in defending the charge or in handling the proceedings;
>
> 4. He further swore before Newcomb that he fully understood and appreciated the consequences of his decision to waive the right to assigned counsel and the right to assistance of counsel.
>
> 5. Further, the Honorable Peter M. McHugh certified that he FULLY INFORMED defendant in open court of:
>
> a. the charges against him;

b. the nature of and the statutory punishment for each charge; and

c. the nature of the proceeding against him and

d. his right to have counsel ASSIGNED by the court and

e. his right to have the ASSISTANCE of counsel to represent him in this action.

6. Judge McHugh further certified that:

a. defendant comprehended the nature of the charges and the proceedings and the range of punishments;

b. defendant understood and appreciated the consequences of his decision; and that

c. defendant voluntarily, knowingly and intelligently elected in open court to be tried in the action WIT[]HOUT THE ASSIGNMENT OF COUNSEL.

7. On January 8th, 1993 the defendant was fully informed of his rights pursuant to G.S. 15A-1[2]42 and voluntarily, knowingly, and intelligently waived his rights to ASSIGNMENT[] of counsel, thus electing either to represent himself or to hire counsel of his own choosing. The mere fact that there is no "check mark" placed in the "Acknowledgment Section" does not invalidate this waiver . . . .

8. The defendant again appeared before Judge McHugh on March 4, 1993. He did not appear with counsel although he knew he had a right to one. He made no motion to continue the matter for any reason but instead entered into a plea agreement with the prosecutor. The judge inquired as to whether the defendant wished counsel but [defendant] told the judge that he did not need a lawyer. He swore that his plea was of his own free will, fully understanding what he was doing. Even at the hearing on this matter, the defendant still asserts he knew he had a right to an attorney and asserted as much to Judge McHugh.

On the basis of these findings of fact, the trial court concluded that "[t]he defendant's waiver of counsel on January 8, 1993 was made knowingly, intelligently, and voluntarily" and that "defendant also implicitly waived his right to assistance of counsel after having been fully advised of both his right to assigned counsel and his right to

assistance of counsel on January 8, 1993." From the trial court's order, defendant appeals.

On appeal, defendant contends the trial court erred in finding that he had knowingly and voluntarily waived his right to counsel for his 4 March 1993 felony conviction, which was subsequently used to enhance his present sentence pursuant to G.S. § 14-7.1. He argues the trial court's order was in error because of his young age at the time of the waiver, his lack of comprehension of its consequences, the incomplete nature of the waiver form, and public policy. We agree.

"A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel . . . if its use will . . . [r]esult in a lengthened sentence of imprisonment." G.S. § 15A-980(a)(3). "When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel." G.S. § 15A-980(c). Before a defendant may be permitted to proceed without the assistance of counsel, the trial court must make thorough inquiry and be "satisfied that the defendant . . . [h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel[;] . . . [u]nderstands and appreciates the consequences of this decision; and . . . [c]omprehends the nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242. "[A]n indigent person may waive counsel provided 'the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver.' " *State v. Williams*, 65 N.C. App. 498, 504, 309 S.E.2d 721, 725 (1983) (quoting G.S. § 7A-457). "In making such a finding, the court shall consider, among other things, such matters as the person's age, education, . . . , [and] mental condition[.]" N.C.G.S. § 7A-457(a).

The trial court's conclusion here that defendant's waiver of counsel in the 1993 Rockingham County conviction "was made knowingly, intelligently, and voluntarily" is not adequately supported by its findings of fact. Those findings do not show that the trial court gave consideration to defendant's age (seventeen years and six days) at the time he signed the wavier, to his ninth grade education, or to defendant having spent approximately three months in jail prior to signing the wavier. Nor do those findings address the effect of defendant's continued incarceration for two additional months prior to the State presenting him with a plea offer on 4 March 1993.

The trial court's order does not demonstrate that defendant's waiver was knowing and voluntary or that his waiver is constitutionally valid. Given the "somewhat equivocal" nature of the waiver of counsel form, a waiver cannot be inferred here. We conclude that defendant carried his burden of showing by a preponderance of the evidence, as required by G.S. § 15A-980(c), that he had not waived his right to counsel. "Admission of prior convictions obtained in violation of the right to counsel for purposes of impeachment or to affect the length of sentence violates N.C.G.S. § 15A-980." *State v. Porter*, 326 N.C. 489, 510, 391 S.E.2d 144, 158 (1990). Under the circumstances of this case, we hold that the 1993 Rockingham County conviction used in finding defendant to be an habitual felon should have been suppressed. As a result, the habitual felon conviction is vacated, and this matter is remanded for resentencing on defendant's conviction for possession of stolen goods.

Habitual felon plea: Vacated.

Possession of stolen goods sentence: Vacated and remanded.

Judges GREENE and TIMMONS-GOODSON concur.

JOANNE KELLER v. WILLOW SPRINGS LONG TERM CARE FACILITY, INC.

No. COA00-74

(Filed 19 June 2001)

Hospitals and Other Medical Facilities— negligence—staff injury—transfer of patient to wheelchair—not a hidden condition

The trial court did not err by granting defendant's motion of summary judgment in a negligence action by a physical therapy assistant who suffered a back injury when she went to the aid of a stroke victim who was falling during a transfer from a bed to a wheelchair. Plaintiff did not indicate any evidence of a defective, dangerous, or unsafe condition and, although plaintiff alleged the situation in the room was a hidden and dangerous condition caused by the actions and inactions of defendant-facility, the only

danger was a human condition of which plaintiff was apprised and well trained to address.

Appeal by plaintiff from judgment entered 20 September 1999 by Judge J.B. Allen, Jr. in Orange County Superior Court. Heard in the Court of Appeals 14 February 2001.

Browne, Flebotte, Wilson & Horne by Linda L. Czyzyk for plaintiff-appellant.

McGuire, Woods, Battle & Boothe by Kurt E. Lindquist, II and Arden Lynn Achenberg for defendant-appellee.

THOMAS, Judge.

Plaintiff Joanne Keller filed a complaint alleging defendant Willow Springs Long Term Care Facility, Inc. was negligent by creating a hidden and dangerous condition which resulted in serious injury to her back. From the grant of defendant's motion for summary judgment, plaintiff appeals.

Plaintiff was employed as a physical therapy assistant for Home Health Agency of Chapel Hill, Inc. Her duties included caring for several residents of a rest home in Carrboro being operated by defendant.

On 21 December 1993, plaintiff went to the room of Peter Koutouzakis (Koutouzakis), a stroke victim, in order to provide physical therapy. She had previously provided care for him including exercise, transfers (moving him from bed to wheelchair and return) and gait training. According to plaintiff's allegations, she noticed Koutouzakis sitting on the edge of his bed, agitated, with one of defendant's employees attempting to assist him into a wheelchair. The employee was not trained to care for patients, had not locked the wheelchair and had failed to put a leg brace or gait belt on him. As plaintiff entered the room, the employee backed away and Koutouzakis began to slide off the bed. Plaintiff rushed to his aid, putting her knees in front of him to prevent his fall. Plaintiff then placed a gait belt around Koutouzakis and transferred him to the wheelchair. In catching him and placing him in his wheelchair, however, she suffered injury to her back resulting in permanent and total disability.

According to plaintiff, "the situation which existed in the room" was the hidden and dangerous condition caused by the actions

and inactions of defendant. According to the defendant, plaintiff in effect is arguing that Koutouzakis himself was the dangerous condition.

The trial court allowed defendant's motion for summary judgment on 20 September 1999, which plaintiff assigns as error.

The standard for granting a motion for summary judgment is well-established. A party is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1 Rule 56.

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). The movant may meet this burden by proving that an essential element of the opposing party's claim is non existent, 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. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Mozingo v. Pitt County Memorial Hosp., Inc., 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992) (citing *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Here, plaintiff alleges defendant was negligent in that it: a) failed to exercise ordinary care to keep and maintain the premises in a reasonably safe condition; b) created a hidden and dangerous condition by failing to properly medicate Koutouzakis; c) failed to train its employees and agents and properly staff its facility; d) failed to timely toilet him; e) failed to transfer him to an intermediate care facility to provide more extensive medical care and supervision when his health condition deteriorated; f) failed to warn plaintiff of hidden perils and unsafe conditions of which defendant knew or, by reasonable inspection, could have discovered; g) failed to reasonably inspect him and to correct unsafe conditions which such an examination would have revealed; and h) generally failed to warn plaintiff of these hidden and dangerous conditions.

In order to establish negligence, plaintiff must show that: 1) defendant owed a legal duty to the plaintiff; 2) the defendant breached the duty; 3) plaintiff sustained injuries; and 4) the plaintiff's

injuries were proximately caused by defendant's breach. *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990).

In the instant case, plaintiff bases her negligence claim on a premises liability theory. She contends a lack of proper care for Koutouzakis caused an unsafe condition which breached a duty to plaintiff as a business invitee.

Our Supreme Court has held that landowners owe a duty to exercise reasonable care in the maintenance of their premises to all lawful visitors. *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). The Court in *Nelson* also eliminated the distinction between licensees and business invitees for the purposes of premises liability and instead imposed a duty on landowners to exercise reasonable care to all lawful visitors. Landowners have a duty to maintain their premises in a reasonably safe condition for their intended use. *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990).

To withstand summary judgment under a premises liability theory, plaintiff must demonstrate substantial evidence showing defendant failed to exercise reasonable care in the maintenance of its premises. *Nelson*, 349 N.C. at 633, 507 S.E.2d at 893.

Plaintiff argues that a staff shortage resulted in Koutouzakis not being toiletted and properly medicated prior to his 10:00 a.m. appointment with plaintiff. She says this failure created a hidden and dangerous condition which resulted in her injury. In essence, plaintiff advances the novel theory that the rest home resident himself became a dangerous condition. Some of the dangerous conditions recognized by North Carolina Courts have included uneven and/or broken sidewalks, indentures in walkways, a dirt filled ditch, uneven stairs and/or the absence of handrails, wet floors, and unlighted parking lots. *See Newsom v. Byrnes*, 114 N.C. App. 787, 443 S.E.2d 365 (1994); *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E.2d 245 (1979). Additionally, this Court has held that a hospital owes a duty to protect a patient against foreseeable assaults by another patient. *Burns v. Forsyth County Hosp. Authority, Inc.*, 81 N.C. App. 556, 344 S.E.2d 839 (1986). There is no reasonable analogy from any of these holdings to the present case.

Our review of the record shows no evidence that defendant failed to act outside the standard of care in the maintenance of its premises, that the premises were improperly maintained or of any

other breach of duty owed to plaintiff. Plaintiff has not indicated any evidence of a defective, dangerous or unsafe condition on the property of defendant.

Even if it were determined that the resident was a dangerous condition, or as plaintiff argues, the "situation" in the room was the dangerous condition with defendant not properly caring for its residents, plaintiff's contention would still fail. Our Supreme Court, in *Branks*, held that dismissal of plaintiff's complaint alleging premises liability was appropriate where the alleged hazard was obvious to her. 320 N.C. 621, 359 S.E.2d 780 (1987). Similarly in *Newsom*, this Court held that "even if the condition . . . had been rendered unsafe under the circumstances, plaintiff knew of the unsafe condition." Therefore, defendant was not liable. *Newsom*, 114 N.C. App. at 790, 443 S.E.2d at 368.

In the case at bar, plaintiff claims the condition was both dangerous and hidden. Even while arguably dangerous, however, the condition was in no way hidden from plaintiff. Her argument goes to Koutouzakis' condition at the moment she entered the room being unexpected, not hidden. Plaintiff also claims defendant had a last clear chance to avoid injury to plaintiff, but fails to adequately analyze the theory or cite appropriate authority.

The ultimate facts are straightforward. Plaintiff voluntarily went to the aid of a resident with the admitted knowledge that he was agitated, needed to use the restroom and was not utilizing his leg brace. She also was aware the wheelchair was not in a locked position. Plaintiff is a physical therapy assistant capable of making proper bed to wheelchair transfers. The only danger alleged by plaintiff was a human condition of which plaintiff was apprised and well-trained to address. Plaintiff may not recover where the allegedly dangerous condition would be obvious to an ordinary person or where plaintiff had equal or superior knowledge of the allegedly dangerous condition. *See Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990); *Branks v. Kerns*, 320 N.C. 621, 359 S.E.2d 780 (1987). Accordingly, this assignment of error is rejected and the decision of the trial court affirmed.

AFFIRMED.

Judges WYNN and McGEE concur.

STATE AUTO PROPERTY AND CASUALTY INSURANCE COMPANY v. TRACEY L. SOUTHARD, BEVERLY RUSSELL, THE ESTATE OF DAVID MORSE, AND LUCILLE S. SHARAR

No. COA00-640

(Filed 19 June 2001)

Insurance— homeowners policy—fire—resident

The trial court did not err by granting summary judgment in favor of plaintiff insurance company in its determination that decedent grandson was not a "resident" of his grandmother's house where a fire occurred and was thus not entitled to insurance coverage under a homeowners policy issued by plaintiff to defendant grandmother, because there was substantial evidence that the grandson was not a resident but instead a frequent visitor to his grandmother's home, including the facts that he did not make his home in that particular place, he did not live there permanently, nor did he stay there for an extended period of time.

Appeal by defendant from judgment entered 10 February 2000 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 29 March 2001.

Wilson & Iseman by Urs. R. Gsteiger for plaintiff-appellee.

Pinto, Coates, Kyre & Brown by David L. Brown and John I. Malone for defendant-appellant.

THOMAS, Judge.

Defendant Tracey L. Southard appeals from a grant of summary judgment in favor of plaintiff State Auto Property and Casualty Insurance Company. The primary issue here is whether David Morse was a "resident" and thus entitled to insurance coverage under a homeowners policy issued by plaintiff. For the reasons stated herein, we affirm the trial court.

The facts are as follows: Defendant owned a house in Surry County and rented it to defendant Beverly Russell (Russell). On 2 January 1998, David Morse was a guest there when the house caught on fire. Morse died from injuries sustained in the fire while the house itself was extensively damaged.

Subsequently, defendant filed a negligence action in *Southard v. Estate of David R. Morse* (file number: 98 CVS 977) against the estate of David Morse (the estate) alleging Morse proximately caused the fire. The estate made a demand for plaintiff to defend and provide coverage for the estate under a policy issued to Morse's grandmother, defendant Lucille Sharar (Sharar). Plaintiff denied coverage saying that Morse was not a resident of Sharar's household and therefore the homeowner's policy would not provide liability coverage for any negligent acts of Morse.

Plaintiff then filed this declaratory judgment action to determine whether the policy it issued to Sharar provides liability coverage for Morse.

As is customary, Sharar's policy covers "insureds" in such a situation. "Insureds" are defined in the policy as "you [Sharar] and residents of your household who are your relatives." It is not disputed that Morse was Sharar's grandson, thus meeting the requirement of being relatives, but there is a dispute as to whether Morse was a member of Sharar's household.

At the time of the fire, Morse did not own a home or rent an apartment. He was not living with his mother, Debra LaValley, at her residence. Sharar testified that Morse maintained a bed and clothes at her home and had his mail sent there. However, plaintiff contends testimony showed Morse in actuality did not have a specific residence anywhere. He did not have a key to Sharar's home and did not have a bedroom there. He did, however, sporadically sleep on a mattress on the living room floor. Morse's address for tax purposes, in fact, was Russell's residence, where the fire occurred, not his grandmother's. Before the fire, Morse had not slept at his grandmother's home in approximately ten days.

Plaintiff and defendant both moved for summary judgment with the trial court granting summary judgment for plaintiff while denying defendant's motion in an order filed 16 February 2000. Defendant, the owner of the damaged house, appeals this order.

For our purposes, we combine defendant's two assignments of error which are, respectively, 1) the trial court erred in denying her motion for summary judgment where all of the evidence indicated Morse was a resident of Sharar's household; and 2) the trial court erred in granting summary judgment for the plaintiff where genuine issues of material fact existed as to whether Morse was a resident

of Sharar's household. We find inadequate merit in defendant's arguments.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2000). An issue is genuine if it can be maintained by substantial evidence. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972). In the instant case, the pivotal query is whether Morse was a resident of Sharar's household.

"Resident" is not defined in the insurance policy at issue, thus we apply its ordinary meaning. *Integon Indemnity Corp. v. Federated Mut. Ins. Co.*, 131 N.C. App. 323, 507 S.E.2d 53 (1998). "Resident" is defined as "one who makes his home in a particular place." American Heritage Dictionary 1051 (2d ed. 1985). "Reside" is defined as "to live in a place for an extended or permanent period of time." *Id.* Therefore, the question here is whether there is evidence Morse lived at Sharar's home permanently or, at least, for an extended period of time.

In Sharar's deposition, there was evidence presented that Morse was indeed a resident of Sharar's home. He had a bed there as well as a dresser full of his clothes located in Sharar's kitchen. Morse used Sharar's home as his mailing address and kept a toothbrush there.

Nevertheless, Sharar also testified that Morse was a "wanderer" and usually spent the night wherever he happened to be when he became sleepy. He actually carried a backpack with a change of clothing and toiletries for this reason and did not have a key to Sharar's home. Morse did not have a permanent bedroom there and when he did spend the night at Sharar's, he almost always slept on the sofa in the living room. A bed was purchased for him, but he only slept in it once before he died. Sharar further testified that Morse never stayed with her for more than three nights in a row. He did not pay rent or any other expenses at the Sharar home. For tax purposes, Morse used Russell's home address. The previous apartment of Morse's mother was listed as his address with the N.C. Department of Motor Vehicles.

In addition, in plaintiff's complaint, it states in paragraph ten, "Plaintiff contends that defendants Southard, Russell and the Estate

of David Morse are not entitled to coverage under the terms of the policy at issue since Morse was not a resident of the household of Sharar[.]" In her handwritten answer, Sharar wrote in her corresponding paragraph ten, "~~deny~~ admit *We are currently unaware of the plaintiff's contentions. This is the first official notice of such claims that we have received." It is not clear whether Sharar was admitting the allegation or admitting that plaintiff had such a contention. However, notwithstanding Sharar's answer, we find there is substantial evidence that Morse was not a resident, but rather a frequent visitor to Sharar's home. He did not make his home in that particular place, live there permanently, or even stay there for an extended period of time. Accordingly, we reject defendants' assignments of error and affirm the trial court's denial of summary judgment for defendant and grant of summary judgment in favor of plaintiff.

AFFIRMED.

Judges MARTIN and BIGGS concur.

MICHAEL LEROY HILLIS, PETITIONER-APPELLANT v. WINSTON-SALEM STATE UNIVERSITY, RESPONDENT-APPELLEE

No. COA00-585

(Filed 19 June 2001)

Administrative Law— jurisdiction of Office of Administrative Hearings—Article 8 discrimination claim—state employee

The trial court did not err by affirming the Office of Administrative Hearings' conclusion that it lacked jurisdiction to hear a contested case brought by a former employee of the University of North Carolina serving as a part-time lecturer and temporary coordinator of respondent university's occupational therapy program who claimed that he was discriminated against in violation of N.C.G.S. § 126-16 based on the fact that he was a white male and was informed that the individual hired by respondent as the permanent coordinator was a black female, because: (1) the state employment position from which petitioner was terminated and the position for which petitioner's application was denied were both exempt from Article 8; and (2) the

term "state employee" in the contested case provisions of Article 8 refers to the employment at issue in the underlying contested case and not to the particular employment status of a given petitioner at the time of filing a contested case.

Appeal by petitioner from order entered 24 January 2000 by Judge James E. Ragan, III in Superior Court, Wilson County. Heard in the Court of Appeals 27 March 2001.

Voerman Law Firm, PLLC, by David P. Voerman, for petitioner-appellant.

Attorney General Roy A. Cooper, by Assistant Attorney General Joyce S. Rutledge, for respondent-appellee.

McGEE, Judge.

Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings (OAH) on 2 April 1998. An administrative law judge (ALJ) granted respondent's motion for summary judgment on 17 May 1999, holding that OAH lacked jurisdiction over the matter. Petitioner petitioned for judicial review, and the trial court affirmed the ALJ's decision on 24 January 2000. Petitioner appeals.

Petitioner was employed by respondent under contract from 2 January 1997 to 30 June 1997 as a part-time lecturer and temporary coordinator of respondent's new Occupational Therapy Program (OTP). At the expiration of the contract, petitioner continued working for respondent in the same capacity with the understanding that, should a permanent coordinator of the OTP not be found by 30 December 1997, the position would be made available to petitioner. Petitioner asserts that, in December 1997, petitioner was offered and accepted the position of permanent coordinator of the OTP on a part-time basis beginning 1 January 1998 and on a full-time basis effective April 1998.

Petitioner learned in February 1998 that respondent had advertised for and in fact had hired someone other than petitioner to be the permanent coordinator of the OTP. Petitioner received a letter on 6 March 1998 clarifying that he had not been offered the position of permanent coordinator and that his employment would end on 31 March 1998. Because he is a white male, and because he had been informed that the individual hired by respondent as permanent coordinator of

the OTP is a black female, petitioner petitioned for a contested case hearing with the OAH on 2 April 1998 asserting that respondent had discriminated against him on the basis of his sex and race in violation of N.C. Gen. Stat. § 126-16.

The decision of the ALJ that OAH did not have jurisdiction to hear petitioner's contested case was a final decision under N.C. Gen. Stat. § 150B-36(c)(1) (1999), entitling petitioner to immediate judicial review pursuant to N.C. Gen. Stat. § 150B-43 (1999). The trial court's scope of review under N.C. Gen. Stat. § 150B-51(b) (1999) includes assuring that the decision of the ALJ contains no errors of law, is supported by substantial competent evidence, and is neither arbitrary nor capricious.

Chapter 126 of the North Carolina General Statutes governs the State Personnel System. N.C. Gen. Stat. § 126-5(a) (1999) states Chapter 126 applies to all State employees not specifically exempted. N.C. Gen. Stat. § 126-5(c1)(8) (1999) specifically exempts the instructional and research staff of the University of North Carolina from all provisions of Chapter 126 except Articles 6 and 7. Respondent is a part of the University of North Carolina, and the position of coordinator of respondent's OTP includes teaching duties. Petitioner does not challenge the ALJ's Finding of Fact No. 2 that the position of coordinator of the OTP is an exempt position.

Petitioner alleges that he was discriminated against in violation of N.C. Gen. Stat. § 126-16 (1999), which requires that "[a]ll State departments and agencies . . . shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition[.]" N.C. Gen. Stat. § 126-34.1 (1999) permits a former State employee or applicant for State employment to file a contested case before OAH if employment has been terminated or denied in violation of N.C.G.S. § 126-16. However, while N.C.G.S. § 126-16 is in Article 6 and therefore is applicable to otherwise exempt University of North Carolina employees, N.C.G.S. § 126-34.1 is in Article 8 and therefore is explicitly not applicable. It follows that OAH lacks jurisdiction to hear a contested case brought under Article 8 by exempt employees of the University of North Carolina, including the coordinator of respondent's OTP.

Although N.C.G.S. § 126-16 prohibits discrimination based on sex or race, it does not, by itself, provide for bringing a contested case

before OAH. Petitioner suggests that our Supreme Court's decision in *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990) indicates otherwise. However, unlike the Department of Correction employment position at issue in the *Batten* case, the position of coordinator of respondent's OTP is specifically exempt from Article 8 of Chapter 126. As our Court has stated, " '[i]f the Legislature desired to establish a public policy entitling [UNC faculty] to the protection [of the grievance procedures] of G.S., Chap. 126, it could have done so.' " *Conran v. New Bern Police Dept.*, 122 N.C. App. 116, 119, 468 S.E.2d 258, 260 (1996) (quoting *Walter v. Vance County*, 90 N.C. App. 636, 641, 369 S.E.2d 631, 634 (1988)).

Petitioner contends that he may nonetheless bring a contested case under N.C.G.S. § 126-34.1 because, at the time he filed his contested case, he was no longer employed by respondent and therefore was not exempt from Article 8 as a member of the instructional or research staff of the University of North Carolina. By petitioner's logic, however, he was likewise no longer a State employee when he filed his contested case and therefore was not within the jurisdiction of Chapter 126 at all. We reject petitioner's reasoning and hold instead that the term "State employee" in the contested case provisions of Article 8 refers to the employment at issue in the underlying contested case and not to the particular employment status of a given petitioner at the time of filing a contested case. Because the State employment position from which petitioner was terminated and the position for which petitioner's application was denied were both exempt from Article 8, we hold that the ALJ did not err in finding that OAH lacked jurisdiction over petitioner's contested case. We therefore affirm the order of the trial court.

Having addressed the underlying issues, we decline to consider respondent's cross-assignment of error to the trial court's failure to address respondent's contention that petitioner's petition to the trial court for judicial review was untimely filed.

Affirmed.

Judges GREENE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. WILLIAM VAN TRUSELL

No. COA00-938

(Filed 19 June 2001)

Sentencing— firearms enhancement statute—second-degree kidnapping—minimum and maximum terms of imprisonment

The trial court properly applied the firearms enhancement statute in its calculation of defendant's minimum and maximum terms of imprisonment for second-degree kidnapping, because: (1) N.C.G.S. § 14-2.2(a) allows defendant's minimum term of twenty-nine months to properly be enhanced, by an additional sixty months, to eighty-nine months based on defendant's possession of a firearm during the commission of the crime; and (2) N.C.G.S. § 15A-1340.17(e) calls for a maximum sentence of 116 months if a minimum sentence of eighty-nine months is imposed.

Appeal by defendant from amended judgment dated 14 April 2000 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 22 May 2001.

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

Harrington, Ward, Gilleland & Winstead, L.L.P., by Eddie S. Winstead, III, for defendant-appellant.

GREENE, Judge.

William Van Trusell (Defendant) appeals an amended judgment dated 14 April 2000 entered consistent with his plea of guilty to second-degree kidnapping and sentencing him to a minimum term of 89 months and a maximum term of 116 months.

In judgments entered 1 May 1997, Defendant was convicted of first-degree kidnapping, misdemeanor assault with a deadly weapon, and two counts of armed robbery. Defendant appealed those convictions and in an unpublished opinion, a divided panel of this Court found no error in Defendant's convictions. On appeal to the North Carolina Supreme Court, based on a dissenting opinion, the Supreme Court reversed the decision of this Court and vacated Defendant's conviction for first-degree kidnapping and remanded to this Court for further remand to the trial court for entry of a verdict for second-

degree kidnapping and resentencing on second-degree kidnapping. *State v. Trusell*, 351 N.C. 347, 524 S.E.2d 804 (2000) (per curiam).

On remand, the trial court held a hearing to resentence Defendant for second-degree kidnapping. The trial court determined second-degree kidnapping was a "Class E" felony and Defendant had a prior record level of two. In a judgment dated 14 April 2000, the trial court sentenced Defendant within the presumptive range with a minimum of 29 months and "impose[d] a firearms enhanced sentence of 89 months minimum and maximum of 125 months." The trial court later amended the judgment and sentenced Defendant to a minimum term of 89 months and a maximum term of 116 months.

The dispositive issue is whether the trial court properly applied the firearms enhancement statute in its calculation of Defendant's minimum and maximum terms of imprisonment.

Defendant does not dispute his sentence was subject to the firearms enhancement statute. Defendant, however, argues the trial court did not properly apply the terms of the firearms enhancement statute to his sentence for second-degree kidnapping. We disagree.

A judgment sentencing a defendant to a term of imprisonment for the commission of a felony must contain both a minimum term of imprisonment and a maximum term of imprisonment. N.C.G.S. § 15A-1340.13(c) (1999). If a person who is convicted of a Class E felony "used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months." N.C.G.S. § 14-2.2(a) (1999); *see* N.C.G.S. § 15A-1340.16A(a) (1999). Neither section 14-2.2(a) nor section 15A-1340.16A(a) instructs the trial court on how to determine the maximum sentence once a defendant's minimum sentence has been enhanced. Section 15A-1340.13(c), however, does instruct a trial court, generally, on how to determine the maximum sentence to be imposed once a minimum sentence has been determined. Unless otherwise indicated, "[t]he maximum term of imprisonment applicable to each minimum term of imprisonment is . . . as specified in G.S. 15A-1340.17." N.C.G.S. § 15A-1340.13(c). Thus, after the trial court has enhanced the minimum term of imprisonment, the trial court is to determine the applicable maximum term of imprisonment by utilizing the chart found in N.C. Gen. Stat. § 15A-1340.17(e).

In this case, based on Defendant's prior record level, the trial court sentenced Defendant to a minimum term of 29 months. Because Defendant possessed a firearm during the commission of the crime, that minimum sentence (29 months) was properly enhanced (by 60 months) to 89 months. The chart contained in 15A-1340.17(e) unequivocally calls for a maximum sentence of 116 months if a minimum sentence of 89 months is imposed. N.C.G.S. § 15A-1340.17(e) (1999). Accordingly, the trial court did not err in sentencing Defendant to a minimum term of 89 months and a maximum term of 116 months.

Affirmed.

Judges TIMMONS-GOODSON and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 19 June 2001

ANDREWS v. CRUMP No. 00-903	Alleghany (95CVS133)	Vacated
DEESE v. B. C. MOORE & SON, INC. No. 00-662	Robeson (98CVS3084)	Appeal dismissed
DELTORO v. DELTORO No. 00-262	Pasquotank (94CVD519)	Affirmed in part, reversed in part and remanded
GARRISON ex rel. BURTIS v. MEDVERKY No. 00-555	Pitt (99CVD1217)	Affirmed
GORE v. GORE No. 00-544	Guilford (99CVD149)	Affirmed in part; vacated and remanded in part
GURKIN v. CRAWFORD No. 00-702	Beaufort (98CVS387)	Affirmed
HUDSON v. HUDSON No. 00-917	Wilson (97CVD2371)	Appeal dismissed
IN RE HUFFMAN No. 00-1243	Davie (98J5) (98J6)	Affirmed
IN RE HUTCHINSON No. 00-575	Caswell (99J29) (99J30)	Affirmed
IN RE IRBY No. 00-993	Person (99J98)	Appeal dismissed without prejudice to appellant
INTERSTATE GLASS, INC. v. CREATIVE ARCHITECTURE, P.A. No. 00-55	Johnston (99CVS01375)	Affirmed
KNIGHT v. ABBOTT LABS. No. 00-730	Ind. Comm. (431374)	Reversed and remanded
OAKLEY v. VALENCIA No. 00-996	Mecklenburg (99CVS7579)	Dismissed
REED v. HOFFMAN PROPS., INC. No. 00-859	Catawba (99CVS1830)	Affirmed

SPARKS v. DURHAM No. 00-669	Wilkes (99SP70)	Affirmed
STATE v. BAILEY No. 00-691	Cabarrus (99CRS210) (99CRS211) (99CRS212) (99CRS213) (99CRS9235)	No error
STATE v. BLAND No. 00-1290	New Hanover (99CRS52684) (99CRS27122)	No error
STATE v. BROWN No. 00-633	Guilford (98CRS95735)	No error
STATE v. CARRINGER No. 00-942	Cherokee (99CRS710) (99CRS711) (99CRS712)	No error
STATE v. CLYBURN No. 00-645	Mecklenburg (95CRS62979) (95CRS62984)	Affirmed
STATE v. COE No. 00-867	Forsyth (00CRS000170)	No error
STATE v. CORRY No. 00-852	Gaston (99CRS7187) (99CRS7188)	Affirmed
STATE v. CRANDLE No. 00-878	Pitt (99CRS58903)	Affirmed
STATE v. DEGRAFFENREID No. 00-634	Robeson (98CRS25256)	Affirmed
STATE v. DILLEHAY No. 00-822	New Hanover (99CRS21434)	No error
STATE v. FAULKNER No. 00-1215	Haywood (99CRS005825) (99CRS005826)	No error
STATE v. FREITAS No. 00-932	Cumberland (98CRS18591) (98CRS18593) (98CRS70383)	Affirmed
STATE v. GRAY No. 00-880	Guilford (99CRS56094) (99CRS56095)	No error

STATE v. HARRIS No. 00-523	Harnett (99CRS9801) (99CRS9802)	No error
STATE v. HILL No. 00-907	Buncombe (00CRS363) (00CRS364)	No error; defendant's motion for appropriate relief dismissed without prejudice
STATE v. HONEYCUTT No. 00-452	Randolph (98CRS352)	New trial
STATE v. HOPE No. 00-444	Columbus (98CRS8341)	No error
STATE v. HUNT No. 00-979	Alamance (99CRS55534)	No error
STATE v. JEFFRIES No. 00-306	Cumberland (98CRS18488)	No error
STATE v. JOYNER No. 00-340	Sampson (98CRS858)	No error
STATE v. LEAZER No. 99-75-2	Wake (96CRS25674)	No error
STATE v. McDONALD No. 99-1625	Randolph (97CRS953)	No error
STATE v. McLEAN No. 00-1251	Wayne (99CRS10411)	No error
STATE v. MELVIN No. 00-1084	Wilson (99CRS51987) (99CRS51988)	Affirmed
STATE v. MOORE No. 00-1286	Cumberland (99CRS55852)	No error
STATE v. MOSSO No. 00-1006	Wake (99CRS011295)	No error
STATE v. PARKER No. 00-461	Durham (98CRS4391)	No error
STATE v. PARKER No. 00-759	Wayne (99CRS4326)	No error; motion for appropriate relief denied
STATE v. PARRIS No. 00-937	Mecklenburg (98CRS038540)	Affirmed
STATE v. PORTER No. 00-419	Anson (98CRS570) (98CRS571)	No error

STATE v. REDD No. 00-986	Rockingham (99CRS012911)	No error
STATE v. REEVES No. 00-495	Haywood (99CRS3711) (99CRS2343)	No error
STATE v. ROYSTER No. 00-48	Cumberland (98CRS18912)	No error
STATE v. RUSS No. 00-893	Cumberland (94CRS26709) (94CRS26710) (94CRS26711) (94CRS26712) (94CRS26713) (00CRS3899) (00CRS3900)	No error. Remanded for correction of clerical error in judgments
STATE v. SNIPES No. 00-443	Person (91CR0010) (90CR2906) (90CR2565)	Affirmed
STATE v. STURDIVANT No. 00-990	Union (98CRS009601) (99CRS005686)	No error
STATE v. WATSON No. 00-428	Guilford (97CRS60134) (97CRS60135)	No error
STATE v. WILKINS No. 00-1159	Nash (99CRS16002)	No error
STATE v. WILLIAMS No. 00-1052	Wake (99CRS18985) (99CRS18986)	No error
TORRES v. KELLY SPRINGFIELD TIRE No. 00-756	Ind. Comm. (746283) (212973)	Appeal dismissed

STATE OF NORTH CAROLINA v. VEARL ACKERMAN

No. COA00-672

(Filed 3 July 2001)

1. Kidnapping— first-degree—motion to dismiss

The trial court erred by denying defendant's motion to dismiss the charge of first-degree kidnapping under N.C.G.S. § 14-39(a)(2), because: (1) the evidence failed to show confinement or restraint in the victim's vehicle beyond that required to establish the crime of first-degree sexual offense; and (2) there was no asportation of the victim.

2. Sexual Offenses— first-degree—infliction of serious personal injury

The trial court did not commit plain error by instructing the jury on first-degree sexual offense based on the employment of a dangerous weapon or the infliction of serious personal injury, because: (1) the photographic evidence revealed three bite marks, a thumb print, scab, and swelling on the victim's neck as the result of being choked, and many bruises and swelling about the victim's face, head, neck, chest, and knees resulting from blows from a full beer bottle and defendant's hands; (2) the victim showed the jury scars on her arm left by defendant's bites; and (3) the victim testified about a blow by defendant's hand on her ear and how she still thinks about the incident every day of her life.

3. Assault— on a female—motion to dismiss

The trial court did not err by denying defendant's motion to dismiss the charge of assault on a female even though defendant contends the State failed to present evidence that defendant was over the age of eighteen as required by N.C.G.S. § 14-33(c)(2), because: (1) the jury had ample opportunity to observe defendant in the courtroom for the duration of the trial; and (2) the jury was presented circumstantial evidence of defendant's regular patronage at a bar from which the jury could conclude that defendant was over eighteen years of age.

4. Criminal Law— prosecutor's argument—explanation for incident

The trial court did not commit plain error by allowing the prosecution to make a statement in its opening argument

allegedly drawing attention to the likelihood that defendant would not testify and that allegedly attempted to shift the burden of proof to defendant, because: (1) at no time during the opening argument did the prosecutor affirmatively state, or even infer, that defendant will not testify; and (2) the prosecutor merely stated the jury will not hear a plausible explanation for why the incident occurred, other than the defense's claim that the victim may have been to blame.

5. Sexual Offenses— first-degree—short-form indictment

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense based on an alleged insufficiency of the short-form indictment to distinguish a first-degree sexual offense from a second-degree sexual offense, because the indictment complied with the statute and the North Carolina and United States Constitutions.

Appeal by defendant from judgment entered 8 December 1999 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Mark J. Pletzke, for the State.

Assistant Public Defender Marc D. Towler for defendant.

TYSON, Judge.

Vearl Ackerman ("defendant") appeals a judgment entered upon convictions of first-degree sexual offense, first-degree kidnapping, assault on a female, assault with a deadly weapon, injury to personal property, and communicating threats. The convictions were consolidated for judgment, and the trial court sentenced defendant to a minimum of 307 months and a maximum of 378 months' imprisonment. We reverse defendant's conviction for first-degree kidnapping. We find no error in the judgment entered on all other charges.

Facts

Defendant and the prosecuting witness, Cathy Hill Cook ("Cook"), were involved in a brief romantic relationship from April to June 1998. Defendant and Cook did not see each other from June until September 1998. On 26 September 1998, defendant telephoned Cook to invite her to dinner at his home. Cook arrived at defendant's apartment around 7:00 p.m. during her work break. Two mutual

friends of defendant and Cook were present at defendant's home. The four had a conversation about a band that was to perform that evening at a local bar, the Comet Grill. Defendant stated that he intended to go. The friends were unsure if they would attend.

The friends left defendant's apartment after Cook finished eating dinner. Cook testified that defendant began to kiss her and make sexual advances toward her when they were alone. Cook rebuked defendant's advances, upon which defendant told Cook to leave. Cook left, and returned to work.

At approximately 11:00 p.m. that evening, Cook arrived at the Comet Grill. She parked her vehicle across the street from the bar, in a parking lot adjacent to defendant's apartment. Cook entered the bar, and did not see the mutual friends who had been with her and defendant earlier that evening. Defendant was at the bar. Cook ordered a glass of wine, and spoke with defendant for a few minutes.

Subsequently, Cook went outside to speak with some friends, including a male friend. Cook testified that defendant came outside and told her to "get [her] butt back inside." When Cook re-entered the bar, defendant "grabbed [her] by the collar" and told her that she had "embarrassed him" and that she needed to "sit down and shut up or else."

Shortly thereafter, Cook attempted to leave the bar. Cook testified that defendant physically grabbed her, pushed her into the bar, and ordered her to pay the bill. Cook testified she just "grabbed a handful of money out of [her] pocket and handed it to [defendant] and left." Cook testified that she left the bar alone, and went to her vehicle, parked across the street. Cook entered her vehicle and began to drive out of the parking lot.

Cook testified that defendant ran towards her vehicle and jumped inside through the open driver's side window. While inside the vehicle, defendant kicked the key until it broke off in the ignition. Defendant also kicked the gear shift into the park position. Cook testified that she reached for the door handle to exit the vehicle, but that defendant "grabbed [her] hand and . . . bit [her] really hard" and "wouldn't let go." Cook further testified that defendant then beat her with a full beer bottle about the head, face, chest, side, knees, and back.

Cook further testified that defendant held the beer bottle at her throat and told her he was "going to kill [her]," and that she was

"going to die tonight." Defendant continued to choke Cook and beat her with the bottle, stating that she was going to die "for everything that [she'd] done," and that she would "never see [her] kids again." Cook testified that she tried to exit the vehicle, but that defendant was physically restraining her. She stated, "if I fought him, it got worse."

Cook stated that she pretended to pass out so that defendant would cease beating her. She testified that she let her head fall over into defendant's lap as though she were unconscious. Defendant unzipped his pants and forced his penis into Cook's mouth. Cook testified that defendant then slammed his hand onto her ear so hard that she sat upright. Defendant then began to choke Cook with both hands, pushing her back between the vehicle seats. Cook testified that when she was at the point where she could no longer breathe, defendant stopped choking her and stated, "I'm not going to kill you now. First I'm going to beat you some more and I'm going to break this bottle and cut your face up; and, I'm going to rape you . . . tonight we're going to die together."

Cook testified that defendant picked her up and put her on top of him, stating that he was going to rape her. At this point, Cook opened the driver's side door and "fell out" of the vehicle. She ran towards the Comet Grill. Defendant continued to shout "I will kill you . . . I know where you live."

Cook ran into the bar screaming that defendant had beat her and tried to kill her. The bar owner, Jenny Wicker ("Wicker"), estimated that 45 minutes had lapsed between the time Cook initially left the bar and when she returned. Wicker testified that Cook was "hysterical and disheveled" and "asked if someone would take her home." Either Wicker or her husband called 911. The fire department was the first to respond to the call. Cook testified that the fire department wanted her to go to the hospital, but she told them that she wanted to talk to the police first.

Cook waited at the bar for the police to arrive, whereupon she told the officers what had transpired. Cook's daughter also arrived at the scene. The officers were able to start Cook's car with a pair of pliers. Cook's daughter then drove Cook to the hospital. The two waited in the hospital emergency room approximately two hours. Cook testified that at 5:00 a.m., she "had enough and just wanted to go home." She left the hospital without seeing a doctor and visited her physician the next day.

The State introduced several photographs of bite marks, scars, swelling, and bruises Cook sustained in the struggle with defendant. Cook testified that she continues to think about the incident "every-day of [her] life and every night." Cook stated that she is in therapy to help her deal with the incident.

Defendant moved to dismiss all charges at the close of the State's evidence. The trial court denied the motions. Defendant did not present any evidence. Defendant renewed his motions to dismiss at the close of all evidence, which motions were denied.

On 8 December 1999, the jury returned guilty verdicts as to all charges: first-degree sexual offense; first-degree kidnapping; assault on a female; assault with a deadly weapon; injury to personal property; and communicating threats. The trial court entered judgment thereon on 8 December 1999. Defendant appeals.

Defendant argues that the trial court erred: (1) in denying his motion to dismiss the charge of first-degree kidnapping; (2) by instructing the jury on first-degree sexual offense based on the infliction of serious personal injury; (3) by denying defendant's motion to dismiss the charge of assault on a female; (4) in allowing the prosecution to make a statement in its opening argument about defendant's evidence; and (5) in denying defendant's motion to dismiss the charge of first-degree sexual offense for insufficiency of the short-form indictment. We agree with defendant that failure to dismiss the charge of first-degree kidnapping was error. We find no error as to all other issues.

A. First-degree kidnapping

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree kidnapping. Specifically, defendant argues the evidence failed to show confinement or restraint beyond that required to establish the crime of first-degree sexual offense. We agree.

First-degree kidnapping requires the unlawful restraint or confinement of a person for the purpose of committing a felony. N.C. Gen. Stat. § 14-39(a)(2). It was not the legislature's intent, however, "to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981).

The restraint required for kidnapping must be an act independent of the intended felony. *State v. Harris*, 140 N.C. App. 208, 213, 535 S.E.2d 614, 617, *appeal dismissed, disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000) (citation omitted); *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978).

"The test of the independence of the act is 'whether there was substantial evidence that the defendant[ ] restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape [, statutory sex offense, or crime against nature].' " *Harris* at 213, 535 S.E.2d at 618 (quoting *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992)). The restraint or asportation of the victim must be a complete act, separate from the sexual assault. *State v. Coats*, 100 N.C. App. 455, 459-60, 397 S.E.2d 512, 515-16 (1990), *disc. review denied*, 328 N.C. 573, 403 S.E.2d 515 (1991) (citation omitted); *see also State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987) (while some restraint is inherent in a sexual assault, there must be some separate, independent restraint, confinement, or asportation of the victim in order to constitute kidnapping).

Thus, in *Harris*, we held that restraint independent of the underlying felony was present where the defendant fraudulently coerced the victim into remaining with him in a car so that he could drive her to a secluded place and sexually assault her. *Harris*, 140 N.C. App. at 213, 535 S.E.2d at 618.

In *State v. Hill*, 139 N.C. App. 471, 482, 534 S.E.2d 606, 614 (2000), we recently held that independent restraint supporting a conviction for kidnapping was present where, after completing the restraint necessary to rob the victim, the defendant then drove the victim to an isolated area. We stated,

> [D]efendant forced his way into, and took control of, T.H.A.'s car by threatening her with a pistol, completing the force necessary to commit the robbery. By further restraining her in the car and driving her to an isolated park, he exposed her to greater danger than that inherent in the robbery. Such additional restraint and removal is sufficient to support the element of restraint necessary for his conviction of the separate crime of kidnapping.

Id. at 483, 534 S.E.2d at 614; *see also State v. McKenzie*, 122 N.C. App. 37, 46, 468 S.E.2d 817, 824-25 (1996) (separate and independent restraint found where defendant grabbed victim in front hallway,

took victim to bedroom, bound her hands, covered her head with a pillowcase, shut blinds, and rummaged through apartment prior to rape: "[i]t is apparent then that the asportation of the victim from the hallway to the bedroom and her confinement prior to the rape, was an effort on the part of defendant to conceal his identity and facilitate the commission of the independent acts of larceny and robbery."); *Walker*, 84 N.C. App. at 543, 353 S.E.2d at 247 ("[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetuated the offense when he first threatened the victim and instead took the victim to a more secluded area to prevent others from witnessing or hindering the rape.").

In contrast, in the present case, there was no restraint "separate and apart" from Cook's confinement in the vehicle, and that required for defendant to commit the sexual offense. There was no asportation of Cook, all events having taken place in the front seat of Cook's vehicle, and across the street from the Comet Grill. Cook voluntarily entered her vehicle. Defendant entered the vehicle by jumping through the open window while Cook was seated in the vehicle. The evidence does not show confinement beyond defendant's preventing Cook from escaping the vehicle. Cook's restraint in the vehicle was necessary for defendant to commit the sexual offense. The restraint was an inherent part of the commission of the sexual offense, and cannot be used to convict defendant of kidnapping.

We note that the sexual assault comprised only a small portion of the total time that Cook and defendant were in the vehicle. However, there was no evidence that defendant took any additional steps to move Cook to another location or otherwise further restrain her. Absent such evidence, defendant's actions do not rise to the level required for first-degree kidnapping. "The test . . . does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense." *State v. Williams*, 308 N.C. 339, 347, 302 S.E.2d 441, 447 (1983). The *Williams* court determined that the defendant restrained the victim beyond what was inherent in the crime of rape:

> The evidence in this case reveals that the defendant restrained the victim for a period of several hours in her home. During that time the defendant forced the victim to sit in the living room and to accompany him to the kitchen so that the defendant could get something to drink. Neither of these restraints is inherent in the crime of rape. As a result, there was substantial evidence of

restraint to support the conviction of kidnapping separate and apart from the restraint inherent in the crime of rape.

Id.; *see also State v. White*, 127 N.C. App. 565, 571, 492 S.E.2d 48, 51 (1997) ("the offense of kidnapping under N.C. Gen. Stat. § 14-39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will.").

No such independent, separate restraint occurred in this case. Defendant's continuous confinement of Cook in the vehicle was the restraint inherent in his commission of the sexual offense. Defendant's conviction for first-degree kidnapping must be reversed.

B. Instruction on first-degree sexual offense

[2] Defendant next argues that the trial court erred in instructing the jury on first-degree sexual offense based either on the employment of a dangerous weapon, or the infliction of serious personal injury upon Cook. Defendant alleges that the evidence was insufficient to support an instruction based on the infliction of serious personal injury. In so arguing, defendant notes that Cook initially declined to go to the hospital, stating that she wanted to first speak to the police; that Cook left the hospital at 5:00 a.m. that morning without having seen a doctor; and that the prosecutor took a dismissal on the charge of assault inflicting serious injury at the close of the evidence.

Defendant acknowledges in his brief that he failed to object to the trial court's instruction at trial. A defendant who fails to object at trial bears the burden of proving that the trial court committed "plain error." *State v. Reaves*, 142 N.C. App. ——, ——, 544 S.E.2d 253, 255 (2001). A ruling of the trial court will be found to be plain error "only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). We find no such error in this case.

Our General Assembly has determined that a second-degree sexual offense is elevated to first degree if serious personal injury is inflicted on the victim. N.C. Gen. Stat. § 14-27.4; 14-27.5. "Our courts

have 'declined to attempt to define the substance of the phrase 'serious [personal] injury' and [have instead] adopted the rule . . . '[w]hether such serious injury has been inflicted must be determined according to the particular facts of each case.' " *State v. Lilly*, 117 N.C. App. 192, 194, 450 S.E.2d 546, 548 (1994), *affirmed*, 342 N.C. 409, 464 S.E.2d 42 (1995) (quoting *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982)).

Injuries sufficient to constitute "serious personal injury" have been held to include: "a bruised and swollen cheek, a cut lip, and two broken teeth," *State v. Jean*, 310 N.C. 157, 170, 311 S.E.2d 266, 273 (1984); bruises to a victim's rectal area, *Lilly* at 195, 450 S.E.2d at 548; a whiplash injury resulting in leg cramps and requiring two visits to a doctor, *State v. Ferguson*, 261 N.C. 558, 560, 135 S.E.2d 626, 628 (1964); and blows resulting in five teeth being knocked out of alignment and a broken tooth root, *State v. Roberts*, 293 N.C. 1, 15, 235 S.E.2d 203, 212 (1977). Moreover, our Supreme Court has held that "serious personal injury" in this context may also include mental injury. *Boone*, 307 N.C. at 204, 297 S.E.2d at 589.

In *State v. Easterling*, 119 N.C. App. 22, 457 S.E.2d 913, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 762 (1995), we interpreted *Boone*:

> We do not read *Boone* as placing an additional burden on the State to show a mental injury must be more than that normally experienced in every forcible rape in addition to showing the mental injury extended for some appreciable time, as defendant suggests. Rather, we read *Boone* as holding that if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape. See *id*, 307 N.C. at 205, 297 S.E.2d at 590 (because only evidence of rape victim's condition was that she was hysterical in morning hours of day crime was committed, and no evidence of residual injury after morning of crime, insufficient evidence for serious personal injury); *State v. Baker*, 336 N.C. 58, 65, 441 S.E.2d 551, 555 (1994) (serious mental injury where rape victim's depression, loss of appetite and weight, counseling, nightmares, and insomnia continued for twelve months after rape); *State v. Davis*, 101 N.C. App. 12, 23, 398 S.E.2d 645, 652 (1990) (serious personal injury where victim suffered from physical pain, appetite loss, severe headaches, nightmares, and difficulty sleeping lasted for at least eight months), *appeal dismissed & disc. rev. denied*, 328 N.C.

574, 403 S.E.2d 516 (1991); *State v. Mayse*, 97 N.C. App. 559, 563-64, 389 S.E.2d 585, 587 (serious mental injury where victim's mental and emotional injuries continued for at least seven months after rape; victim quit work, quit school, moved from home, sought professional help), *disc. rev. denied*, 326 N.C. 803, 393 S.E.2d 903 (1990).

Id. at 40-41, 457 S.E.2d 923-24.

In this case, the State introduced several photographs illustrating the injuries Cook sustained in the struggle with defendant. The photographs depicted three bite marks, a thumb print, scab, and swelling on Cook's neck as a result of being choked, and many bruises and swelling about Cook's face, head, neck, chest and knees resulting from blows from a full beer bottle and defendant's hands. Cook testified that when she attempted to exit the vehicle, defendant "bit [her] really hard" and "wouldn't let go." Cook showed the jury scars on her arm left by defendant's bites.

Cook further testified that a blow by defendant's hand on her ear was "so hard" that now "when [she] hear[s] the radio or anything, [her] ear goes . . . like a broken record—broken speaker." Cook testified that "everyday of [her] life and every night" she still thinks of the incident. Cook testified she has dreams every night about the incident, and is still receiving therapy as a result of the incident, some 15 months after its occurrence.

In light of the combination of evidence of Cook's physical and mental injuries, we hold that her injuries were "serious personal injuries" and the trial court's instruction was proper. This assignment of error is overruled.

C. Assault on a female

[3] Defendant assigns error to the trial court's denial of his motion to dismiss the charge of assault against a female. Defendant argues that the State failed to present evidence that defendant was over the age of 18, a required element of the offense. N.C. Gen. Stat. § 14-33(c)(2).

In *State v. Evans*, 298 N.C. 263, 267, 258 S.E.2d 354, 356, (1979), *overruled on other grounds*, *State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989), our Supreme Court noted that "[w]hile it is true that one of the elements of assault on a female is that the defendant be more than 18 years old, the jury may look upon a person and estimate his age . . . . The jury had ample opportunity to view the defendant in this

case and estimate his age." *Id.* (citations omitted); *see also*, *State v. Samuels*, 298 N.C. 783, 787, 260 S.E.2d 427, 430 (1979) (element of first degree rape that defendant be more than 16 years old satisfied where "jury had ample opportunity to view the defendant and estimate his age.").

More recently, this Court distinguished such prior cases, and held that a jury should not "determine the age of a criminal defendant beyond a reasonable doubt merely by observing him in the courtroom without having the benefit of other evidence, whether circumstantial or direct." *In re Jones*, 135 N.C. App. 400, 405, 520 S.E.2d 787, 789 (1999).

Here, the jury had ample opportunity to observe defendant in the courtroom for the duration of the trial. In addition, the jury was presented with circumstantial evidence from which, in addition to observing defendant, they could conclude that defendant was over 18 years of age. The State introduced evidence that defendant had been involved in a romantic relationship with Cook, age 43; that defendant "was a regular" at the Comet Grill bar; that Wicker, the bar owner, knew defendant as a customer in her bar; and that defendant purchased and drank alcoholic beverages at the bar on the evening in question.

A person must be 21 years of age to purchase or consume alcohol in this State. *See* N.C. Gen. Stat. § 18B-302. The circumstantial evidence of defendant's regular patronage of a bar and consumption of alcohol is sufficient evidence from which a jury, in addition to observing defendant, could conclude defendant was over 18 years of age. We find no error in light of this evidence.

D. Prosecutor's opening statement

[4] Defendant argues that the trial court committed plain error in failing to intervene and prevent statements made by the prosecutor during the State's opening statement. Defendant argues that the prosecutor inappropriately called "attention to the likelihood that defendant would not testify," and "attempted to shift the burden of proof to the defense." We disagree.

Each party in a criminal jury trial has the opportunity to make a brief opening statement. N.C. Gen. Stat. § 15A-1221(a)(4). "The purpose of an opening statement is to set forth a 'general forecast' of the evidence. *State v. Allred*, 131 N.C. App. 11, 16, 505 S.E.2d 153, 156 (1998) (citation omitted).

"Counsel for the parties may not, however, '(1) refer to inadmissible evidence, (2) 'exaggerate or overstate' the evidence, or (3) discuss evidence [they] expect[ ] the other party to introduce.' " *Id.* (quotation omitted). The parties are generally given "wide latitude" in the scope of an opening statement. *State v. Summerlin*, 98 N.C. App. 167, 171, 390 S.E.2d 358, 360, *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990). Such scope is within the sound discretion of the trial court. *Allred* at 16, 505 S.E.2d at 156.

Defendant objects to the following statement made by the prosecutor during opening statements:

> I'll tell you what you're not going to hear. You're not going to hear a plausible, reasonable explanation, given by the defense, as to why this terrible event happened. All you're going to hear from them is for them to point their finger at [Cook], and blame her and ask her why she was there in the first place.

Defendant argues that this statement "constituted not only an improper comment on [defendant's] expected failure to testify but also an attempt to shift the burden of proof to the defendant."

At no time during the opening argument does the prosecutor affirmatively state, or even infer, that defendant will not testify. The prosecutor merely states that the jury will not hear a plausible explanation for why the incident occurred, other than Cook may have been to blame. Such a statement does not, (1) refer to inadmissible evidence, (2) exaggerate or overstate any evidence, or (3) discuss the evidence that the defense had planned to introduce. *Allred* at 16, 505 S.E.2d at 156. Nor do we read the prosecutor's statement as unfairly shifting the burden of proof to defendant.

Defendant has failed to show that this statement was "so basic, so prejudicial, so lacking in its elements that justice cannot have been done," given the "wide latitude" afforded the scope of such opening statements and the trial court's ample discretion to determine this scope. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (noting standard of plain error review); *see also State v. Jaynes*, 342 N.C. 249, 281, 464 S.E.2d 448, 468 (1995), *cert. denied*, *Jaynes v. North Carolina*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996) (no prejudice in opening statement that defendant "[o]f course . . . has come here and pled not guilty, denies this offense, and by that plea says that he doesn't know anything about these charges or offenses and didn't have anything to do with it."); *State v. Paige*, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (permissible for counsel in opening statement to state that the

defendant "would rely on the presumption of innocence."). We overrule this assignment of error.

E. Short-form indictment

[5] Finally, defendant argues that the trial court erred in failing to dismiss the first-degree sexual offense indictment because the short-form indictment used violated defendant's Sixth Amendment rights and his right to due process. Defendant failed to object to the form of the indictment at trial. However, where an indictment is alleged to be invalid on its face, depriving the trial court of its jurisdiction, a challenge may be made at any time. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000), *cert. denied*, *Wallace v. North Carolina*, — U.S. —, 148 L. Ed. 2d 498, *reh'g denied*, — U.S. —, 148 L. Ed. 2d 784 (2001).

Defendant argues that the sexual offense short-form indictment was constitutionally insufficient in that it failed to allege the elements that distinguish a first-degree sexual offense from a second-degree sexual offense. An identical argument was recently rejected by our Supreme Court. *See Wallace* at 505, 528 S.E.2d at 342. The short-form indictment used in *Wallace* contained the exact language as defendant's indictment here; specifically, that on or about the date alleged, defendant "did unlawfully, wilfully and feloniously with force and arms engage in a sexual act with [victim's name], by force and against the victims will." *Id.* at 505, 528 S.E.2d at 341-42. Our Supreme Court held that the indictment complied with the statute authorizing short-form indictments for a sexual offense, and that such indictments "have been held to comport with the requirements of the North Carolina and United States Constitutions." *Id.* at 505, 528 S.E.2d at 342 (citing *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984); *State v. Lowe*, 295 N.C. 596, 604, 247 S.E.2d 878, 883-84 (1978)). This assignment of error is overruled.

For the reasons stated, we hold that defendant's kidnapping conviction in 99 CRS 109538 must be reversed. The judgment is vacated and remanded for re-sentencing. In all other respects defendant received a fair trial free from prejudicial error. As to the remaining judgments, we find no error.

No error in part; reversed in part; judgment vacated in 99 CRS 109538; remanded for re-sentencing.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. SONJA ALETHEA STEPHENSON

No. COA00-512

(Filed 3 July 2001)

1. Robbery— armed—taking by violence or fear—sufficiency of evidence

There was sufficient evidence to support an armed robbery conviction, which underlay a first-degree murder conviction, where defendant contended that there was no evidence that the taking was by violence or putting in fear because the taking was complete by the time the altercation occurred. Taking the evidence in the light most favorable to the State, defendant resorted to violence before she left the victim's home in order to retain the money she had taken from the victim's dresser, and the taking and violence were thus part of one continuing transaction.

2. Evidence— other offense—drug use—not prejudicial

There was no plain error in a prosecution for robbery and first-degree murder in the admission of evidence that defendant had bought and used illegal drugs where the evidence was properly used to demonstrate motive and there was no reasonable possibility of a different outcome if the jury had not known of the drug use. Defendant's version of events was incredible and would not have been more believable in the absence of this evidence.

3. Evidence— hearsay—deceased victim—catchall exception

The trial court did not err in a prosecution for robbery and first-degree murder by admitting hearsay testimony regarding statements made by the victim before her death that defendant had stolen $200 from her under the catchall exception of N.C.G.S. § 8C-1, Rule 804(b)(5) where the court made numerous findings to the effect that the victim and the witness were extremely close and that the witness was the only person in the community who looked after the victim, whom the victim trusted, and in whom she confided.

4. Evidence— murder victim—irrelevant evidence about victim—not prejudicial

The trial court did not err in a prosecution for robbery and first-degree murder by admitting evidence that the victim had not been able to receive her Christmas gift basket from church, a portrait photograph of the victim taken before she died, and twelve items of clothing where there was convincing evidence of

defendant's guilt and no reasonable possibility that the outcome was changed.

5. Confessions and Incriminating Statements— Miranda warnings—lapse of time until questioning

The trial court did not err in a prosecution for robbery and first-degree murder by denying defendant's motion to suppress her statements because she was not properly advised of her constitutional rights where, assuming that she was in custody and that Miranda warnings were required, warnings given at 6:30 p.m. were still in effect at the time of defendant's questioning 30 to 45 minutes later and at the time of her inculpatory oral statement one and a half hours later.

6. Confessions and Incriminating Statements— promises and coercive environment—statement not induced

Statements given by the defendant in a prosecution for first-degree murder and robbery were not induced by promises and a coercive environment where the officers were merely speaking in generalities and asking defendant to tell the truth, and there was evidence to support the finding that officers had made no promises of leniency.

7. Confessions and Incriminating Statements— promises or threats—statements about defendant's child

Statements by officers to a robbery and murder defendant regarding her child did not amount to promises or threats regarding defendant's child where the detective told her that he had seen defendant's closeness with her child and that the child deserved a better life.

8. Confessions and Incriminating Statements— environment—not coercive

A robbery and first-degree murder defendant was not questioned in a coercive environment where defendant was not physically or mentally impaired and showed a willingness to talk to the officers; she never asked for a lawyer, asked to go home, or requested to remain silent; she was never handcuffed, physically restrained or threatened, and the officers were in plain clothes; she was told that she was free to leave and that the interview was to be entirely voluntary; the officers did not accuse her of lying and did not yell at her or show anger; and defendant's requests to smoke and use the telephone were allowed.

9. Homicide— first-degree murder—short-form indictment— no error

The short-form murder indictment has been approved by the North Carolina Supreme Court.

Appeal by defendant from judgment entered 30 April 1999 by Judge Donald Jacobs in Northampton County Superior Court. Heard in the Court of Appeals 18 April 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for the State.

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

HUDSON, Judge.

Defendant appeals her conviction of common law burglary and first degree murder. We find no reversible error in the proceedings below.

The evidence presented at trial tended to show the following: in the fall of 1996, the 30-year old defendant went regularly to the home of 84-year old Mildred Carter (Carter). She knew where Carter kept her money and when Carter's monthly checks arrived, and she told her friend Sharon Turner that she was "getting" money from Carter. She told Turner, "I ought to rob Ms. Mildred, hit that bitch in the head."

Defendant indicated in a statement to police that, on 10 December 1996, she went to Carter's home to pay back some money she owed her. Defendant asked to borrow more money, but Carter said no. Defendant then went to use the phone in Carter's bedroom, opened her dresser drawer when Carter wasn't looking, and removed $10.00. Carter "caught" defendant taking the money and demanded it back. She allegedly grabbed defendant's coat sleeve and pushed her, and defendant pushed her back. Defendant maintained that Carter then hit a closet door and grabbed some plastic bags as she fell to the floor. The bags purportedly "caught on [Carter's] face" and she struggled to remove them. Defendant claimed she began putting more bags on Carter's face, and that Carter started wheezing. It appeared to defendant that Carter had gotten part of a bag in her mouth, and Carter asked defendant to help her, but defendant "was scared and couldn't move." "I just watched her choke herself . . . from the bags being over her face that she just couldn't get off alone." Defendant

opined that Carter essentially "killed herself from fighting herself with the plastic bags."

On 11 December, law enforcement officers discovered Carter's body lying at the front door inside her home. Carter had been dead for a number of hours, and her body was fully clothed and lying face up with a brown plastic grocery bag pressed tightly around her neck. Newspapers and five or six plastic grocery bags were in disarray around the immediate area of her body. There was no evidence of a struggle anywhere else in the home. The autopsy showed Carter had eight broken ribs and a depression in the skin around most of her neck. The cause of death was a combination of ligature strangulation (strangulation with a device pulled around the neck) and smothering.

Defendant was subsequently indicted for armed robbery and murder. The jury found her guilty of common law robbery and first degree murder under the theory of felony murder, with robbery as the underlying felony. The jury was unable to reach a unanimous verdict with regard to awarding defendant the death penalty. The trial court arrested judgment on the robbery conviction and sentenced defendant to life in prison without parole. Defendant appealed to this Court.

[1] Defendant first argues that her first degree murder conviction must be vacated, because there is insufficient evidence she committed common law robbery, the felony which underlies her first degree murder conviction. Common law robbery is defined as the nonconsensual taking of money or personal property from another by means of violence or putting in fear. *See State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The violence or putting in fear must precede or be concomitant with the taking in order for the crime of robbery to be committed. *See State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986).

Defendant in this case contends there was no evidence any taking of property was done "by violence or putting in fear." She claims the taking of the money from Carter's dresser was complete by the time she and Carter had a physical altercation. A similar argument was made by the defendant in *State v. Sumpter*, who asserted the evidence showed he had broken into an unoccupied house and had already taken property when the victim unexpectedly came home and he shot her. The Supreme Court held: "[f]rom this evidence the jury

rationally could have found beyond reasonable doubt that defendant used violence before he left the victim's premises with the stolen property, and, therefore, before the taking was over." 318 N.C. at 112, 347 S.E.2d at 402. Thus, the taking and the violence were part of "one continuing transaction" and supported the charge of robbery. *Id.*

In the present case, the evidence taken in the light most favorable to the State showed that defendant resorted to violence before she left Carter's home in order to retain the money she had taken from Carter's dresser. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (in determining sufficiency of evidence to support verdict, evidence must be taken in light most favorable to the State). This evidence is sufficient to prove defendant took money from Carter by violence or putting her in fear, and therefore supports the charge of common law robbery.

[2] Defendant next contends the trial court erroneously admitted evidence that she had bought and used illegal drugs. State's witness Wendell Gatling (Gatling) testified without objection that, in early December 1996, defendant asked him for a ride to Norfolk, bought $60.00 worth of cocaine there, and smoked it. He further testified without objection that on 11 December 1996, the day after Carter died, defendant asked him for a ride to Norfolk to buy cocaine, bought and smoked cocaine on the way to Norfolk, unsuccessfully tried to buy more cocaine in Norfolk, and asked Gatling if he knew where to buy more cocaine. Over defendant's objection, Gatling read his prior statement to police containing this evidence to the jury, and the statement itself was admitted as evidence for corroborative purposes. Also over defendant's objection, Investigator Mason read a statement to the jury by defendant in which she admitted unsuccessfully trying to buy cocaine in Norfolk on December 11th. Finally, defendant complains that the State, with no objection by defendant, referred to defendant's buying and using cocaine a number of times during closing argument.

Defendant claims the above evidence was inadmissible under N.C. R. Evid. 401 because it was irrelevant in proving the crimes charged. Defendant also contends its admission violated N.C. R. Evid. 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Defendant argues that this evidence convinced the jury she was a person of bad character who must have committed the charged offenses.

Evidence of other wrongs, however, "may be admissible for other purposes, such as proof of motive." N.C. R. Evid. 404(b). In the present case, we believe evidence of defendant's drug use was properly used to demonstrate that she had a motive to rob Carter. *See State v. Powell*, 340 N.C. 674, 690, 459 S.E.2d 219, 226-27 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996) (evidence of defendant's cocaine habit relevant to show motive to commit robbery after his government assistance checks were terminated); *State v. Stevenson*, 136 N.C. App. 235, 241, 523 S.E.2d 734, 737 (1999), *disc. review denied*, 351 N.C. 368, 543 S.E.2d 144 (2000) (evidence that defendant went to place known for drug dealing immediately after robbery relevant to show motive); *State v. Smith*, 96 N.C. App. 235, 240, 385 S.E.2d 349, 351 (1989), *disc. review denied*, 326 N.C. 267, 389 S.E.2d 119 (1990) (defendant's possession of cocaine tended to establish motive for robbery). In this case, the evidence of defendant's drug use was limited to two instances in December 1996, clearly within the time period she was "getting" money from Carter. The second day about which Gatling testified, December 11th, was the day after Carter was killed. Evidence of defendant's desire and attempt to buy drugs in December 1996 provides a potential explanation as to why she killed Carter in order to retain the $10 she had taken.

We note that defendant did not object to the majority of the instances in which the State introduced evidence of defendant's drug use. As such, defendant is limited to arguing that the trial court committed "plain error" in allowing such evidence. *See* N.C.R. App. P. 10(c)(4). "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Gardner*, 315 N.C. 444, 450, 340 S.E.2d 701, 706 (1986) (citations omitted). As for the evidence to which defendant properly objected, in order to reverse the trial court, we must believe that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1999).

Assuming *arguendo* that the evidence of defendant's drug use was improperly admitted, we cannot say the trial court committed "plain error," or even prejudicial error under G.S. § 15A-1443. We do not believe there is a reasonable possibility the trial would have had a different outcome if the jury had not known of defendant's drug use. Defendant admitted that she took money from Carter, then

engaged in a physical altercation with Carter, put bags on her face, and watched her die. Her assertion that Carter killed herself fighting with the bags is incredible and would not have become more believable in the absence of this evidence. The autopsy showed Carter was killed in part by ligature strangulation, and this evidence created a strong inference that defendant strangled her to death with a grocery bag.

[3] Defendant next contends the trial court erroneously admitted testimony by Leroy Long (Long) regarding statements made by Carter before her death under N.C. R. Evid. 804(b)(5) without making proper findings. The State filed a pre-trial notice of intent to present Long's hearsay evidence at trial under Rule 804(b)(5), and the court held a hearing on the matter. At the hearing, Long testified that in the several weeks before her death Carter told him: 1) "[Defendant] took $200 from [me];" 2) "While [defendant] was making a telephone call, that's when she got that $200;" 3) "I know who got [my money] because [defendant is] the only one that's been here and been in there;" 4) "[Defendant has] got every nickel I've got in here and I don't have money to pay my bills;" and 5) "I ain't got no money because [defendant has] done been in here and got my money." In an oral order later reduced to writing, the trial court admitted this testimony into evidence over defendant's objection. Also over defendant's objection, the court instructed the jury it could consider Long's testimony to show that defendant had "a plan, scheme, system, or design involving the crime charged in this case."

Under Rule 804, if a witness is unavailable to testify at trial, for example, due to death, the witness's statement may be admitted under certain exceptions to the rule excluding hearsay. Under Rule 804(b)(5), a statement not covered under other specifically enumerated exceptions is admissible if it has

> equivalent circumstantial guarantees of trustworthiness [and] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Defendant argues the trial court failed to make findings of fact and conclusions of law that Long's testimony was "more probative on

the point for which it [was] offered than any other evidence which the proponent [could have] procure[d] through reasonable efforts." Defendant's argument is without merit.

The trial court made numerous findings of fact to the effect that Long and Carter were extremely close and that he was the only person in the community who looked after her, whom she trusted, and in whom she confided about financial and personal matters. Carter was clearly the person in the best position to know that defendant had stolen $200 from her, and the court's findings demonstrate that Long was the likeliest person with whom Carter would have shared this information.

The trial court made a conclusion of law that Long's hearsay testimony was "more probative than any other evidence which the State may present because the victim, Mildred Carter, is unavailable due to her death." Defendant is correct that Carter's unavailability due to her death is a prerequisite for admission of the evidence under Rule 804(b)(5), and is not an explanation of why Long's testimony was more probative on the point for which it was offered than any other evidence the State could reasonably find. However, the trial court's extensive findings of fact support its conclusion that Long's testimony did meet the requirements of Rule 804(b)(5)(B).

As for the trial court's instruction to the jury that it could use Long's testimony as proof that defendant had a plan or scheme to rob Carter, defendant simply argues that it was improper due to the inadmissibility of Long's statement under Rule 804(b)(5). Again, the trial court made proper findings as to the admissibility of Long's statement. This assignment of error is overruled.

[4] Next, defendant asserts the trial court erroneously admitted certain irrelevant evidence which had the effect of inflaming the passions of the jury to convict her. First, Mary Pittman testified that, on 11 December 1996, she attempted to deliver a Christmas gift basket to Carter's house but got no answer. Over defendant's objection, Pittman testified that the basket was from Carter's church and affirmed that Carter was never able to get her "little goodie Christmas basket" because she was dead.

Second, Pittman, Leroy Long, and Sharon Turner testified that a portrait photograph of Carter taken before she died looked like Carter in life; over defendant's objection, the trial court admitted the picture into evidence. This picture was later passed to the jury.

Third, over defendant's objection, Detective Barfield identified and the court admitted into evidence twelve items of clothing he retrieved at Carter's autopsy and from her home, including the gown, shorts, shoes, underpants, panties, bra, slip, stockings, girdle, hat, and wig she appeared to have been wearing at the time she was killed, and a loose button found under her body. The jury was at one point allowed to view and touch the clothing while wearing gloves.

N.C. R. Evid. 401 states: " 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The photograph of Carter was relevant in that it allowed the State to contrast Carter's normal, well-kept appearance with her appearance when she was found dead in her home. This contrast was evidence that there was a struggle before she died. Furthermore, certain items of Carter's clothing had dirt and blood on them and thus were relevant as evidence of a struggle and of her injuries.

We agree that Pittman's statement regarding Carter's inability to get her Christmas basket was irrelevant to the case, as were arguably certain items of Carter's clothing which were not stained, such as her underclothing. However, we believe there is no reasonable possibility that admission of Pittman's statement and Carter's clothing changed the outcome of this case. *See* G.S. § 15A-1443(a). As discussed above, defendant's explanation of Carter's death defies credibility; there was convincing evidence that defendant robbed and killed Carter. Any error by the trial court in admitting the above evidence was harmless. Furthermore, defendant did not object to the jury's personal viewing of Carter's picture and of her clothes, and we do not believe the trial court's allowing this contact with the evidence amounted to plain error.

[5] Defendant next argues that the trial court erred in denying her motion to suppress oral and written statements she gave to the police on 14 December 1996, in that she was not properly advised of her constitutional rights beforehand and that the statements were given involuntarily.

In its order on defendant's motion to suppress these statements, the trial court found the following facts: On 13 December 1996, officers spoke with defendant on three occasions. She gave statements on two of these occasions, which statements are not the subject of the motion to suppress.

On the afternoon of 14 December 1996, Detectives Barfield and Skinner interviewed Wendell Gatling, who gave a statement which conflicted with those of defendant. The officers telephoned Investigator Mason and asked that he seek defendant's further cooperation in coming to the sheriff's office for another interview. Mason went to defendant's house in plain clothes, asked if she would go to the sheriff's department to answer more questions, and, when she said yes, returned to his unmarked car to wait for her. Defendant sat in the front seat of the police car on the way to the station.

At the station, she was taken into an interview room and given the Miranda warnings at approximately 6:30 p.m. Defendant indicated she understood each of the constitutional rights read to her and signed a form waiving these rights. Mason did not ask her any questions, but explained that the interview would not begin until Barfield and Skinner arrived in a few minutes. Defendant indicated her willingness to wait for their arrival and thereafter sat in the interview room unattended. Approximately 30 to 45 minutes later, Barfield and Skinner arrived. Barfield and Mason conferred outside the interview room in close proximity to defendant, where Mason advised Barfield he had warned defendant of her rights and that she had waived them. Barfield entered the room and advised her that he wanted to talk with her further, but that she was not under arrest and that she was free to leave. Barfield and Skinner, also present, were unarmed, in plain clothes, and without handcuffs or symbols of authority.

After some discussion with the officers, defendant requested to smoke and use the telephone, both of which were allowed. She went across the hall to use the telephone unattended. She talked for approximately three to five minutes to her mother, then returned to the room and said, "I'll tell you what happened." She gave an inculpatory verbal statement, and when she was finished, the officers asked her to write it down. She was then advised of her Miranda rights, waived them, and wrote the same statement she had orally given. Finally, she was arrested and booked.

The trial court's findings of fact resulting from the *voir dire* on defendant's motion to suppress are binding if they are supported by any competent evidence in the record. *See State v. Leak*, 90 N.C. App. 351, 354, 368 S.E.2d 430, 432 (1988). We have thoroughly reviewed the record and determined the court's findings of fact above are so supported.

Defendant first contends that her oral statement to police on 14 December 1996 is inadmissible because she was in custody at the time of the statement and was not warned of her constitutional rights before she gave it. *See State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E.2d 857, 859 (1985) (person "in custody" of police must be informed of rights before interrogation begins). The trial court found that defendant was informed of her rights at 6:30 p.m. and was questioned by police approximately 30 or 45 minutes later. Defendant contends that the 6:30 p.m. Miranda warnings had grown stale by the time she was questioned by police and gave an inculpatory statement at approximately 8:00 p.m.

Whether the Miranda warnings were stale such that "there is a substantial possibility [defendant] was unaware of [her] constitutional rights at the time of the subsequent interrogation" is to be determined by the totality of the circumstances. *State v. McZorn*, 288 N.C. 417, 434, 219 S.E.2d 201, 212 (1975), *vacated in part*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). Our Supreme Court has set forth several factors to consider in determining whether earlier Miranda warnings remained in effect during subsequent questioning:

> (1) the length of time between the giving of the first warnings and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; (5) the apparent intellectual and emotional state of the suspect.

Id. (citations omitted).

Assuming *arguendo* that defendant was in police custody on December 14th and that therefore Miranda warnings were required, an analysis of the above factors leads us to a determination that the 6:30 p.m. warnings were still in effect at the time of defendant's questioning 30 to 45 minutes later and at the time of her inculpatory oral statement one and a half hours later. First, based on prior case law, we do not believe an overly long amount of time passed between the giving of the Miranda warnings in this case and defendant's questioning and statement. *See State v. Mitchell*, 353 N.C. 309, 328, 543 S.E.2d 830, 842 (2001) (admitting a confession which occurred six and a half hours after warnings); *State v. Westmoreland*, 314 N.C. 442, 447, 334 S.E.2d 223, 226 (1985) (second interrogation within two and a half

hours of initial warnings; warning not stale); *State v. Small*, 293 N.C. 646, 655, 239 S.E.2d 429, 436 (1977) (thirty minute lapse of time between initial questioning and subsequent interrogation did not render warnings stale).

Furthermore, defendant was given the Miranda warnings and interrogated in the same room. Although Officer Mason gave defendant the warnings and Officers Barfield and Skinner questioned her, Mason explicitly told defendant that the other officers, not he, were going to question her. She expressed a willingness to wait for their arrival and was thereafter left alone in the room to wait for them. There were no intervening events between the warning and their arrival to dilute the message of the Miranda warnings. However, defendant's December 14th statement did differ from her earlier statements and did inculpate her. This factor weighs against finding the Miranda warnings to be valid.

Regarding defendant's intellectual and emotional state, the court found as fact that she was a thirty year-old woman with a twelfth grade education. She was not under the influence of drugs or alcohol at the time of her statement; rather, she was alert and coherent and her attitude toward the officers was generally calm.

Balancing the above factors, we agree with the finding of the trial court that the 6:30 p.m. Miranda warnings were not so remote in time as to be stale at the point of defendant's questioning and statement shortly thereafter. In other words, we do not believe there is a substantial possibility that defendant was unaware of her constitutional rights at the time she gave her December 14th oral statement. As for defendant's written statement, given immediately after the oral statement, defendant was advised of her constitutional rights before making it.

[6] Regardless of her awareness of her Miranda rights, defendant contends that her statements were induced by promises made by the officers and an overall coercive environment. In determining whether a statement was given voluntarily, the court is to consider the totality of the circumstances. *See State v. Smith*, 328 N.C. 99, 114, 400 S.E.2d 712, 720 (1991).

Defendant first points to several statements made by Detectives Barfield and Skinner during her questioning on December 14th as being coercive. Specifically, Barfield told her that in his experience, "a lie would hurt her much more than the truth ever would."

He also said that if she had to go to court, she "could tell the court about her drug problem, or anything else she wanted to tell." Detective Skinner told her that "a mistake had been made and it was time to correct it."

A confession is not admissible when it is induced by "threat, coercion, hope, or promise of reward." *State v. Small*, 293 N.C. 646, 652, 239 S.E.2d 429, 434 (1977). However, it is not coercive for officers to ask an accused to tell the truth if they hold out no hope of a lighter punishment in exchange for the accused's inculpatory statement. *See State v. Fox*, 274 N.C. 277, 292, 163 S.E.2d 492, 503 (1968). In *Small*, the Supreme Court held that an officer's telling a defendant that he could not "buy" one of the defendant's statements and that the defendant should tell the truth did not amount to coercion. 293 N.C. at 653, 239 S.E.2d at 435. Likewise, in *State v. Dishman*, 249 N.C. 759, 762, 107 S.E.2d 750, 752 (1959), the Supreme Court did not object to an officer's message that "[he] thought it would be better if [the defendant] would go ahead and tell [them] what had happened."

In this case, the officers were merely speaking in generalities and asking defendant to tell the truth. The trial court found as fact that the officers made no promises of leniency in exchange for her giving a statement, and there is evidence in the record to support this finding.

Detective Barfield's statement that she could tell the court about her drug habit does imply that drug use is a relevant factor the court might consider in her favor in determining her culpability. However, the officers did not promise defendant that the judge would show her leniency on this basis. In fact, the trial court did submit defendant's cocaine use as a mitigating factor in her sentencing phase, and it was the only mitigating factor the jury found to apply.

[7] Defendant also objects to certain statements the officers made about her child. When Detective Skinner visited her home on the night of December 13th, he told her that her son was well-behaved. On December 14th, during defendant's questioning, he told her he "saw the closeness that she had with her child the night before." Also on the 14th, Detective Barfield told defendant her child deserved a better life than he was having at that time. Defendant contends the officers effectively told her that her son's life would be better if she cooperated and gave a statement. We do not believe these statements by the officers amounted to promises or threats regarding defendant's child.

[8] Defendant argues finally that there was an overall coercive environment. The trial court did not find this to be the case. Defendant was not physically or mentally impaired, and she showed a willingness to talk to the officers. She never asked for a lawyer, asked to go home, or requested to remain silent. Defendant was never handcuffed, physically restrained or threatened, and the officers were in plain clothes. Detective Barfield told her she was free to leave and that the interview was to be entirely voluntary on her part. The officers did not accuse her of lying, and did not yell at her or show anger. Defendant requested to smoke and to use the telephone, both of which were allowed. These findings are supported by evidence in the record. In considering the totality of the circumstances, defendant was not questioned in a coercive environment and her statements will not be considered involuntary.

[9] Defendant finally argues that her first degree murder conviction must be vacated because the "short-form" indictment returned by the grand jury did not allege that the murder was committed during the perpetration of another felony. Defendant recognizes that the North Carolina Supreme Court approved the use of such "short-form" indictments 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). We are not at liberty to revisit this issue. *See Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993) (Court of Appeals bound by decisions of the Supreme Court).

No error.

Judges WYNN and TIMMONS-GOODSON concur.

SAMMIE E. WILLIAMS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF COASTAL MANAGEMENT, AND COASTAL RESOURCES COMMISSION, RESPONDENTS

No. COA00-677

(Filed 3 July 2001)

1. Environmental Law— wetlands—variance from CAMA—unnecessary hardship

The conclusion of Coastal Resources Commission that the denial of a landowner's application for a variance from the Coastal Area Management Act (CAMA) to permit construction of a fast freezer and storage unit building on wetlands property would not cause unnecessary hardship was not supported by substantial evidence and the Commission's findings because (1) the fact that the landowner owns other nearby property on which the building could be constructed is irrelevant and insufficient to support this conclusion; (2) evidence that the landowner has offered to make changes in his plans is not substantial evidence that a strict application of CAMA will not result in unnecessary hardship when the record does not indicate that the Commission considered the alternatives suggested by the landowner; and (3) the Commission failed to find facts as to the impact of strict application of CAMA on the landowner's ability to make reasonable use of his property. N.C.G.S. § 113A-120.1.

2. Environmental Law— wetlands—variance from CAMA—conditions peculiar to property

The conclusion of the Coastal Resources Commission in denying a landowner's application for a variance from the Coastal Area Management Act to permit construction of a building on wetlands property that the property was not affected by "conditions peculiar" to it alone was not supported by substantial evidence in the record because (1) evidence that a septic tank and two residences had been removed from the wetlands does not show that any conditions peculiar to this land have dissipated due to the long absence of residences on the land when the evidence was unclear as to how long the residences have been removed and the period of time could be less than two years prior to the filing of the petition for a variance; and (2) there is no mention in the stipulated facts that this particular parcel of property is similar to other nearby properties or that wetlands regularly reemerge when structures are removed.

3. Environmental Law— wetlands—variance from CAMA—reemergence of wetlands—anticipation by CRC

The conclusion of the Coastal Resources Commission (CRC) in denying a landowner's application for a variance from the Coastal Area Management Act to permit construction of a building on wetlands property that the reemergence of wetlands over time was anticipated by the CRC at the time wetlands regulations were adopted was unsupported by substantial evidence in the record. Rather, 15A N.C.A.C. 7-J.0211 clarifies that the CRC anticipated allowing landowners to rebuild nonconforming or unacceptable uses if the replacement project complied with this regulation.

4. Environmental Law— wetlands—variance from CAMA—spirit, purpose and intent of CRC rules—conclusion unsupported and unnecessary

A conclusion of the Coastal Resources Commission (CRC) in denying a landowner's application for a variance from the Coastal Area Management Act to construct a fast freezer and storage unit building on wetlands property that the proposed development was not within the spirit, purpose and intent of the CRC's rules was unsupported by substantial evidence and was unnecessary because the CRC concluded that this property did not meet the three-part test set forth in N.C.G.S. § 113A-120.1.

5. Evidence— judicial notice—location of parcel of land

The trial court did not err by taking judicial notice that the "parcel of land at issue is located in downtown Englehard," because the stipulated facts already state the property is in Englehard.

6. Environmental Law— wetlands—variance from CAMA—allowance by superior court—absence of authority

When the superior court reversed the Coastal Resources Commission's (CRC) denial of a landowner's application for a variance from the Coastal Area Management Act to permit construction of a building on wetlands property, the court lacked authority to allow the variance because it is for the CRC to consider and modify applications for permits and variances.

Appeal by respondents from order entered 16 February 2000 by Judge William C. Griffin, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 20 April 2001.

Pritchett & Burch, P.L.L.C., by Lars P. Simonsen, for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Longest, Jr. and Assistant Attorney General Mary Penny Thompson, for respondent-appellants.

EAGLES, Chief Judge.

Appellants appeal from the Superior Court's order reversing the Coastal Resources Commission's, (hereinafter "CRC"), decision in an expedited hearing process. The CRC's order denied appellee's request for a variance. The Superior Court's order found that based on the whole record, there was not substantial evidence to support the CRC's conclusions of law. After careful review, we affirm the reversal. In its order, the Superior Court also granted the appellee a variance. Because we believe granting a variance here is beyond the purview of the Superior Court, we reverse and remand to the Superior Court for further review.

Appellee applied for a permit to build a "fast freezer" and storage unit building on his property in Englehard, Hyde County, North Carolina. The property is located at the intersection of S.R. 1101 and S.R. 1102 approximately 250 feet from the shoreline of Far Creek. The property is bordered on the east side by a manmade canal, Jarvis Ditch. Currently several wetland species of vegetation exist on the property and the U.S. Army Corps of Engineers designates the entire property as Section 404 wetlands pursuant to their authority under the Clean Water Act. 33 U.S.C. § 1344. Section 404 gives jurisdiction to the U.S. Army Corps of Engineers to create lines "essential to the preservation and protection of harbors" and beyond those lines "no piers, wharves, bulkheads, or other works shall be extended or deposits made," except under such regulations as may be prescribed from time to time . . . ." 33 U.S.C. § 404.

This property "averages 1.5 feet above mean sea level." In order to build the fast freezer and storage unit building on the property, appellee requested permission to fill in approximately one-half acre of his property. Appellee further proposed to build a 1.5 foot high, 294 foot long bulkhead along the perimeter of the property. From at least 1954 until at least 1978 two residences and other structures existed on the property. Those structures were removed at some time before 1995.

Appellee's application for a permit was denied by the North Carolina Department of Environment and Natural Resources (hereinafter "NCDENR") on 17 April 1997. Appellee filed a petition for a variance before the CRC 22 July 1998. Appellee's variance request was heard utilizing an expedited process on 29 January 1999. The variance hearing was conducted using oral arguments and stipulated facts. On 29 February 1999 the CRC filed an order concluding in part:

> 4. Application of 15A NCAC 7H.0208(a) and the Dredge and Fill Act, N.C.G.S. § 113-229, will not result in practical difficulties or unnecessary hardship to Petitioner in that alternatives for siting and design of the proposed facility exist that would reduce or eliminate the wetlands impacts of the project.
>
> 5. There is no hardship caused by conditions peculiar to Petitioners' property in that wetlands occur throughout the coastal area and reemergence of wetland vegetation once structures have been removed from a [sic] low lying areas adjacent to surface waters is not unusual.
>
> 6. At the time 15A NCAC 7H.0205 and .0208 were adopted, the Commission reasonably anticipated that the actual boundaries of a coastal wetland could change over time as wetland vegetation migrated landward or reestablished in a disturbed area.
>
> 7. The proposed development is not within the spirit, purpose and intent of the Commission's rules and that the amount of wetland loss, and loss of its resource values, can be reduced or eliminated by redesigning or relocating the facility.

Appellee petitioned the Superior Court for judicial review of the CRC's order. The Superior Court, held that the "agency's conclusion[s] of law and decision are unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted and are arbitrary or capricious . . . ."

Appellants argue that the Superior Court failed to use the proper standard of review and substituted its judgment for that of the CRC. Judicial review of a final agency decision is conducted in Superior Court pursuant to the Administrative Procedure Act. G.S. 150B-43. The standard of review is as follows:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may

also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

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

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

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

(6) Arbitrary or capricious.

G.S. 150B-51(b) (1987); *Powell v. N.C. Dept. of Transportation*, 347 N.C. 614, 622, 499 S.E.2d 180, 184-85 (1998).

The proper standard of review by the Superior Court depends upon the particular issues presented by the appeal. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Brooks, Commr. of Labor v. McWhirter Grading Co.*, 303 N.C. 573, 580, 281 S.E.2d 24, 28 (1981). When the issue on appeal is whether the agency's decision was supported by substantial evidence or whether the agency's decision was arbitrary and capricious, the reviewing court must apply the "whole record" test. *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392; *Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); *Powell*, 347 N.C. at 623, 499 S.E.2d at 185. A "whole record" review "does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views," but rather requires the court to determine whether there was substantial evidence to support the conclusions by taking all the evidence, both supporting and conflicting, into account. *Powell*, 347 N.C. at 623, 499 S.E.2d at 185; *Associated Mechanical Contractors*, 342 N.C. at 832, 467 S.E.2d at 401. Substantial evidence is "more than a scintilla" and 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); *Norman v. Cameron*, 127 N.C. App. 44, 48, 488 S.E.2d 297, 300 (1997).

In this case, appellee asserted that the stipulated facts were unsupported by substantial evidence in view of the entire record, and thus do not support the conclusions of law. The Superior Court "should have, therefore, reviewed petitioner's alleged errors *de novo* and in accordance with the 'whole record' test." *Hedgpeth v. North Carolina Division of Services for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169, 176 (2001). In its order the Superior Court stated the correct standard of review. Now, we will apply the whole record test to the CRC decision.

I. The CRC's Conclusions of Law

The General Assembly provided the circumstances under which a landowner whose "major development" permit has been denied, may obtain a variance:

> Any person may petition the Commission for a variance granting permission to use his land in a manner otherwise prohibited by rules, standards, or limitations prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. When it finds that (i) practical difficulties or unnecessary hardships would result from strict application of the guidelines, rules, standards, or other restrictions applicable to the property, (ii) such difficulties or hardships result from conditions which are peculiar to the property involved, (iii) such conditions could not reasonably have been anticipated when the applicable guidelines, rules, standards, or restrictions were adopted or amended, the Commission may vary or modify the application of the restrictions to the property so that the spirit, purpose, and intent of the restrictions are preserved, public safety and welfare secured, and substantial justice preserved. In granting a variance, the Commission may impose reasonable and appropriate conditions and safeguards upon any permit it issues.

G.S. 113A-120.1 (1989). If the landowner cannot meet each of the three enumerated requirements, the variance must not be granted. *Id.* If the landowner meets all three requirements, the commission may then grant, vary or modify the variance such that the "spirit, purpose, and intent of the restrictions are preserved . . . ." *Id.*

The appellee argues that the Superior Court erred when reversing the CRC because there was substantial evidence in the record to support each of the CRC's conclusions of law. Because we, like the Superior Court, apply the whole record test in review, it is necessary for us to analyze each of the contested CRC conclusions of law.

A. Unnecessary Hardship

[1] The CRC concluded that the first variance element was not met, stating:

> 4. Application of 15A NCAC 7H.0208(a) and the Dredge and Fill Act, N.C.G.S. § 113-229, will not result in practical difficulties or unnecessary hardship to Petitioner in that alternatives for siting and design of the proposed facility exist that would reduce or eliminate the wetlands impacts of the project.

Appellants argue that conclusion of law #4 is substantially supported by certain stipulated facts: appellee owns other property in the area, appellee submitted possible revisions of the plan and appellee is willing to re-design the facility. Applying the whole record test, we disagree and hold that these stipulated facts do not support conclusion of law #4. First, appellants argue that since this landowner owns other land nearby, then there is no unnecessary hardship occurring since the landowner has other available development sites. Whether strict application of the Coastal Area Management Act, (hereinafter "CAMA"), places an "unnecessary hardship" on a parcel of property, depends upon the unique nature of the property; not the landowner. If "hardship" stemmed from the situation of the landowner, then those persons owning less land would have an easier time showing unnecessary hardship than those owning more than one parcel of land. Similarly situated persons would be treated differently, giving rise to equal protection of law issues. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 87 L. Ed. 2d 313 (1985). Accordingly we hold that whether or not the landowner owns other property is irrelevant and insufficient to support CRC's conclusion of law #4.

The other facts asserted by appellants are also insufficient to support conclusion of law #4. Appellants argue that the evidence that appellee has offered to make changes to his plans is substantial evidence that strict application of CAMA will not result in "unnecessary hardship." On this record, we cannot agree. This record is devoid of any indication that the CRC considered the alternatives suggested by the appellee. Appellants assert in their brief that appellants have accepted appellee's proposals for redesign of the site. Their assertion is based solely on the fact that appellee's conciliatory proposals appear as part of the stipulations in this record. The assertion is not persuasive.

Further, the CRC failed to find facts which address whether the appellee has been denied reasonable and significant use of his property. The Court of Appeals of Maryland in *Belvoir Farms Homeowners Assoc., Inc. v. John C. North, II*, 734 A.2d 227 (1999), in the context of zoning regulations, explained the theory of "unnecessary hardship" as whether the "restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership." Id. at 237; *Marino v. Mayor of Baltimore*, 137 A.2d 198, 202 (1957). The *Belvoir Farms* court explored in depth the various jurisdictions' definitions of "undue hardship." In Virginia, "unnecessary hardship" is statutorily defined as "effectively prohibit[s] or unreasonably restrict[s] the utilization of the property." Va. Code Ann. § 15.2-2309. The *Belvior* court noted that authorities throughout the country define "unnecessary, unreasonable, and unwarranted hardship" as the "denial of beneficial or reasonable use or the denial of all viable economic use, the unconstitutional taking standard." *Belvior*, 734 A.2d at 240. However, the *Belvior* court also noted that variances may be granted in cases where the application of zoning ordinances would **not** result in unconstitutional taking. *Id.* The *Belvior* court adopted the law of Virginia, stating "[i]t is important to note here that the purpose of a variance is to protect the landowner's rights from the unconstitutional application of zoning law." *Id.; Packer v. Hornsby*, 267 S.E.2d 140, 142 (Va. 1980). The *Belvior* court held that although the definitions were similar, the "unnecessary hardship" standard is **not** the same as an "unconstitutional taking" standard. *Belvior*, 734 A.2d at 240. The *Belvior* court further stated that it is a question of fact for the zoning commission to find whether a property owner has been denied "reasonable and significant" use of his property. *Belvior*, 734 A.2d at 240.

Our Supreme Court has held, in the context of zoning, that pecuniary loss alone is not enough to show an "unnecessary hardship" requiring a grant of a variance. *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946). In *Natrella v. Board of Zoning Appeals of Arlington County*, 345 S.E.2d 295 (Va. 1986), the Supreme Court of Virginia stated:

> The authorities generally agree that *financial loss*, standing alone, cannot establish an extraordinary or exceptional situation or hardship approaching confiscation sufficient to justify the granting of a variance of a zoning regulation, but it *is a factor or an element to be taken into consideration and should not be ignored.*

Id. at 300 (citation omitted). Since "unnecessary hardship" is the initial inquiry as to whether a variance from a zoning ordinance is appropriate, as it is for CAMA ordinances, we find these cases persuasive. We hold that to determine whether a parcel of property suffers from unnecessary hardship due to strict application of CAMA, the CRC must make findings of fact and conclusions of law as to the impact of the act on the landowner's ability to make reasonable use of his property. This Court can find no findings of fact as to this question. As there are insufficient findings of fact as to "unnecessary hardship," we hold that conclusion of law #4 is not supported by substantial evidence. G.S. 150B-51(b).

B. "Peculiarity"

[2] The CRC next concluded that this property is not affected by "conditions peculiar" to it alone, stating:

> 5.There is no hardship caused by conditions peculiar to Petitioners' property in that wetlands occur throughout the coastal area and reemergence of wetland vegetation once structures have been removed from a low lying areas adjacent to surface waters is not unusual.

Appellants argue that the Superior Court erred when it held that there was not substantial evidence of record to support CRC conclusion of law #5. Appellants assert that most of the stipulated facts support this conclusion.

Certainly, all parties agree that wetlands species exist on this property. Appellee asserted that this property is affected by conditions peculiar to it because it has a septic tank situated on it and from at least 1952 to between 1978 and 1995 there were two residences and their driveways situated upon it. Appellants argue that any conditions peculiar to this land have dissipated due to the "long absence of residences" on this property. The record is unclear as to when the residences were actually removed. When the evidence is unclear as to how long the residences have been removed and the minimum period of time could be less than two years prior to filing the petition for variance, we are reluctant to hold that this is substantial evidence that any conditions peculiar to the land have dissipated due to the "long absences of residences."

Appellants additionally argue that the stipulated facts referring to reports completed by the Division of Marine Fisheries, the Division of Water Quality, the Wildlife Resources Commission, and the National

Marine Fisheries Service are sufficient to support the conclusion that the land is not affected by conditions peculiar to it. Since those reports are not part of this record, it is impossible for this Court to review them. Further, there is no mention in the CRC's stipulated facts that this particular parcel of property is similar to other nearby properties or that wetlands regularly reemerge when structures are removed. The stipulated facts discuss the importance of wetlands. The stipulations also indicate that the commissions were concerned that the project would result in the loss of wetlands. The Clean Water Act and the Code of Federal Regulations provide that fill material should not be placed in wetlands if a practicable alternative exists. 40 C.F.R. § 230.10(a); 33 U.S.C. § 1344 *et seq.*

However, the stipulations do not mention the presence or absence of conditions peculiar to wetlands on this property. The stipulated facts do not mention the reemergence of wetlands on property when structures have been removed. Accordingly, based on a review of the whole record, there is not substantial evidence upon which to base CRC conclusion of law #5. *Powell*, 347 N.C. at 623, 499 S.E.2d at 185; G.S. 150B-51(b).

C. CRC's Anticipation

[3] The CRC further concluded that the reemergence of wetlands over time was anticipated by the CRC, stating:

> 6. At the time 15A NCAC 7H.0205 and .0208 were adopted the Commission reasonably anticipated that the actual boundaries of a coastal wetland could change over time as wetland vegetation migrated landward or reestablished in a disturbed area.

As discussed above, the record is devoid of any stipulated facts which support CRC conclusion of law #6. 15A N.C.A.C. 7H.0205 and .0208 make no mention of the migration of coastal wetlands over time. Appellant argues that since the commission designated parking lots, residences, businesses and private roads as "unacceptable," it is substantial evidence that the commission decided not to replace those items once they were removed and wetlands reemerged. When the General Assembly enacted CAMA, it created the CRC and delegated to it the power to regulate wetlands. Appellants contend that when CAMA and the ensuing administrative ordinances were passed, it was the intent of the CRC to prevent destroyed structures from being rebuilt if wetlands were in any way involved. Appellants contend that if appellee had requested a variance to re-construct resi-

dences and driveways on this property, the CRC would have not permitted the construction. Based on the language of North Carolina's Administrative Code, we disagree.

North Carolina's Administrative Code addresses those properties not in conformance with CAMA regulations at the time it was passed. 15A N.C.A.C. 7J.0211 states:

> A non-conforming structure is any structure within an AEC other than Ocean Hazard and Inlet Hazard AECs that is inconsistent with current CRC rules, and, was built prior to the effective date(s) of the rule(s) with which it is inconsistent. Replacement of such structures **shall be allowed** when all of the following criteria are met:
>
> (1) the structure will not be enlarged beyond its original dimensions;
>
> (2) the structure will serve the same or similar use;
>
> (3) there are no practical alternatives for replacing the structure to provide the same or similar benefits in compliance with current rules; and
>
> (4) the structure will be rebuilt so as to comply with current rules to the maximum extent possible.

Id. (emphasis added). Appellee here is not requesting to rebuild these residences. However, this regulation does clarify that the commission anticipated allowing property owners to rebuild non-conforming or "unacceptable" uses if the replacement project complied with 15A N.C.A.C. 7J.0211. Appellants' argument that the CRC anticipated that the boundaries of coastal wetlands could change over time and in such cases the CRC would not allow rebuilding, fails. Appellant makes no alternative argument and we can find no evidence of record suggesting that the General Assembly or the CRC anticipated the reemergence of wetlands when the statute was passed. Accordingly, there is not substantial evidence of record to support conclusion of law #6. *Powell*, 347 N.C. at 623, 499 S.E.2d at 185; G.S. 150B-51(b).

D. Spirit, Purpose and Intent of the CRC's Rules

[4] The CRC's final relevant conclusion of law (No.7) is as follows:

> 7. The proposed development is not within the spirit, purpose and intent of the Commission's rules and that the amount of wet-

> land loss, and loss of its resource values, can be reduced or eliminated by redesigning or relocating the facility.

At the outset we note that both parties seem to assert that whether the proposed development is within the spirit, purpose and intent of the Commission's rules is a fourth element under G.S. 113A-120.1. The statute indicates that when the three enumerated elements for a variance are met, the "Commission may vary or modify the application of the restrictions to the property such that the spirit, purpose and intent" of the commission's rules are preserved. *Id.* The statute further states that the "Commission may impose reasonable and appropriate conditions and safeguards upon any permit it issues." *Id.* Because the CRC concluded that this property did not meet the elements of the three part test, it was unnecessary for the CRC to make conclusion of law #7. None of the stipulated facts state that appellee's proposals for redesign of the facility, if approved and constructed, would actually reduce wetland loss. As noted above, whether this landowner may relocate the facility on his other property is an improper consideration. The only stipulated facts mentioning redesign of the facility are those regarding the appellee's proposals. The CRC has not accepted those proposals and does not indicate anywhere in this record that a redesign would (1) actually reduce wetland loss or (2) be acceptable to CRC. Based on a review of the whole record, we are unable to find substantial evidence to support this conclusion of law. G.S. 150B-51(b).

Because there is not substantial evidence of record to support the CRC's conclusions of law #'s 4, 5 and 6, we affirm the Superior Court's reversal of the CRC's order denying petitioner's request for a variance.

II. Judicial Notice

[5] Appellants next argue that the Superior Court improperly took judicial notice that the "parcel of land at issue is located in downtown Englehard." Our review of an error of law is *de novo*. Hedgpeth, 142 N.C. App. at 346, 543 S.E.2d at 174. The stipulated facts state in part:

> Mr. Sammie E. Williams (hereinafter "Petitioner") owns a tract of land (hereinafter "property") approximately one acre in size, located in Englehard, Hyde County, North Carolina, at the eastern corner of the intersection of N.C.S.R. 1102 and N.C.S.R. 1101, approximately 250 feet from the shoreline of Far Creek . . . .

It is stipulated that the property is *in* Englehard. Appellants argue that in order to present new evidence in a judicial review hearing, a party must apply to the court pursuant to G.S. 150B-49. If the court finds that the evidence is material and not cumulative, the court may remand the case. However, appellate courts may take judicial notice of facts that are not subject to reasonable dispute. Our Supreme Court took judicial notice of the typical hours of the court system in *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998). In *State v. Hughes*, 136 N.C. App. 286, 524 S.E.2d. 70, *rev'd on other grounds*, 353 N.C. 200, 539 S.E.2d 625 (2001), this Court took judicial notice of the day of the week. In *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533, *disc. rev. denied*, 353 N.C. 392, S.E.2d (2001), this Court took judicial notice of the time of day the home was broken into. That the Superior Court took notice that the property was in downtown Englehard, when it was stipulated the property was *in* Englehard, even if error—is harmless. The CRC's stipulated facts do not support CRC's conclusions of law #'s 4, 5 and 6 and the CRC was properly reversed by the Superior Court.

III. "Takings"

NCDENR also excepts to the Superior Court's conclusion of law #5:

> 5. The substantial rights of the petitioner have been prejudiced in that the Coastal Resources Commission's decision appears to deprive the petitioner of all economically beneficial or productive use of his land, without just compensation.

The Superior Court's conclusion of law #5 appears to indirectly deal with the issue of whether there was a taking of appellee's property. There is no "taking" issue in this appeal. The General Assembly has provided for an exclusive method of challenging the CRC's final decision as a taking. G.S. 113A-123(b). The appellee here has not followed the appropriate procedure to obtain a takings remedy. We note that the Superior Court's order merely indirectly alluded to a taking and did not make any award of compensation. Accordingly, we hold that this statement is mere dicta, having no effect on this proceeding or any other.

IV. Superior Court's Grant of a Variance

[6] The Superior Court not only reversed the CRC's order which denied appellee's request for a variance, but also purported to grant the variance with certain restrictions. G.S. 150B-51(b) permits a

Superior Court to affirm, reverse, remand or modify the decisions of administrative hearings. Here, the Superior Court was without power to issue a variance to the petitioner. *Waggoner v. Board of Alcoholic Control*, 7 N.C. App. 692, 173 S.E.2d 548 (1970). G.S. 113A-120.1 states that the CRC "may impose reasonable and appropriate conditions and safeguards upon any permit it issues." *Id.* "Ordinarily courts cannot either grant or deny variances." *Belvoir Farms*, 734 A.2d at 234. Thus it is for the CRC to consider and modify applications for permits and variances so that the

> spirit, purpose, and intent of the restrictions are preserved, public safety and welfare secured, and substantial justice preserved. In granting a variance, the Commission may impose reasonable and appropriate conditions and safeguards upon any permit it issues.

G.S. 113A-120.1. Accordingly, we hold that on this record, the Superior Court erred when it purported to issue a variance.

V. Conclusion

In conclusion, we hold that based on a whole record review, the CRC's conclusions of law #'s 4, 5 and 6 are not based on substantial evidence. Further, we hold that an appellate court may take judicial notice of facts which are not subject to reasonable dispute. Finally we hold that the granting of permits and variances is exclusively within the CRC's purview.

Accordingly, the decision of the Superior Court is

Affirmed in part, vacated in part and reversed and remanded in part for further proceedings not inconsistent with this opinion.

Judges McCULLOUGH and SMITH concur.

HARLAND DEAN CAMPBELL, PLAINTIFF v. CITY OF HIGH POINT, DEFENDANT

No. COA00-882

(Filed 3 July 2001)

1. **Cities and Towns— negligence—contact with electrical wire—no notice to defendant of break in insulation**

The trial court did not err by granting summary judgment for defendant city in a negligence action by a Cablevision installer who was injured in a fall after coming into contact with an electrical wire owned by defendant. Although plaintiff alleged that a tree branch had grown around the wire, breaking its insulation, plaintiff did not set forth facts establishing that defendant had actual or constructive notice of any break in the insulation of the wire.

2. **Negligence— res ipsa loquitur—contact with electrical line while on ladder**

The trial court did not err by granting summary judgment for defendant city in a negligence action by a Cablevision installer who was injured in a fall after coming into contact with an electrical wire owned by defendant where plaintiff contended that defendant was liable under res ipsa loquitur. Res ipsa loquitur does not apply because the evidence permits a reasonable inference that defendant's negligence, if any, was concurrent with that of plaintiff and his employer in that OSHA standards for working above ground and around electrical power conductors were not observed. Moreover, a person aware of a dangerous electrical wire has a duty to avoid coming into contact with it.

Judge HUNTER dissenting.

Appeal by plaintiff from judgment entered 4 April 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2001.

Skager Law Firm, by Philip R. Skager, for plaintiff.

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

TYSON, Judge.

Harland Dean Campbell ("plaintiff") appeals the trial court's entry of summary judgment in favor of the City of High Point ("defendant"). We affirm the trial court's grant of summary judgment.

Facts

Plaintiff was employed as an installer technician for Cablevision of High Point ("Cabelvision") on 16 October 1995. Plaintiff was working that day to disconnect cable television service at a residence at 1701 County Club Road in High Point, North Carolina. The residence was owned by private individuals, and was used for rental purposes. No one had occupied the residence since 2 October 1995. The owners did not disconnect the electrical power following the tenants' departure.

Plaintiff positioned a fiberglass ladder against a wire support strand attached to a telephone pole in order to disconnect cable service at the residence. Plaintiff then ascended the ladder and began to disconnect the service. As plaintiff began to disconnect the service, he felt an electrical current travel through his body. Plaintiff jumped off of the ladder to escape the current, and sustained leg and foot injuries in his fall to the ground.

Plaintiff testified that he inspected the area where he was about to work and did not see anything unusual prior to ascending the ladder. Plaintiff further testified that he did not see any broken or bare electrical wires prior to his attempt to disconnect the cable service. Plaintiff was not wearing a safety belt, insulated safety gloves, or a fall-arrest system at the time of his injury.

On 15 October 1998, plaintiff filed the present negligence action against defendant, and the individual owners of 1701 Country Club Road. Plaintiff subsequently filed a voluntary dismissal with prejudice as to the individual owners on 25 May 1999. Plaintiff proceeded against defendant, alleging that the electrical shock which caused his fall resulted from a broken or bare electrical wire owned, operated, and negligently maintained by defendant. Plaintiff alleged that a tree branch located on the property of the residence had grown around the electrical wires, causing the wires' insulation to break.

Defendant answered on 19 November 1998, denying any negligence, and alleging, in the alternative, the joint and concurrent negligence of Cablevision. Defendant presented evidence that city

employees trimmed the trees at 1701 Country Club Road less than two months prior to plaintiff's accident. Lloyd D. Shank, Jr. ("Shank"), Director of Electric Utilities for defendant, testified that defendant "regularly trims trees around electrical wires," and that defendant, through its contractor, "trimmed the trees in the Country Club Road area, including 1701 Country Club, on August 25 through 28, 1995." Shank further testified that plaintiff's accident "was the first notice to [defendant] of any problems with the electricity or the electrical wires at 1701 Country Club."

Defendant moved for summary judgment on 9 March 2000. Plaintiff filed a motion for partial summary judgment on 24 March 2000. The trial court granted defendant's motion on 4 April 2000. Plaintiff appeals.

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[1] The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. Plaintiff concedes that defendant initially insulated the wire which plaintiff alleges was defective. Plaintiff asserts that defendant breached a duty of care by "allowing the [tree] limb to grow around or otherwise damage the electrical wire." Plaintiff argues that he has presented evidence of each element of a negligence action sufficient to withstand defendant's motion for summary judgment, and to support the entry of summary judgment in plaintiff's favor. We disagree.

"It is well-established that our review of the grant of a motion for summary judgment requires the two-part analysis of whether, '(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and (2) the moving party is entitled to judgment as a matter of law.' " *Price v. City of Winston-Salem*, 141 N.C. App. 55, 58, 539 S.E.2d 304, 306 (2000), *disc. review denied*, 353 N.C. 380, — S.E.2d — (2001) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000)). " '[S]ummary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence.' " *Willis v. City of New Bern*, 137 N.C. App. 762, 764, 529 S.E.2d 691, 692 (2000) (quoting *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996)).

"Municipalities are responsible only for negligent breach of duty, which is made out by showing that (1) a defect existed, (2) an injury

was caused thereby, (3) the City officers knew, or should have known from ordinary supervision, the existence of the defect, and (4) that the character of the defect was such that injury. . . therefrom might reasonably be anticipated." *Desmond v. City of Charlotte*, 142 N.C. App. 590, 592-93, 544 S.E.2d 269, 271 (2001) (citing *McClellan v. City of Concord*, 16 N.C. App. 136, 191 S.E.2d 430 (1972)).

"[N]otice of the defect, actual or constructive, and a failure to act on the part of the municipality to remedy the situation are prerequisites to recovery in an action involving a municipality." *Bowman v. Town of Granite Falls*, 21 N.C. App. 333, 334-35, 204 S.E.2d 239, 240-41 (1974) (citing *Faw v. North Wilkesboro*, 253 N.C. 406, 117 S.E.2d 14 (1960)); *see also*, *Rice v. City of Lumberton*, 235 N.C. 227, 236, 69 S.E.2d 543, 549-50 (1952) (municipal corporation engaged in business of supplying electricity must exercise diligence to repair breaks in high tension wires where it has notice of a break, regardless of cause which produced break); *Ward v. City of Charlotte*, 48 N.C. App. 463, 467, 269 S.E.2d 663, 666, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 463 (1980) ("a municipal corporation is not an insurer of the condition of its sewerage system, and liability may only arise where the municipality has actual or constructive notice of the existence of an obstruction or defect and fails to act.").

In *Willis*, this Court held that summary judgment in favor of the defendant city was proper where the plaintiff could not "offer proof of any factor which should have given the City constructive notice of a defect in its sidewalk." *Willis*, 137 N.C. App. at 765, 529 S.E.2d at 693. The Court noted that the plaintiff "did not notice any defect in the sidewalk herself until after she had fallen." *Id.* We stated that " '[t]he happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive . . . . The existence of a condition which causes injury is not negligence per se.' " *Id.* (quoting *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960)).

In *Gower v. City of Raleigh*, 270 N.C. 149, 153 S.E.2d 857 (1967), our Supreme Court held that the plaintiff could not forecast sufficient evidence that the defendant city had actual or constructive knowledge of a defect in the street on which the plaintiff injured herself. *Id.* at 151, 153 S.E.2d at 859. The plaintiff testified that she looked down before stepping off the curb and did not observe any defect. *Id.* The Supreme Court held that the defect would not be more visible to a city inspector than to plaintiff, and that reasonable inspection of the street would not have led to discovery of the defect. *Id.* The Supreme

Court stated: "[i]f the city should have known the crack was a hazard to pedestrians, the plaintiff was negligent in stepping upon it, and thereby contributed to her own injury." *Id.* at 151-52, 153 S.E.2d at 859.

In this case, plaintiff has failed to offer proof of any factor establishing defendant's actual or constructive notice of the defect in the insulation. The evidence shows that defendant regularly trims trees surrounding electrical wires. Defendant trimmed the trees on Country Club Road, including trees on the property of 1701 Country Club Road, from 25-28 August 1995, less than two months before plaintiff's accident. Shank testified that defendant never received any complaints or notice of any problem with the electricity or electrical wires located at 1701 Country Club Road prior to plaintiff's accident. Plaintiff did not forecast any evidence that defendant was ever notified of any problem with the wires. *See Desmond*, 142 N.C. App. at 593, 544 S.E.2d at 271-72 (plaintiff presented no evidence that city received actual or constructive notice of defect in sidewalk prior to plaintiff's injury where there were "no records of complaints regarding this sidewalk since 1994, when the municipality began maintaining such records.").

Plaintiff testified in his deposition that he did "a visual inspection" around the wires prior to attempting to disconnect the cable service. He testified that he did not "notice anything unusual about any tree limbs before [he] went up on the ladder," and that he did not "notice anything unusual about any electrical wires before [he] went up on the ladder." Plaintiff also testified that there were "leaves all over the tree," such that he did not notice any bare or broken insulation or wires. Plaintiff did not present evidence to show that a reasonable inspection of the area would have led to discovery of the broken insulation. Nor did plaintiff present any evidence as to when the insulation broke or otherwise became bare. *See Ward*, 48 N.C. App. at 469, 269 S.E.2d at 667 (directed verdict in favor of defendant city proper even if city failed to inspect or clean sewer lines where there was no evidence to show that defect causing backflow "had been present for a sufficient period of time so as to place the City on constructive notice of the defects or to show that an inspection would have disclosed their presence.").

Plaintiff testified that he had no "evidence that [defendant] had any notice that there was a problem with that wire and that tree limb at any time before [his] accident." Plaintiff testified that he did not have any evidence "to support the allegations that the electrical

transmission wire had been allowed by the defendants to grow into a tree branch." Plaintiff testified that he did not have any evidence "that the defendants knew or should have known that the electrical wire had become entrapped and/or stretched in the tree limbs." He testified that he had no evidence that defendant "knew or should have known that the wire can break or become bare."

Plaintiff further testified that the only evidence he had that defendants failed to inspect the wires was simply "the very fact that [he] had this accident." This evidence is insufficient to withstand a properly supported motion for summary judgment. *See Willis*, *supra* ("[t]he happening of an injury does not raise the presumption of negligence."). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A-1, Rule 56(e) (emphasis supplied); *see also Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992) (once defendant shows plaintiff's inability to prove the notice element of negligence, burden shifts to plaintiff for a contrary showing); *Willis* at 765-66, 529 S.E.2d at 693 (quoting *Atkins v. Beasley*, 53 N.C. App. 33, 38, 279 S.E.2d 866, 870 (1981)) (non-movant " 'must set forth specific facts' " establishing genuine issue for trial; non-movant may not rely on " 'mere allegations or denials of his pleadings.' ").

Plaintiff has not set forth specific facts establishing that defendant had actual or constructive notice of any break in the wires' insulation. Plaintiff has therefore failed to forecast sufficient evidence of each element of his claim of negligence against defendant. The trial court did not err in granting summary judgment in favor of defendant. *See Nicholson v. County of Onslow*, 116 N.C. App. 439, 441, 448 S.E.2d 140, 141 (1994) ("While we have recognized that summary judgment is a drastic remedy, a defendant can prevail on a motion for summary judgment by showing that the plaintiff will not be able to prove an essential element of her claim.").

[2] We also find no merit in plaintiff's assertion that defendant is liable under the doctrine of *res ipsa loquiter*. "*Res ipsa* applies when direct proof of the cause of an injury is not available, the instrumentality involved in the accident is under the defendant's control, and the injury is of a type that does not ordinarily occur in the absence of

some negligent act or omission." *Russell v. Sam Solomon Co.*, 49 N.C. App. 126, 130-31, 274 S.E.2d 518, 520 (1980), *disc. review denied*, 301 N.C. 722, 271 S.E.2d 231 (1981) (citing *Snow v. Power Co.*, 297 N.C. 591, 256 S.E.2d 227 (1979)).

However, the doctrine " 'does not apply where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons, or that the accident might have happened as a result of one or more causes, or where the facts will permit an inference that it was due to a cause other than defendant's negligence as reasonably as that it was due to the negligence of the defendant, or where the supervening cause is disclosed as a positive fact.' " *O'Quinn v. Southard*, 269 N.C. 385, 390, 152 S.E.2d 538, 542 (1967) (quoting *Etheridge v. Etheridge*, 222 N.C. 616, 619, 24 S.E.2d 477, 480 (1943)); *see also Ward*, 48 N.C. App. at 468, 269 S.E.2d at 666-67 (*res ipsa loquitur* inapplicable where the evidence "does not exclude all inferences other than the inference that the defendant was negligent as plaintiffs alleged.").

The evidence in this case permits a reasonable inference that defendant's negligence, if any, was concurrent with that of plaintiff and/or his employer, Cablevision. The federal Occupational Safety and Health Administration ("OSHA") standards governing telecommunications labor require that "[s]afety belts and straps shall be provided and the employer shall ensure their use when work is performed at positions more than 4 feet above ground, on poles, and on towers." 29 C.F.R. § 1910.268(g).

Plaintiff testified that he was working approximately 18 feet above ground while on the ladder. Plaintiff concedes in his brief that he failed to comply with 29 C.F.R. § 1910.268(g), requiring use of a safety belt. We are unpersuaded by plaintiff's argument that the failure to do so was not negligent because the absence of the safety device was not the proximate cause of his injuries. While plaintiff correctly observes that the safety belt would not have prevented an electric shock, the belt would have prevented plaintiff's fall all the way to the ground, the impact of which caused the injuries of which he now complains.

Subsection (m) of the OHSA standards states that "[e]lectric power conductors and equipment shall be considered as energized unless the employee can visually determine that they are bonded to [suitable protective grounding]." 29 C.F.R. § 1910.268(m). Plaintiff testified that he did not check the lines for voltage prior to beginning

work on the lines. Duane Church, an installation supervisor for Cablevision, testified that although such an inspection was "possibly" standard procedure, Cablevision did not provide plaintiff with the equipment necessary to check for voltage.

Moreover, "[i]t is well settled that when a person is aware of an electrical wire and knows that it is or may be highly dangerous, he has a duty to avoid coming in contact with it." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 404, 250 S.E.2d 255, 258 (1979). The evidence does not so clearly establish that any negligence which caused plaintiff's injury was solely that of defendant. Thus, *res ipsa loquitur* does not apply. The trial court properly entered summary judgment in favor of defendant.

Affirmed.

Judge WALKER concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

The majority opinion held that summary judgment was appropriately granted in defendant's favor. However, as I believe a genuine issue of material fact exists, I respectfully dissent.

"Summary judgment is recognized as a drastic remedy, and, particularly in cases involving the question of negligence or reasonable care, that remedy is an appropriate procedure only under exceptional circumstances." *Brown v. Power Co.*, 45 N.C. App. 384, 386, 263 S.E.2d 366, 368 (1980).

"Electricity is an inherently dangerous substance." *Snow v. Power Co.*, 297 N.C. 591, 596, 256 S.E.2d 227, 231 (1979). We note that a City engaged in the proprietary activity of furnishing electricity is liable for injury due to its negligence upon the same principles applicable to privately-owned power companies. *See Dale v. Morganton*, 270 N.C. 567, 573, 155 S.E.2d 136, 142 (1967).

"A supplier of electricity owes the highest degree of care to the public because of the dangerous nature of electricity." *Sweat v. Brunswick Electric Membership Corp.*, 133 N.C. App. 63, 65, 514 S.E.2d 526, 528 (1999). As such, electric companies are required to use reasonable care in the construction, *maintenance, and inspec-*

tion of their lines and apparatus where they are likely to come in contact with the public. *See Helms v. Power Co.*, 192 N.C. 784, 786, 136 S.E. 9, 10 (1926) (power company's negligence in maintaining wires coming in contact with telephone wires injuring lineman held for jury); *see also Benton v. Public-Service Corporation*, 165 N.C. 354, 81 S.E. 448, 449 (1914) (where intestate, a boy of 12, climbed a tree in a city street, and, coming in contact with one of defendant's high-tension electric wires passing through the tree at a place where the insulation had been worn off, received injuries from which he died, defendant was guilty of actionable negligence); and *Sweat*, 133 N.C. App. 63, 65, 514 S.E.2d 526, 528.

In fact:

> The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires.

Helms, 192 N.C. 784, 786, 136 S.E. 9, 10. Additionally, " '[a] company maintaining electric lines over which a current of high voltage is carried is bound to exercise the necessary care and prudence to prevent injury at places where others have the right to go either for *work*, *business* or pleasure.' " *Ellis v. Power Co.*, 193 N.C. 357, 360, 137 S.E. 163, 165 (1927) (emphasis in original and emphasis omitted) (quoting *Love v. Power Co.*, 86 W. Va. 393, 397, 103 S.E. 352, 353 (1920)).

In its opinion, the majority states that "[p]laintiff has not set forth specific facts establishing that defendant had actual or constructive notice of any break in the wires' insulation." However, regarding notice, our Supreme Court has stated:

> "The owner or operator of an electric plant is bound to exercise a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wire wherever people have a right to go and are liable to come in contact with them, and *in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or*

> *pleasure, may be reasonably discovered. It would hardly do to say that the defendant can only be required to exercise due diligence after it received notice of any defect in its appliances or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance.*"

Ellis, 193 N.C. at 360, 137 S.E. at 165 (emphasis omitted, emphasis in original and emphasis added) (quoting *Bourke v. Butte Elec. & Power Co.*, 33 Mont. 267, 83 P. 470, 474 (1905)). Moreover:

> "It is also the duty of such company to make reasonable and proper inspection of its appliances. This duty does not contemplate such inspection as would absolutely forestall injuries. Whether in a given case the duty to inspect, as reasonable care, prudence and foresight would suggest, has been performed is a question for the jury to determine under all the facts and circumstances of the event."

Ellis, 193 N.C. at 361, 137 S.E. at 165 (quoting *Alabama City G. & A. Ry. Co. v. Appleton*, 171 Ala. 324, 330, 54 So. 638, 640, Am. Ann. Cas. 1913A, 1181 (1911)).

In his complaint, plaintiff asserts, *inter alia*, that the City of High Point was negligent in "[f]ailing to inspect its electrical transmission wire leading to the residence . . . ," "[f]ailing to trim tree branch or branches that had grown around said wire . . . ," and "[f]ailing to maintain its electrical wire in an area close to a house and close to cable television wires . . . ." Plaintiff presented evidence which tended to show that a tree branch, located on the property at 1701 Country Club Road in High Point, North Carolina, had grown onto the electrical lines leading from the street to the house and caused the electrical wire to lose its insulation or otherwise break. This break in the electrical wire caused a feedback of approximately 100 volts onto the cable television lines on which plaintiff was working.

Additionally, plaintiff contends that he was at least forty inches away from any electrical line while working, and at no time did he come into contact with any of the electrical lines. Furthermore, the Director of Electric Utilities for the City of High Point stated that the City, "regularly trims trees around electrical wires in order to prevent the trees from coming in contact with the wires"; and a report was proffered showing that the City had inspected and trimmed the trees on Country Club Road approximately two months prior to plaintiff's accident. Regarding the tree limb that caused the electrical line to

lose its insulation or break, plaintiff stated in his deposition that the City must have missed it while trimming.

Moreover, Duane Church, an installation supervisor for Cablevision in High Point, arrived at the scene shortly after plaintiff's accident. In his deposition, Mr. Church stated, "I saw what looked to be about a three inch to four inch limb with roughly an inch to two inches of the limb actually grown around the power drop." "[I]t was actually . . . encased in, in the limb itself." In fact, the City does not dispute any pertinent facts of plaintiff's accident, however, the City does assert that plaintiff failed to show that the City had any notice whatsoever of the break in the wires' insulation.

In sum, I am of the opinion that the City of High Point should have been aware that a cable repairman might likely come into contact with its electrical lines. Based on plaintiff's evidence that he did not touch the electrical lines, he was at least forty inches away from the electrical lines, the tree limb was growing through the electrical line, and the observation that the City must have missed this particular limb when trimming, a genuine issue of material fact exists. In light of our Courts' treatment of electricity and "the highest degree of care" owed to the public because of the dangerousness of its nature, whether the duty to inspect and maintain had been performed is a question for the jury to determine under all the facts and circumstances of this case. Thus, summary judgment was inappropriately granted here.

BRIDGESTONE/FIRESTONE, INC., PLAINTIFF v. OGDEN PLANT MAINTENANCE COMPANY OF NORTH CAROLINA AND THE BUDD GROUP, INC., DEFENDANTS

No. COA00-400

(Filed 3 July 2001)

Indemnity— contractual—industrial accident—motion for judgment on the pleadings

The trial court erred by granting defendants' motion for judgment on the pleadings in plaintiff's contractual claim for indemnity from defendants under N.C.G.S. § 22B-1 arising out of an industrial accident resulting in the death of two individuals and destruction of property during the accident, because: (1) plaintiff is seeking indemnity for costs and sums paid as a result of

defendants' negligence, and plaintiff is not attempting to hold defendants responsible for the negligence of plaintiff; (2) there is no admission, finding, or adjudication of negligence on the part of plaintiff in the underlying action; and (3) plaintiff's settlement payment was not voluntary as a matter of law when defendants already settled and plaintiff faced the prospect of costly and protracted litigation as the only remaining defendant in that action.

Judge CAMPBELL concurring in part and dissenting in part.

Appeal by plaintiff from judgment dated 12 February 2000 by Judge W. Russell Duke in Wilson County Superior Court. Heard in the Court of Appeals 5 February 2001.

Young Moore & Henderson, P.A., by David M. Duke; and Womble Carlyle Sandridge & Rice, P.L.L.C., by Jerry S. Avis and G. Christopher Olson, for plaintiff-appellant.

Ragsdale Liggett PLLC, by George R. Ragsdale and Walter L. Tippett, Jr., for defendant-appellee Ogden Plant Maintenance Company of North Carolina.

Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey, for defendant-appellee The Budd Group, Inc.

WALKER, Judge.

This appeal involves plaintiff's claim for indemnity from defendants arising out of an industrial accident which resulted in the deaths of two individuals. The accident occurred on 9 September 1994 at a tire manufacturing facility, owned by Bridgestone/Firestone, Inc. (plaintiff), in Wilson County, North Carolina.

Plaintiff contracted with Ogden Plant Maintenance Company of North Carolina (defendant Ogden) to maintain the plant and operate its powerhouse, which generated energy for the plant's manufacturing process and included two large fuel storage tanks (tanks). Plaintiff also contracted with Budd Services, Inc. (defendant Budd) to provide security for the plant and to issue "hot work" permits which allowed jobs to be performed by independent contractors who engage in welding or other types of "hot work" at the plant. The contracts between plaintiff and each defendant included a provision obligating each defendant to indemnify plaintiff from any and all losses suffered by plaintiff arising out of defendants' respective acts of negligence at the plant.

Prior to 9 September 1994, defendant Ogden determined that two of the tanks needed measuring devices. Defendant Ogden then requisitioned plaintiff for the parts and labor for this job, which included the services of an off-facility independent contractor, A. B. Electric Services, Inc. (ABES), that defendant Ogden had selected. Plaintiff agreed to supply the parts and contracted with ABES to perform the installation of the measuring devices.

On 9 September 1994, ABES arrived at the plant to install the measuring devices. ABES first determined that pipes would need to be attached to the top of each tank to house the measuring devices and therefore requested defendant Budd to issue a "hot-work" permit for the welding necessary to attach the pipes. After defendant Budd issued the permit, ABES employees proceeded with their welding work on top of one of the tanks. During this task, the tank exploded from the heat generated by the welding and resulted in the deaths of both employees as well as the destruction of the tank.

The estates of the deceased welders filed wrongful death suits alleging negligence and gross negligence by plaintiff, defendant Ogden and defendant Budd. Plaintiff's motion for summary judgment was denied. Defendants Ogden and Budd then settled the claims prior to trial and plaintiff settled the claims against it during trial. Plaintiff subsequently filed this action seeking indemnity and/or contribution from defendants for its costs and sums paid to settle the underlying claims. Plaintiff also sought the costs of repair to its property destroyed during the accident. From the trial court's granting of defendants' motions for judgment on the pleadings, plaintiff appeals.

In its assignments of error, plaintiff argues the trial court erred in granting defendants' motions for judgment on the pleadings. Plaintiff contends it is entitled to be indemnified for its costs and sums paid to settle the claims and for its property damage pursuant to indemnity provisions in the contracts with defendants because the accident did not arise from plaintiff's negligence but from the negligence of defendants.

At the outset, we note that when a trial court considers a motion for judgment on the pleadings pursuant to Rule 12(c) of our Rules of Civil Procedure, all allegations in the non-movant's pleadings are deemed admitted. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted); N.C.R. Civ. P. 12(c) (1999). The motion is granted when the movant, held to a strict standard, shows that "no material issue of [fact] exists and that he is clearly entitled

to judgment." Ragsdale, 286 N.C. at 137, 209 S.E.2d at 499, *citing Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 479 F.2d 478 (6th Cir. 1973). The purpose of the motion is to dispose of baseless claims and to ensure that a party is not precluded from a full and fair hearing on the merits. *Id.*

Contractual indemnity provisions in this State are controlled by N.C. Gen. Stat. § 22B-1 (1999), which provides:

> Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance . . . *purporting to indemnify or hold harmless the promisee*, the promisee's independent contractors, agents, employees, or indemnitees *against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee*, its independent contractors, agents, employees, or indemnitees, *is against public policy and is void and unenforceable.* Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees . . . .

(emphasis added). In other words, a construction indemnity agreement may purport to indemnify a promisee from damages arising from negligence of the promisor, but any provision seeking to indemnify the promisee from its own negligence is void. "The indemnity provisions to which G.S. § 22B-1 apply are those construction indemnity provisions which attempt to hold one party responsible for the negligence of another." *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315, 385 S.E.2d 553, 555 (1989) (holding that where contract provision which violated N.C. Gen. Stat. § 22B-1 was not a central feature of the contract, the illegal provision was severable from the otherwise valid indemnity contract).

In the instant case, the indemnity provision in the contract between plaintiff and defendant Ogden is as follows in pertinent part:

> Except as provided in Article XIII of this contract, [defendant Ogden] shall indemnify [plaintiff] and save it harmless from dam-

> age to or theft of [plaintiff's] property and from all claims and judgments for injury or death to persons or property damage (including costs of [litigation] and attorney's fees) made or obtained against [plaintiff] by third persons including [plaintiff's] and [defendant Ogden's] employees and agents, based on injuries to person or property, in any manner caused by, incident to, connected with, resulting or arising from the performance of this contract or the presence of [defendant Ogden's] employees, and/or agents on [plaintiff's] premises, *regardless of whether such claims are alleged to be caused by negligence, or otherwise, on the part of [plaintiff] or its employees*, excepting however, injury to or death of employees of [defendant Ogden], from any cause whatsoever.

By this provision, plaintiff seeks indemnity for costs and sums paid as a result of defendant Ogden's negligence. Plaintiff is therefore not attempting "to hold [defendant Ogden] responsible for the negligence of [plaintiff]." *Id.* This indemnity provision does not violate N.C. Gen. Stat. § 22(b)(1).

The indemnity provision in the contract between plaintiff and defendant Budd contains the following language:

> [Defendant Budd] will further *indemnify and hold [plaintiff] harmless* from and against any and all liabilities, claims, demands, suits, losses, damages, costs, attorney's fees and expenses for bodily injury to, or death of any person, or damage to or destruction of any property, *caused by any negligent or intentional act or omission on the part of [defendant Budd]*, its officers, employees or former employees. Except *[plaintiff] shall not be held harmless* for any such liabilities, claims, demands, suits, losses, damages, costs, attorney's fees and expenses *caused by any negligent or intentional act or omission on the part of [plaintiff]*, its officers, employees or agents.

Likewise, this indemnity provision purports to hold defendant Budd responsible for its own negligent acts but not the negligent acts of plaintiff.

In this State, "a principal generally is liable for the negligent acts of his agent which result in injury to another." *Willoughby v. Wilkins*, 65 N.C. App. 626, 633, 310 S.E.2d 90, 95 (1983), *citing King v. Motley*, 233 N.C. 42, 62 S.E.2d 540 (1950). "Generally, there is no vicarious lia-

bility upon an employer for negligent acts of an independent contractor." *Id., citing Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 159 S.E.2d 362 (1968). *But see Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) (which stated general rule that one who employs an independent contractor is not liable for the independent contractor's negligence but recognized exceptions when: (1) the employer retains the right to control the manner in which the contractor performs his work; and (2) the independent contractor is employed to perform an inherently dangerous activity, because the employer has a continuing responsibility to ensure that adequate safety precautions are taken, which responsibility cannot be delegated to the independent contractor).

As to the question of when an issue of indemnity should be submitted to the jury, this Court has held:

> The right to indemnity between defendants arises when liability is imposed upon one defendant for the other's tortious conduct through operation of law, as for example, through the doctrine of *respondeat superior*. Indemnity is not permitted when the defendants are in *pari delicto*, that is, when both defendants breach substantially equal duties owed to the plaintiff. In order to recover indemnity from a second defendant, the first defendant must allege and prove (1) that the second defendant is liable to the plaintiff and (2) that the first defendant's liability to the plaintiff is derivative, that is, based upon the tortious conduct of the second defendant.

Kim v. Professional Business Brokers, 74 N.C. App. 48, 51, 328 S.E.2d 296, 299 (1985) (citations omitted) (holding trial court did not err in failing to submit issue of indemnity to jury where multiple defendants were in *pari delicto* and thus not derivatively liable); *See also Anderson v. Robinson*, 275 N.C. 132, 165 S.E.2d 502 (1969).

In its complaint, plaintiff alleges that the accident occurred solely as a result of defendants' negligence. Plaintiff further alleges that if it were in any way liable, it could only be on the "basis of some passive or derivative fault," and thus would be entitled to indemnification. To support this assertion, the complaint also alleges that plaintiff was not involved in the discussion which took place between defendants and ABES regarding the installation job and that plaintiff "was not notified of [the welding] activity and had no personnel present." In their answer, defendants admit discussing the installation job among each other and with ABES, and that plaintiff's personnel were not

present during the activity. However, defendants deny that plaintiff was not notified of the activity. Defendants also admit the "hot work" permit to perform the welding was issued without notice to plaintiff but deny the allegation that plaintiff was not included in the coordination of the activity.

Defendants contend plaintiff settled claims of direct and active negligence against it in the underlying action and therefore is not entitled to indemnification. Defendants further contend that because plaintiff has settled claims of direct and active negligence, it cannot recover either under common law or contractual indemnity.

In examining the record before us, there is no admission, finding or adjudication of negligence on the part of plaintiff in the underlying action. All that appears is that plaintiff, for whatever reasons, paid sums to settle the underlying claims.

Defendants cite *City of Wilmington v. Natural Gas Corp.*, 117 N.C. App. 244, 450 S.E.2d 572 (1994), for the proposition that where a party voluntarily pays a claim for which it is not liable, that party is not entitled to indemnity. In that case, the City was required to pay a certain amount of workers' compensation benefits to an individual pursuant to a city ordinance, which also provided that any additional amount paid was within the City's discretion. *Id.* at 250, 450 S.E.2d at 577. Because the City paid additional amounts for which it "was not legally obligated to pay[,]" this Court found its "actions were voluntary" and thus it was not entitled to be indemnified. *Id.*

We distinguish this case from *City of Wilmington.* Plaintiff's settlement in the underlying action came after Ogden and Budd had settled and plaintiff asserts it was faced with the prospect of costly and protracted litigation as the only remaining defendant in that action. We cannot conclude as a matter of law that plaintiff's settlement payment was voluntary. *See Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (1990); *Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987).

Defendant Ogden contends N.C. Gen. Stat. § 1B-4 (1999) bars plaintiff from seeking contribution. Contribution, as opposed to indemnity, "arises when more than one tortfeasor is found liable for the plaintiff's injury. It allows a defendant to demand assistance from the other joint tortfeasor(s) if his payment to the plaintiff exceeds his *pro rata* share. Contribution also allows the defendant to apply any damages it pays as a joint tortfeasor as a credit against the total dam-

age award." David A. Logan and Wayne A. Logan, North Carolina Torts § 8.20, at ¶ 7 (1996), *citing Holland v. Southern Pub. Util. Co.*, 208 N.C. 289, 180 S.E. 592 (1935).

On the other hand, as previously noted, indemnity arises under the doctrine of primary-secondary liability, also known as active-passive negligence. Here, plaintiff is seeking indemnification, as opposed to contribution, on the basis that it is not a joint nor primary tortfeasor.

We conclude plaintiff's allegations, together with the contractual indemnity provisions, are sufficient to withstand defendants' motion for judgment on the pleadings. We therefore reverse the trial court's order and remand the case for a determination of whether plaintiff is entitled to indemnity from defendants Ogden and Budd.

Reversed and remanded.

Judge HUNTER concurs.

Judge CAMPBELL concurs in part and dissents in part.

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

I concur with the majority opinion to the extent that it allows plaintiff to proceed on its claim against defendants for the property damage plaintiff allegedly incurred as a result of the 9 September 1994 accident. I respectfully dissent from the majority opinion's conclusion that plaintiff should be allowed to proceed on its claim seeking indemnity from defendants for the costs incurred by plaintiff in defending and settling the underlying wrongful death action. Therefore, the trial court's order should be affirmed in part and reversed in part.

"The right to indemnity between defendants arises when liability is imposed upon one defendant for the other's tortious conduct through operation of law, as for example, through the doctrine of *respondeat superior*." *Kim v. Professional Business Brokers*, 74 N.C. App. 48, 51, 328 S.E.2d 296, 299 (1985). "Indemnity is not permitted when the defendants are in *pari delicto*, that is, when both defendants breach substantially equal duties owed to the plaintiff." *Id.* In the instant case, plaintiff seeks indemnification from defendants for the expenses it incurred in defending and settling the underlying wrongful death action brought against the parties. Upon

examination of the complaint in the underlying wrongful death action, which defendants attached as an exhibit to their respective answers[1], I find that the only allegations asserted against plaintiff are allegations of direct and active negligence. Although plaintiff's complaint in the instant case alleged that plaintiff's liability in the underlying action could only be based on passive or derivative negligence, there are no allegations of passive or derivative negligence on the part of plaintiff in the underlying wrongful death suit. Having settled an action based on a complaint alleging direct and active negligence on its part, plaintiff would be prohibited from seeking indemnification from defendants for the costs incurred in such settlement. I believe a contrary ruling would violate this State's public policy against allowing an entity to be indemnified for loss arising from its own negligence, as codified in N.C. Gen. Stat. § 22B-1.

Further, as to defendant-Ogden, plaintiff's contractual indemnification claim is itself violative of N.C.G.S. § 22B-1. Pursuant to N.C.G.S. § 22B-1, a construction indemnity provision which purports to indemnify a promisee against liability for damages arising from the negligence, in whole or in part, of the promisee "is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-1 (1999). In the instant case, the indemnity provision in the contract between plaintiff and defendant-Ogden clearly purports to indemnify plaintiff against damages arising from its own negligence. By its terms, the indemnity provision provides that defendant-Ogden shall indemnify plaintiff "from damage to or theft of [plaintiff's] property and from all claims and judgments . . . based on injuries to person or property . . . regardless of whether such claims are alleged to be caused by negligence, or otherwise, on the part of [plaintiff] or its employees . . . ." This provision clearly attempts to hold defendant-Ogden responsible for the negligence of plaintiff. It is therefore against public policy and is void and unenforceable.

However, this does not end the inquiry as to the indemnity provision between plaintiff and defendant-Ogden. "When a contract contains a provision which is severable from an illegal provision and is in no way dependent upon the enforcement of the illegal provision for its validity, such a provision may be enforced." *International Paper Co. v. Corporex Instructors, Inc.*, 96 N.C. App. 312, 315, 385 S.E.2d

1. When ruling on a motion for judgment on the pleadings the trial judge is allowed to consider any exhibits which have been attached to the pleadings. *See Minor v. Minor*, 70 N.C. App. 76, 318 S.E.2d 865, *cert. denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

553, 555 (1989). The majority opinion does not specifically address the issue of severability, but having carefully reviewed the indemnity provision at issue and applicable case law, I do not believe that the indemnity provision between plaintiff and defendant-Ogden can be severed so as to make it valid under N.C.G.S. § 22B-1.

Even if the offending phrase, "regardless of whether such claims are alleged to be caused by negligence, or otherwise, on the part of [plaintiff] or its employees," were to be stricken, the remaining indemnity provision would still allow plaintiff to seek indemnity from defendant "from all claims and judgments . . . based on injuries to person or property . . . in any manner caused by, incident to, connected with, resulting or arising from the performance of this contract, ..." The remaining indemnity provision would not by its terms prevent plaintiff from seeking indemnification from loss arising from the performance of the contract and caused, in whole or in part, by plaintiff's own negligence. Therefore, it would still violate public policy and be void and unenforceable.

In *Miller Brewing Co. v. Morgan Mechanical Contractors, Inc.*, 90 N.C. App. 310, 368 S.E.2d 438, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 110 (1988), this Court considered an appeal from a trial court order holding that the indemnity provision printed on the back of a purchase order was against public policy, void and unenforceable under N.C.G.S. 22B-1. The indemnity provision at issue in *Miller*, read:

> 9. Seller is to save harmless and indemnify Buyer from any and all judgments, costs, expenses, attorneys' fees, and claims . . . arising out of or in any way connected with the work done or goods furnished under this [purchase order]. . . .

As in the instant case, the indemnity provision in *Miller* did not in any way prohibit the party seeking indemnity from recovering for loss caused by its own negligence. In *Miller*, this Court held that the indemnity provision at issue was invalid under N.C.G.S. 22B-1. I believe that the indemnity provision at issue in the instant case is sufficiently similar to the one in *Miller* to make this Court's holding in *Miller* controlling.

Further, the majority's reliance on *International Paper Co.* does not change my opinion. In *International Paper Co.*, this Court severed from an indemnity provision a phrase similar to the offend-

ing phrase in the instant case. Having done so, the remainder of the indemnity provision was found not to be violative of N.C.G.S. § 22B-1. However, unlike the remaining indemnity provision here, the remaining indemnity provision in *International Paper Co.* only allowed for indemnification for loss "caused in whole or in part by any negligent act or omission of the Builder, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable." This provision would not allow plaintiff to seek indemnification for loss caused by its own negligence.

Having found this Court's conclusion in *Miller* to be controlling, I believe the indemnity provision between plaintiff and defendant-Ogden is void and unenforceable under N.C.G.S. § 22B-1, and cannot be used as the basis for recovery in an indemnity action. Consequently, plaintiff's contractual indemnification claim against defendant-Ogden has no legal basis, and the trial court did not err in entering judgment on the pleadings in favor of defendant-Ogden as to that portion of plaintiff's claim.

I do not find that the indemnification provision between plaintiff and defendant-Budd violates N.C.G.S. § 22B-1. It does not purport to indemnify plaintiff against liability arising from its own negligence. Nevertheless, for the reasons previously stated, I believe the trial court's judgment on the pleadings in favor of defendant-Budd as to plaintiff's contractual indemnification claim was correct.

As to plaintiff's property damage claim, I concur in reversing the trial court's order, and remanding for further proceedings to determine if defendants are liable to plaintiff for the property damage incurred on 9 September 1994. On remand, one of the factual issues to be resolved would be whether the damage to plaintiff's property and equipment was covered by the "Fire and Extended Coverage and Boiler and Machinery Insurance Policies filed and approved in New York State" at the time of the accident, thereby leading to plaintiff's waiver of its right to recover from defendant-Ogden pursuant to Article XIII of their contract.

STATE OF NORTH CAROLINA v. DONALD ANDRE BARKLEY

No. COA00-731

(Filed 3 July 2001)

1. **Evidence— blood drawn for unrelated investigation—DNA testing**

The trial court did not err in a first-degree rape and kidnapping prosecution by denying defendant's motion to suppress the results of a blood analysis where defendant contended that his consent to having his blood drawn was limited to analysis for an unrelated murder investigation and that his Fourth Amendment rights were violated. Once the blood was lawfully drawn, defendant no longer had a possessory interest in the blood and suffered no additional intrusion by the comparison of the DNA characteristics with the evidence in this case. Moreover, the court's findings support the conclusion that a reasonable person would have understood that his blood analysis could be used generally for investigative purposes.

2. **Evidence— other offense—similarities—not too remote in time**

The trial court did not err in a prosecution for first-degree kidnapping and first-degree rape by admitting the testimony of another woman that defendant raped her and evidence that defendant was convicted of that rape. The similarities support a reasonable inference that the crimes were committed by the same person and, although the rapes were six years apart, defendant was paroled only three and a half months prior to this crime.

3. **Criminal Law— continuance denied—prior victim's testimony—notice**

The trial court did not abuse its discretion in a prosecution for first-degree rape and first-degree kidnapping by denying defendant's motion for a continuance where defendant argued that he was not given notice prior to trial that the State would offer a prior victim's testimony, but the State notified defendant of hearsay statements made by defendant which would be offered by someone other than a law enforcement officer. Pursuant to N.C.G.S. § 15A-903(a), the State is not required to disclose the name of the witness testifying to the statements or the circumstances surrounding the statements.

4. Rape— first-degree—alternative theories

There was no plain error in a rape prosecution where the trial court instructed the jury that it could find defendant guilty of first-degree rape if it found that defendant used a dangerous weapon or that the victim was seriously injured where there was evidence to support both theories.

5. Rape— first-degree—second-degree not submitted

The trial court in a first-degree rape prosecution did not err by failing to submit the lesser offense of second-degree rape to the jury where all of the evidence established that some type of sharp weapon was placed against the victim's neck.

6. Rape— first-degree—indictment—short form

A short form indictment for first-degree rape was constitutional.

7. Evidence— forensic evidence from unrelated case—not turned over

The trial court did not err in a first-degree kidnapping and first-degree rape case by denying defendant's request to turn over all records and documents regarding DNA analysis and forensic evidence in an unrelated murder case where DNA tests from that case led to this conviction. The court reviewed the records in camera and provided defendant with chain of custody records.

Appeal by defendant from judgments entered 10 September 1999 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Stewart L. Johnson and Assistant Attorney General Anne M. Middleton, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

MARTIN, Judge.

Defendant was tried upon bills of indictment charging him with first degree rape and first degree kidnapping of Juanita McClendon on 12 April 1996. The State's evidence tended to show that

McClendon was walking to a friend's house in Charlotte at approximately 1:00 a.m. when she was grabbed from behind. Defendant stuck something sharp in her neck, which she believed was a knife, and grabbed her by the mouth. Defendant pushed McClendon down the street and took her back behind a building in an area that was not lighted. He then threw McClendon on the ground and pulled off her clothes. He forced McClendon to have vaginal, anal and oral sex twice during the incident. When McClendon tried to get up or scream he repeatedly hit her in the face and fractured her jaw. Before defendant left, he asked McClendon "where was his knife." McClendon ran home and called the Charlotte-Mecklenburg Police Department. She was taken to Carolinas Medical Center for an examination, including a rape kit, and a police officer took her statement. Following the examination, she underwent a three to four hour surgery to repair her jaw. McClendon was unable to identify defendant in a line-up; DNA evidence linked defendant to the rape and kidnapping.

Defendant's motion to suppress the blood evidence was heard in a *voir dire* hearing prior to the start of the trial. The State's evidence tended to show that defendant was a suspect in a murder investigation in June 1996. The police had information that defendant was seen with the victim the night of the murder and that he had admitted to committing the crime. On 11 June 1996, defendant was picked up by police on a habitual felon indictment. While in custody, he complained of an unrelated injury to his hand and was escorted to Carolinas Medical Center for treatment. While defendant was waiting for treatment by the physician, Investigator Graue asked defendant if he would consent to give his blood to the investigators. After defendant responded "no," Officer Holl informed defendant that he could obtain a search warrant. Defendant then indicated that he would cooperate but would not sign a consent form. After defendant was treated for the hand injury, Officer Holl asked him again if he would voluntarily give the police some blood and defendant responded "yes." The blood was drawn while he was at the hospital. Officer Holl testified that he did not tell defendant why the blood was being drawn, and that defendant was also a suspect in other crimes.

Defendant testified on his own behalf at the *voir dire* hearing. He stated he understood that he was being arrested on an indictment for habitual felon status stemming from possession of cocaine, but that he was also made aware that he was a suspect in a murder case. He further stated that the officers asked him questions at the hospital regarding his knowledge of and contact with the murder victim, but

did not indicate that he was also a suspect in a rape case. He testified that he understood that the blood was drawn from his arm "strictly" to be used in comparison with the DNA found in the murder case, and that he agreed to have the blood drawn to obtain treatment and to exonerate himself of the murder. While defendant conceded on cross-examination that no officer told or promised him that the blood would be drawn solely for use in the murder investigation, he stated that "the atmosphere and the contents of their questioning lead me to believe that was the purpose that the blood was being drawn for." At the conclusion of the hearing, the court denied the motion to suppress. The court then heard defendant's motion to compel discovery of the records pertaining to the collection of defendant's blood during the murder investigation; defendant was specifically concerned about the chain of custody of the DNA samples. The court reviewed the materials *in camera*, determined defendant had the necessary records and then deemed the remainder of the records to be irrelevant and ordered the clerk to seal them.

The court conducted another *voir dire* hearing during the trial pertaining to admissibility of the testimony of Jacqueline Ferguson pursuant to G.S. § 8C-1, Rule 404(b). At the hearing, Ferguson testified that she was raped on 4 August 1990, and identified defendant as her assailant. She described the events leading up to and during the rape, and stated that she was not enticed to testify based on a deal with the State. On cross-examination, defendant attacked her credibility by inquiring about her drug use and other allegations of rape. The court also heard testimony regarding the admissibility of court records showing that defendant had been convicted of second degree rape in Mecklenburg County in connection with the assault on Ferguson. Defendant testified at the hearing that his sexual encounter with Ferguson was in exchange for drugs, and that he pled guilty to the charge because it would be difficult to establish his innocence and he faced a life sentence if found guilty. The court ruled that the testimony of Ferguson was admissible pursuant to Rule 404(b) and also permitted the evidence regarding his conviction. The court denied defendant's motion for a continuance on the grounds that he was given insufficient notice of the State's intent to present the evidence concerning the rape of Ferguson.

The defendant did not offer evidence before the jury.

The court instructed the jury as to the offenses of first degree rape and first degree kidnapping. With regard to the first degree rape

charge, the court instructed the jury that it could find defendant guilty if it found that defendant employed a dangerous weapon or if it found McClendon was seriously injured. Defendant requested a charge on second degree kidnapping in the charge conference but did not object to its omission.

The jury returned a verdict of guilty as to first degree rape and first degree kidnapping. Defendant received a sentence of life imprisonment without parole as to the first degree rape conviction. The court arrested judgment as to first degree kidnapping, entered judgment upon the offense of second degree kidnapping, and sentenced defendant to a minimum term of 59 months to a maximum term of 80 months in prison. Defendant appeals.

I.

[1] Defendant first assigns error to the court's denial of his motion to suppress the results of the analysis of his blood. Defendant argues that he consented to have his blood drawn to exonerate himself in the murder investigation and that the use of his blood to implicate him in the present case violated his constitutional right to be free from unreasonable searches.

An individual has both a state and federal constitutional right to freedom from unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const., art. 1, §§ 19, 20. Our courts have held that the taking of blood from a person constitutes a search under both constitutions. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed.2d 908 (1966); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

Defendant asserts first that a blood sample obtained in an uncharged crime cannot be used as evidence against him in another unrelated crime without violating his constitutional rights under the Fourth Amendment. Although this is an issue of first impression in North Carolina, other jurisdictions have considered the issue. In *New York v. King*, 663 N.Y.S.2d 610, 232 A.D.2d 111 (1997), a case with similar facts to the one before us, the Supreme Court of New York held that the defendant's Fourth Amendment rights were not violated by using the defendant's blood sample, which was drawn with probable cause in an August 1991 rape and robbery, to convict the defendant of a May 1991 rape and robbery. After determining that the blood was lawfully seized in the investigation of the August rape, the court opined:

> It is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person. In this regard we note that the defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests. In this regard it bears noting that the defendant's sample was contemporaneously tested against all the stain evidence seized during both investigations in a single scientific procedure.

Id. at 614-15, 232 A.D.2d at 117-18. A similar conclusion has been reached by the courts in Indiana, Maryland, Georgia, and Florida. *See Smith v. State*, — Ind. —, 744 N.E.2d 437 (2001) (stating once a DNA profile is obtained, the owner no longer has any possessory or ownership interest in it); *Wilson v. State*, 132 Md. App. 510, 550, 752 A.2d 1250, 1272 (2000) (holding that the use of the defendant's DNA in an unrelated case did not violate his Fourth Amendment rights because "[a]ny legitimate expectation of privacy that the appellant had in his blood disappeared when that blood was validly seized"); *Bickley v. State*, 227 Ga. App. 413, 415, 489 S.E.2d 167, 170 (1997) (holding that the defendant's Fourth Amendment rights were not violated when the defendant's blood was drawn pursuant to a warrant and used in an unrelated case and noting "in this respect, DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations"); *Washington v. Florida*, 653 So.2d 362 (1994), *cert. denied*, 516 U.S. 946, 133 L.Ed.2d 309 (1995) (holding once the samples were validly obtained in another case, the police were not restrained from using them in the case before the court).

We agree with the conclusion reached by the courts in these jurisdictions. The United States Supreme Court stated "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384

U.S. at 767, 16 L.Ed.2d at 917. In the case before us, defendant does not challenge the validity of the taking of the blood sample; rather defendant concedes it was done with his consent. Once the blood was lawfully drawn from defendant's body, he no longer had a possessory interest in that blood. The use of the DNA analysis of his blood in this case required no additional chemical analysis which might infringe any privacy interest he might have in the blood; rather, it involved only a comparison of the characteristics of his blood with the evidence in this case. Therefore, defendant suffered no additional intrusion, and for the reasons cited in the foregoing cases, we conclude that his Fourth Amendment rights were not violated by the use of the DNA analysis in the present case.

Nevertheless, defendant argues the use of the DNA analysis should have been limited by the scope of his consent. The taking of blood requires a search warrant unless an exception applies. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). Consent to the search by the owner of the item constitutes one exception to the warrant requirement. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971). Defendant argues that he limited his consent to the use of the DNA analysis in the murder investigation only.

The trial court made findings of fact and conclusions of law following a suppression hearing on this issue. The standard of appellate review is whether the findings of fact are supported by competent evidence and whether the findings support the court's conclusions of law. *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994). Defendant asserts that the court erred in entering the following conclusion of law:

> That the Defendant freely, voluntarily, understandingly, and knowingly consented to having his blood withdrawn for investigative purposes on June the 11th, 1996.

The court's conclusions of law are "fully reviewable on appeal." *Id.* at 141, 446 S.E.2d at 585 (citing *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992)). In *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L.Ed.2d 297, 302 (1991), the Supreme Court stated that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"

The court's findings indicate that: (1) defendant was arrested on a habitual offender indictment; (2) he was taken to the hospital for

treatment on his hand at his own request; (3) he initially refused to give a blood sample, but after being told by the officers that they could apply for a search warrant, he consented; (4) he knew he was a suspect in the murder case; (5) he consented to have his blood drawn "because he had nothing to hide" but would not sign a consent form; (6) Investigator Holl knew at the time that the Rape Unit was looking for someone named Donald, and (7) the officers made no promises that the blood would solely be used in the investigation of the murder case. We hold that these findings support a conclusion that a reasonable person would have understood by the exchange that his blood analysis could be used generally for investigative purposes, and not exclusively for the murder investigation.

II.

[2] Defendant next assigns error to the court's admission of the testimony of Jacqueline Ferguson, who accused defendant of raping her in 1990, and to the admission of evidence that defendant was convicted of the rape of Mrs. Ferguson. While the assignment of error in the record on appeal is premised on federal and state constitutional grounds, the argument in his brief is based primarily on G.S. § 8C-1, Rules 404(b) and 403, as was his argument at trial. Notwithstanding the apparent inconsistency between the question presented by the assignment of error and the argument presented in defendant's brief, we will exercise the discretion granted us by N.C.R. App. P. 2 and consider his appellate argument.

Evidence of prior crimes is admissible under Rule 404(b) as long as it is " 'relevant to any fact or issue other than defendant's propensity to commit the crime.' " *State v. Hamilton*, 132 N.C. App. 316, 319, 512 S.E.2d 80, 83 (1999) (quoting *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853, *cert. denied*, 516 U.S. 994, 133 L.Ed.2d 436 (1995)). In this case, the State argued the evidence of defendant's rape of Jacqueline Ferguson was admissible because it was relevant to show the identity of the perpetrator and to show evidence of a common plan or scheme.

Evidence of another crime "must be sufficiently similar to the crime charged and not too remote in time such that it is more prejudicial than probative under Rule 403." *Id.*

> A prior act or crime is sufficiently similar to warrant admissibility under Rule 404(b) if there are "some unusual facts present in both crimes or particularly similar acts which would indicate

> that the same person committed both crimes." It is not necessary that the similarities between the two situations "rise to the level of the unique and bizarre." However, the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts.

State v. Sokolowski, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) (citations omitted).

We conclude that the similarities between the rapes of Ferguson and McClendon support a reasonable inference that the crimes were committed by the same person. Both victims were young black females accosted in Charlotte in the early morning hours. In both cases, the victims were grabbed from behind by the mouth and the assailant held a sharp object to their throats while directing them to a dark secluded area. In addition defendant disrobed both victims and forced them to have vaginal and anal sex.

We also conclude the incident involving Ms. Ferguson was not too remote in time from the incident involving Ms. McClendon. In *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), *disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991), this Court held that a ten year lapse in time between the crimes did not make the earlier crime too remote where the defendant was incarcerated for all but 132 days of that period. Although, in the present case, the rapes were six years apart, the record indicates that defendant was paroled following his conviction for the Ferguson rape only three and a half months prior to the McClendon rape. We hold the rape of Ferguson was not too remote in time and the trial court did not err in admitting Ferguson's testimony pursuant to Rule 404(b) and Rule 403.

For the same reason, we also hold that the court did not err in admitting evidence that defendant was convicted of Ferguson's rape. *See State v. Murillo*, 349 N.C. 573, 595, 509 S.E.2d 752, 765 (1998) (quoting *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)) (stating "[a] prior conviction may be a bad act for purposes of Rule 404(b) if substantial evidence supports a finding that defendant committed both acts, and the 'probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged.' "). We additionally reject defendant's argument that the trial court abused its discretion under G.S. § 8C-1, Rule 403 in admitting the testimony regarding his conviction. Defendant contends that since he attempted to enter an Alford plea, without admitting his guilt of the Ferguson rape, the evidence was unduly

prejudicial. However, the evidence admitted before the jury showed only that defendant was convicted, not that he pled guilty. Therefore defendant has failed to show that the court's ruling could not have been the result of a reasoned decision.

[3] Finally, defendant argues that because he was not given notice prior to trial that the State would offer Ferguson's testimony, the trial court erred by denying his motion for a continuance after ruling the evidence admissible. The appellate standard of review of the denial of a motion to continue is abuse of discretion, unless the denial raises a constitutional issue. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). Defendant asserts that he was deprived of a fair opportunity to defend himself because he was not given notice that the State would offer Ferguson's testimony. "Even when a motion for a continuance raises a constitutional issue and is denied, the denial is grounds for a new trial only when a defendant shows that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Hill*, 116 N.C. App. 573, 578, 449 S.E.2d 573, 576, *disc. review denied*, 338 N.C. 670, 453 S.E.2d 183 (1994). The record establishes that the State timely notified defendant of hearsay statements made by defendant which were to be offered by a non-law enforcement officer pursuant to Rule 404(b). Defendant argued before the trial court that the State failed to give him necessary information as to who would offer the statements and what the surrounding circumstances were (i.e. that Jacqueline Ferguson would be testifying), and he therefore needed additional time to prepare for Ferguson's testimony. Pursuant to G.S. § 15A-903(a), however, the State is not required to disclose the name of the witness testifying to the statement or the circumstances surrounding the oral statement. *State v. Strickland*, 346 N.C. 443, 488 S.E.2d 194 (1997), *cert. denied*, 522 U.S. 1078, 139 L.Ed.2d 757 (1998). Therefore, we cannot say that the court erred or abused its discretion in failing to grant defendant's motion for a continuance because the basis for such request had no merit.

III.

[4] Defendant next assigns error to the court's jury instruction on alternative theories of first degree rape, and to the court's failure to require the jury to be unanimous as to the theory upon which it found defendant guilty. The trial court instructed the jury that it could find defendant guilty of first degree rape if it found defendant used a dangerous weapon or if it found the victim was seriously injured. Although defendant stated his concerns about this instruction during

the charge conference, he did not object to the instruction given by the court as required by N.C.R. App. P. 10(b)(2). We therefore review for plain error. *State v. Holbrook*, 137 N.C. App. 766, 529 S.E.2d 510 (2000). His argument has been previously addressed by our Supreme Court in *State v. Johnson*, 320 N.C. 746, 360 S.E.2d 676 (1987). In *Johnson*, the trial court gave a disjunctive instruction, similar to the one given in this case, with respect to a first degree rape charge. The Court held that there was evidence to support both theories; therefore, the trial court did not err in submitting the general verdict to the jury. *Id.* at 749-50, 360 S.E.2d at 679 (citing *State v. Belton*, 318 N.C. 141, 164, 347 S.E.2d 755, 769 (1986)).

In the present case, there was also evidence to support both theories. McClendon testified that defendant held a sharp object against her neck, and a box cutter with the blade exposed was found at the crime scene. In addition, a physician testified that McClendon suffered compound fractures of the jaw. *See State v. Locklear*, 320 N.C. 754, 360 S.E.2d 682 (1987) (holding that the defendant inflicted a serious injury on a rape victim where the victim's jaw was fractured). We hold the trial court did not err in instructing the jury on the alternate theories shown by the evidence.

IV.

[5] Defendant next assigns error to the trial court's failure to instruct the jury on the issue of defendant's guilt of second degree rape as a lesser offense. Although defendant did not object to the jury charge and this assignment of error is not properly before us, N.C.R. App. P. 10(b)(2), we consider his argument pursuant to N.C.R. App. P. 2. " 'A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.' " *State v. Mustafa*, 113 N.C. App. 240, 245, 437 S.E.2d 906, 909, *cert. denied*, 336 N.C. 613, 447 S.E.2d 409 (1994) (quoting *Sansone v. United States*, 380 U.S. 343, 350, 13 L.Ed.2d 882, 888 (1965)).

> The crime of first degree rape and second degree rape contain essentially the same elements. The sole distinction between first degree rape and second degree rape is the element of the use or display of a dangerous weapon.

Id. (citation omitted).

"To sustain a conviction for first degree rape, the evidence need only show that a weapon was 'displayed or employed in the course of

the rape.' " *Id.* (quoting *State v. Blackstock*, 314 N.C. 232, 241, 333 S.E.2d 245, 251 (1985)). All of the evidence in this case established that some type of sharp weapon was placed against the victim's neck, either a knife or a box cutter. Therefore, we hold this issue was not in dispute and the court did not err in failing to submit the lesser offense of second degree rape to the jury.

V.

[6] Defendant next argues the first degree rape indictment was insufficient to confer jurisdiction on the Superior Court. Specifically, he contends the use of a short form indictment for rape was deemed unconstitutional in *Jones v. United States*, 526 U.S. 227, 143 L.Ed.2d 311 (1999). The identical argument has previously been considered and rejected in *State v. Harris*, 140 N.C. App. 208, 535 S.E.2d 614, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000). Accordingly, this assignment of error is overruled.

VI.

[7] Finally, defendant assigns error to the court's refusal to turn over to him all of the records and documents regarding the DNA analysis and forensic evidence in the unrelated murder case. The trial court reviewed the records *in camera* and provided defendant with the chain of custody records for the blood samples taken from him and compared to the evidence in this case. We have reviewed the sealed documents and find no evidence relevant or exculpatory in this case. Thus, we hold that the trial court did not err in denying defendant's request.

No error.

Judges HUNTER and JOHN concur.

STATE OF NORTH CAROLINA v. BRYANT EDWARD WILLIAMS

No. COA00-582

(Filed 3 July 2001)

1. Constitutional Law— speedy trial—no prejudice

The trial court did not err by not dismissing a charge of first-degree murder on the ground that defendant's constitutional right to a speedy trial was violated where defendant was indicted on 25 August 1997 and tried on 28 June 1999; the district attorney made numerous requests for additional criminal terms of superior court; he tried three other capital cases during this time, each older than defendant's case; and there was no evidence that the delay impaired defendant's ability to prepare his defense.

2. Homicide— first-degree murder—insufficient evidence of premeditation—elements of second-degree murder necessarily found

A judgment for first-degree murder was vacated and the case was remanded for judgment and sentencing on second-degree murder where defendant and the victim knew each other before this altercation at a club; there was no evidence of animosity or that defendant had made threatening remarks to the victim; defendant was provoked by the victim's assault, to which defendant immediately retaliated by firing one shot resulting in the immediate cessation of the altercation after the victim fell; and defendant's actions before and after the shooting did not show planning or forethought. The conviction of first-degree murder must be reversed because of the absence of premeditation and deliberation, but the jury necessarily found all of the elements of second-degree murder in finding defendant guilty of first-degree murder.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 9 July 1999 by Judge Thomas D. Haigwood in Halifax County Superior Court. Heard in the Court of Appeals 18 April 2001.

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

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

WALKER, Judge.

Defendant appeals his conviction of first degree murder on 9 July 1999. The State's evidence at trial tended to show the following: On 19 April 1997, the victim, Kenny Gregory (Gregory) attended a cook-out with several friends including Sam Jackson (Jackson), Marvin Kee (Kee), Michelle Brooks Shearin (Shearin) and Tegra Turner (Turner). At approximately 11:00 p.m., the group went to the Fireside Disco in Littleton. While inside the club, Jackson, who had been drinking heavily, walked between a man and a woman who were dancing. An argument ensued which resulted in the house lights being turned on. However, the argument soon ended and the rest of the evening proceeded without incident until the club closed.

After the club closed, patrons began to leave. As Jackson, Shearin and Turner approached the door, Jackson saw the man with whom he had argued earlier. Jackson pursued the man outside the club and their argument soon turned into a fight. Another man known as June Man, who had been seen with defendant earlier that night, attempted to break up the fight and told Jackson to stop fighting. June Man and Jackson then began to fight and a crowd gathered to watch. Defendant and a man known as Conrad began to push people back in an attempt to allow the two to fight. After about fifteen or twenty minutes, Shearin and Turner saw Gregory and Kee walking from the club. Shearin called out to Gregory in an attempt to get him to break up the fight. As Gregory and Kee approached the scene, defendant pushed Gregory back with his hands and told him to allow a "one on one fight." Gregory then punched defendant in the jaw, causing him to stagger backwards several feet. Defendant produced a handgun and fired a shot which struck Gregory in the neck.

Kee testified that the series of events "didn't take no time. [Defendant] [j]ust pushed him, that's when [Gregory] hit him, like a chain reaction. He pushed him, he hit him, he shot him." Gregory's wound was fatal. Defendant fled the scene immediately after the shooting but turned himself in to the Halifax County Sheriff's Department the next day.

[1] We first address defendant's contention that the trial court erred in failing to dismiss the charges because his constitutional right to a speedy trial was violated.

Defendant was indicted for murder on 25 August 1997 and awaited trial for nearly two years while in custody before his case was brought to trial on 28 June 1999. During that time, he filed four motions for a speedy trial, all of which were heard and denied. On 22 June 1999, defendant filed a fifth motion, asking for dismissal of the charges due to the failure to grant a speedy trial. This motion was heard on 28 June 1999, the first day of trial. After hearing evidence, the trial court found, in pertinent part:

> 5. That this matter has been calendered for trial during six sessions of Halifax County Superior Court.
>
> 6. That the [d]efendant during none of those sessions of court or any other session of court has ever requested a continuance.
>
> 7. That since the defendant was indicted, there have been eighteen sessions of felony Superior Court, only thirteen of which were available for the trial of this matter.
>
> 8. That during the pendency of this matter three capital trials have taken place. Those trials consumed a total of thirty-three weeks.
>
> 9. That the Assistant District Attorney has announced that this matter is scheduled for trial to be held during the next session of Superior Court to be held on June 28, 1999.

On the basis of these findings, the trial court concluded:

> 1. That the delay in calling this matter for trial has not been unreasonable.
>
> 2. That the relief sought in the [d]efendant's motion for Speedy Trial is denied.

Furthermore, in denying defendant's motion, the trial court stated that "the evidence in the record amply shows that the dockets in this county are congested and that has, through no particular purpose directed towards this defendant, has [sic] resulted in the time that has gone by before this case has been called for trial." While the trial court acknowledged that the delay in bringing defendant's case to trial had been unusually long, it also concluded that there was a lack of "any purposeful intent or any arbitrary actions on the part of the

State that resulted in this delay, and certainly no evidence that the State was seeking any tactical advantage against this particular defendant by the delay."

In *State v. Lundy*, 135 N.C. App. 13, 519 S.E.2d 73 (1999), our Supreme Court set out the balancing test to be used when considering whether a defendant's constitutional right to a speedy trial has been violated. In applying the test, this Court must balance four factors: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay. *Lundy* at 19, 519 S.E.2d at 79. "The issue of whether a transgression of defendant's right to a speedy trial has occurred is not resolved by any one factor; 'rather, the factors must be examined as a whole, with such other circumstances as may be relevant.' " *Id.*

Here, the evidence reflects that the district attorney diligently worked throughout the time at issue to deal aggressively with an overflowing docket. The district attorney made numerous requests for additional criminal terms of superior court. He had tried three other capital cases during this time. Each of these three cases was older than defendant's case. Further, we find no infringement of defendant's rights has occurred because he has failed to show what he recognizes as the most important factor—prejudice due to the delay. There is an absence of evidence that the delay impaired defendant's ability to prepare his defense through the loss of evidence, fading of memories or any other risk inherent in a delayed trial. Thus, in accordance with the balancing test required by *Lundy*, we find defendant's constitutional right to a speedy trial has not been violated.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss the charge of first degree murder because insufficient evidence existed to show he shot Gregory with a premeditated and deliberated intent to kill.

First degree murder consists of the unlawful killing of another with malice, premeditation and deliberation. *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). " 'Premeditation' means that the defendant thought about killing for some length of time, however short, before he killed." *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985). " 'Deliberation' means that the intent to kill was formulated in a 'cool state of blood', 'one not under the influence of a violent passion suddenly aroused by some lawful or just cause or

legal provocation.' " Id. "The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *State v. Elliott*, 344 N.C. 242, 475 S.E.2d 202 (1996). "Although there may have been time for deliberation, if the purpose to kill was [sic] formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated." *Misenheimer* at 113, 282 S.E.2d at 795.

A non-exclusive list of factors to be considered in determining whether the defendant committed the crime after premeditation and deliberation are:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Hamlet, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984). An examination of these factors reveals that insufficient evidence was presented to show that defendant acted with premeditation and deliberation.

In *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981), the victim entered defendant's house in an intoxicated state, approached the couch and insulted defendant. Defendant asserted that the victim initiated a physical confrontation with him and attempted to hit him but was unsuccessful. Defendant then pulled a rifle from behind the cushion of his couch and shot the victim eight to ten times in the chest, killing him. After the shooting, defendant walked across the street and called the police. Defendant contended there was insufficient evidence of premeditation and deliberation to support his conviction of first degree murder. After considering the aforementioned factors, our Supreme Court agreed, stating "[t]here is no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions." *Corn* at 298, 278 S.E.2d at 224.

Similarly, in the case at bar there was no evidence that defendant and Gregory knew each other before the altercation at the club.

There also was no evidence of animosity or that defendant had made threatening remarks to Gregory. Furthermore, the defendant was provoked by Gregory's assault to which defendant immediately retaliated by firing one shot resulting in the immediate cessation of the altercation after Gregory fell. Finally, defendant's actions before and after the shooting did not show planning or forethought on his part. After committing the crime in front of a crowd of bystanders, defendant left the scene immediately but turned himself in the next day. In light of these factors, the evidence fails to show that defendant acted in a "cool state of blood" or that he was "not under the influence of a violent passion" at the time of the shooting. Given the absence of the requisite premeditation and deliberation by defendant, his conviction of first degree murder must be reversed.

Although we determine that insufficient evidence exists to support the conviction of first degree murder, we conclude the evidence supported the crime of second degree murder. In *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991), the trial court submitted possible verdicts finding the defendant guilty of second degree murder, guilty of the lesser included offense of involuntary manslaughter or not guilty. The jury convicted the defendant of second degree murder; however, the judgment for second degree murder was later vacated by our Supreme Court. Nevertheless, the Court found that by convicting the defendant of second degree murder, "the jury necessarily had to find the facts establishing the lesser included offense of involuntary manslaughter." *Id.* at 623, 403 S.E.2d at 502. Accordingly, the defendant's case was "remanded for judgment as upon a verdict of guilty of involuntary manslaughter." *Id. See also State v. Barnett*, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Here, the trial court submitted possible verdicts finding the defendant guilty of first degree murder, guilty of the lesser included offenses of second degree murder or voluntary manslaughter or not guilty. Second degree murder is a lesser included offense of first degree murder but without premeditation and deliberation. Thus, in finding defendant guilty of first degree murder, the jury necessarily found all the elements of second degree murder were met. Accordingly, we vacate the judgment for first degree murder and remand the case to the trial court for sentencing and entry of judgment finding defendant guilty of second degree murder.

After careful review, we find defendant's remaining assignment of error to be without merit.

Reversed and remanded.

Judge HUNTER concurs.

Judge TYSON concurs in part and dissents in part.

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

I. Speedy Trial

I concur with that portion of the majority opinion which holds that defendant failed to establish the prejudice necessary to show a violation of his right to a speedy trial. While length of delay is not alone determinative of whether a defendant has been deprived of this right, *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000) (delay of 3 years, 326 days held not to violate right to speedy trial absent showing of prejudice), post-accusation delay becomes presumptively prejudicial at approximately one year. *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 120 L. Ed. 2d 520 (1992)). A year's delay triggers application of the balancing test set forth in the majority opinion, as enumerated in *Lundy* and *Grooms*.

I agree with the majority's holding that defendant failed to show facts to meet the fourth requirement from *Lundy*: that the delay was prejudicial. I note, however, that (1) the length of defendant's incarceration was presumptively prejudicial; (2) that the State's justification for the delay: (a) that three older capital trials had occurred during the pendency of this matter, and (b) that the district attorney requested additional sessions of court, and "that the dockets in this county are congested," and the trial court's findings that the delays were not "purposeful" or for "tactical advantage," should not affect defendant's own constitutional right to a speedy trial; and (3) that defendant properly and timely asserted his right to a speedy trial by never requesting a continuance and by filing five separate motions for a speedy trial during his incarceration.

II. Reversal of Conviction for First-Degree Murder

I dissent from that portion of the majority opinion which holds "that insufficient evidence was presented to show that defendant acted with premeditation and deliberation" to sustain defendant's conviction for first-degree murder. The majority lists six nonexclusive factors from *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984) which are to be considered in determining whether

defendant committed murder with premeditation and deliberation. I would find sufficient evidence in "(2) the conduct and statements of the defendant before and after the killing," and "(3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased." *Id.*

Viewed in the light most favorable to the State, as required on such a motion to dismiss, *see State v. Miller*, —— N.C. App. ——, 543 S.E.2d 201 (2001), the evidence shows that defendant initiated the event when he stepped towards the victim, Gregory, pushed him back with his hands, and held Gregory to let Jackson and June Man continue fighting. After being pushed and held by defendant, Gregory struck defendant in the mouth. Defendant, without warning, then escalated the encounter by introducing a deadly weapon into the fist fight. Defendant pulled out a pistol, extended his arm, aimed at Gregory's head, and shot him. After the shooting, defendant did not attempt to assist Gregory himself, or call for assistance. *See State v. Hunt*, 330 N.C. 425, 428, 410 S.E.2d 478, 481 (1991). Rather, defendant fled the scene by jumping into the trunk of a vehicle. The vehicle then stopped at the end of the driveway to the Fireside Disco. Defendant exited the trunk of the vehicle, entered the driver's seat, and drove away from the scene.

After the murder, defendant was not at his residence when Sheriff's Captain Charles E. Ward went there, nor was defendant at Jack Clanton's residence where the vehicle was parked that defendant used to flee the scene. Only after the officer left word for defendant to go to the Sheriff's office did defendant turn himself in to authorities the following afternoon. Such actions before, during and after the murder are consistent with the jury's finding of premeditation and deliberation. *See Hunt* at 428, 410 S.E.2d at 481 (evidence supported finding of premeditation and deliberation where, during scuffle with the victim, the defendant took out his pistol, aimed, and shot the victim several times, after which the defendant "left the deceased to die without attempting to obtain assistance for the deceased.").

After hearing and considering *all* the evidence, and judging the credibility of the witnesses, the jury found the defendant guilty of first-degree murder. I would hold that defendant received a fair trial free from prejudicial error. Accordingly, I respectfully dissent from the majority's holding to reverse defendant's conviction of first-degree murder, and to remand this case for entry of a judgment for second-degree murder.

WILLIAM EDWARD VAUGHN, PLAINTIFF v. CVS REVCO D.S., INC., DEFENDANT

No. COA00-159

(Filed 3 July 2001)

Pensions and Retirement— anticipatory breach of contract— unfair and deceptive trade practices—Employment Retirement Income Security Act

The trial court erred by concluding that plaintiff's claims for anticipatory breach of contract and unfair and deceptive trade practices, arising out of defendant's alleged failure to honor its purported agreement with plaintiff establishing 15 February 1972 as the date of hire for purposes of determining plaintiff's pension benefits, are preempted by the Employment Retirement Income Security Act (ERISA) under U.S.C. §§ 1001-1461 and thus subject to dismissal for lack of jurisdiction, because: (1) plaintiff's claims do not make reference to an ERISA plan and are based on state law; (2) a finding of preemption is not necessary to protect the objectives of ERISA; (3) plaintiff's state law claims do not fall within any of the three categories of state laws that Congress intended ERISA to preempt; and (4) plaintiff's claims are not against defendant's employee benefits plan, but are instead against defendant for its anticipated failure to abide by its promise to provide pension benefits based on an agreed upon date of hire which does not concern the substance of the pension plan or the plan's regulation.

Appeal by plaintiff from order entered 5 November 1999 by Judge J.B. Allen, Jr. in Orange County Superior Court. Heard in the Court of Appeals 26 February 2001.

Haywood, Denny & Miller, L.L.P., by Michael W. Patrick, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals the trial court's determination that his claims are preempted by the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (ERISA), and, thus, subject to dismissal for lack of jurisdiction.

On 9 June 1999, plaintiff filed an action against CVS Revco D.S., Inc. (defendant), successor in interest to Revco D.S., Inc. (Revco), alleging anticipatory breach of contract and unfair and deceptive trade practices. Plaintiff's complaint alleged that he began employment with Revco on 15 February 1972. Plaintiff later operated his own business, Vaughn Independent Pharmacy, until in or around August 1995, at which time his pharmacy was purchased by Revco. Plaintiff further alleged that an agent of Revco orally contracted with plaintiff for a position of employment as a salaried pharmacist at Revco's Carrboro location. In evidence of this alleged oral contract, plaintiff received written confirmation by letter dated 5 June 1995, stating "you will retain your tenure showing a date of hire of February 15, 1972," and "[a]ll benefits will be applicable per your tenure." Defendant subsequently acquired Revco, and plaintiff retained his employment with defendant. Plaintiff alleged that agents of defendant have expressly stated on numerous occasions that upon retirement plaintiff's pension benefits will be calculated as if he were hired in or about August 1995, although the contract provides for a date of hire of 15 February 1972. Plaintiff alleged that these statements constituted an anticipatory breach of contract, and that defendant's conduct constituted unfair and deceptive trade practices.

Defendant answered plaintiff's complaint and moved to dismiss plaintiff's claims, arguing that they are preempted by ERISA. The trial court agreed and entered an order dismissing plaintiff's claims for lack of jurisdiction over the subject matter.

Plaintiff argues the trial court erred in its conclusion that his claims are preempted by ERISA. We agree, and reverse the order of the trial court.

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C.A. § 1144(a) (1999). The text of ERISA's preemption provision is "clearly expansive." *New York Blue Cross v. Travelers Ins.*, 514 U.S. 645, 655, 131 L. Ed. 2d 695, 705 (1995). However, the United States Supreme Court has recognized that the term "relate to" cannot be "taken to extend to the furthest stretch of its indeterminancy," or else "for all practical purposes pre-emption would never run its course." *Id.* Likewise, the United States Supreme Court has cautioned that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' " an ERISA plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 77 L. Ed. 2d 490, 503 n. 21 (1983).

In *Shaw*, the United States Supreme Court explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it [1] has a connection with or [2] reference to such a plan." *Id.* at 96-97, 77 L. Ed. 2d at 501. Under the latter inquiry, where a State's law acts immediately and exclusively upon ERISA plans, as in *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 100 L. Ed. 2d 836 (1988) (holding that ERISA preempts a state law specifically exempting ERISA plans from an otherwise generally applicable garnishment provision), or where the existence of an ERISA plan is essential to the law's operation, as in *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 112 L. Ed. 2d 474 (1990) (holding that ERISA preempts a common law cause of action for wrongful discharge premised on the existence of an ERISA plan), the law impermissibly "refers to" an employment benefit plan, resulting in preemption. *Cal. Div. of Lab. Stds. v. Dillingham*, 519 U.S. 316, 324-25, 136 L. Ed. 2d 791, 799 (1997).

A law that does not refer to ERISA plans may still be preempted if it has an impermissible connection with ERISA plans. To determine whether a state law has the forbidden connection with ERISA plans, the United States Supreme Court in *Travelers* adopted a pragmatic approach, "go[ing] beyond the unhelpful text [of § 1144(a)] and the frustrating difficulty of defining its key term ["relates to"], and look[ing] instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive [preemption]." *Travelers*, 514 U.S. at 656, 131 L. Ed. 2d at 705.

ERISA was enacted to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C.A. § 1001(b) (1999). In passing ERISA's preemption provision, Congress intended

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . ., [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Travelers, 514 U.S. at 656-57, 131 L. Ed. 2d at 706 (quoting *Ingersoll-Rand v. McClendon*, 498 U.S. at 142, 112 L. Ed. 2d at 486 (1990)). "The

basic thrust of the preemption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.*

"[I]n light of the objectives of ERISA and its preemption clause, Congress intended ERISA to preempt at least three categories of state laws that can be said to have a connection with an ERISA plan." *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1468 (4th Cir. 1996). "First, Congress intended ERISA to preempt state laws that 'mandate[] employment benefit structures or their administration.' " *Id.* (quoting *Travelers*, 514 U.S. at 658, 131 L. Ed. 2d at 707). For example, the Court in *Shaw* held that ERISA preempted a New York statute which prohibited employers from structuring benefit plans in a manner that discriminated on the basis of pregnancy, as well as a statute that required employers to pay employees specific benefits. *Shaw*, 463 U.S. 85, 77 L. Ed. 2d 490. Without preemption, such laws would subject benefit plans to conflicting directives from one state to the next. *Id.*

"Second, Congress intended to preempt state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself." *Coyne & Delany Co.*, 98 F.3d at 1468. "Accordingly, the Court in *Travelers* held that ERISA did not preempt New York's statute imposing surcharges on patients covered by certain insurers because the statute merely had an 'indirect economic influence' on a plan's shopping choices but did not bind a plan to any particular choice." *Id.*

Third, Congress intended to preempt "state laws providing alternate enforcement mechanisms" for employees to obtain ERISA plan benefits. *Travelers*, 514 U.S. at 658, 131 L. Ed. 2d at 707. In considering whether a particular state law claim falls within this category, it is important to determine whether the claim is "aimed at obtaining ERISA benefits." *Coyne & Delany Co.*, 98 F.3d at 1471. Specifically, in *Coyne & Delany Co.*, the Fourth Circuit emphasized that the plaintiff's claims were not preempted by ERISA because if the plaintiff succeeded on its claims, the defendants would be liable in their individual capacities, not as an administrator or fiduciary of an ERISA plan, and the plaintiff would not be entitled to ERISA plan benefits. *See also Smith v. Cohen Ben. Group, Inc.*, 851 F. Supp. 210, 214 (M.D.N.C.1993).

In contrast to the three categories of state laws that Congress intended ERISA to preempt, "Congress did not intend to preempt 'traditional state-based laws of general applicability [that do not] implicate the relations among the traditional ERISA plan entities . . . ." *Coyne & Delany Co.*, 98 F.3d at 1469 (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1167 (4th Cir. 1996).

In the instant case, plaintiff alleged (1) a common law claim of anticipatory breach of contract, and (2) a statutory claim of unfair and deceptive trade practices. The factual basis for both of plaintiff's claims is that defendant does not intend to honor its agreement with plaintiff that allegedly established 15 February 1972 as the date of hire for purposes of determining plaintiff's pension benefits. In light of the principles already discussed, we now consider whether plaintiff's claims "relate to" an ERISA plan.

At the outset, we hold that plaintiff's claims do not make "reference to" an ERISA plan, and, thus, are not preempted on that basis. To be preempted for making "reference to" an ERISA plan, a law must specifically refer to ERISA plans, *See Mackey*, 486 U.S. 825, 100 L. Ed. 2d 836; *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 121 L. Ed. 2d 513 (1992), or the cause of action must be dependent on the existence of an ERISA plan. *See Ingersoll-Rand*, 498 U.S. 133, 112 L. Ed. 2d 474. In the instant case, plaintiff's claims are based on state law that applies in a variety of contexts and does not specifically refer to ERISA plans, and plaintiff's claims are not dependent on the existence of an ERISA plan. Therefore, we must consider whether plaintiff's claims have an impermissible "connection with" ERISA plans.

We start by emphasizing that allowing plaintiff's claims to go forward in state court would not in any way undermine the objectives of the ERISA statute. Hearing plaintiff's claims in state court in no way threatens ERISA's objective to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing appropriate remedies, sanctions, and ready access to Federal courts." 29 U.S.C.A. § 1001(b). Further, allowing plaintiff's claims to survive in state court does not interfere with the purposes of ERISA's preemption provision. Plaintiff's claims will not subject plans and plan sponsors to "conflicting directives among States or between States and the Federal Government . . . ." *Travelers*, 514 U.S. at 656, 131 L. Ed. 2d at

706 (quoting *Ingersoll-Rand*, 498 U.S. at 142, 112 L. Ed. 2d at 474). Nor do they create "the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Id.* Plaintiff's state law claims simply do not threaten Congress' goal of "the nationally uniform administration of employee benefit plans." *Id.* at 657, 131 L. Ed. 2d at 706. Therefore, a finding of preemption in this case is not necessary to protect the objectives of ERISA.

Further, we do not feel that plaintiff's state law claims fall within any of the three categories of state laws Congress intended ERISA to preempt. First, plaintiff's state law claims do not "mandate[] employee benefit structures or their administration." *Id.* at 658, 131 L. Ed. 2d at 707. The state law claims at issue here do not attempt to require an employee benefit plan with particular terms, or to regulate the types of benefits a plan may provide. They do not create reporting, disclosure, or funding requirements, nor do they define fiduciary duties or address faulty plan administration. *See Coyne & Delany Co.*, 98 F.3d at 1471. Plaintiff's claims simply seek to enforce, or secure compensation for the breach of, an alleged agreement as to the date of hire for purposes of determining plaintiff's pension benefits.

Second, plaintiff's claims do not seek to bind a plan administrator to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan. Plaintiff's claims are not aimed at the administrator of defendant's employee benefits plan. Instead, plaintiff is suing defendant in its individual corporate capacity for its alleged anticipated refusal to adhere to the agreement entered into between it and plaintiff concerning plaintiff's date of hire for pension purposes. Plaintiff's claims do not attempt to regulate the employee benefit plan itself, but merely seek to establish the length of service plaintiff will be credited with upon retirement.

Third, plaintiff's state law claims cannot be considered an "alternate enforcement mechanism" for obtaining plan benefits. *Travelers*, 514 U.S at 658, 131 L. Ed. 2d at 707. Should plaintiff prevail on the damages portion of his claim, his recovery would be limited to damages against the defendant itself, and he would not be entitled to recover ERISA plan benefits. Although plaintiff does, in the alternative, seek to enjoin defendant from denying that plaintiff's date of hire for pension purposes is 15 February 1972, we hold that the connection between such an injunction and defendant's employee bene-

fits plan is likewise too minimal to bring plaintiff's claims within ERISA's preemption provision. *See Smith*, 851 F. Supp. at 214.

We believe that plaintiff's claims are traditional state-based claims of general applicability that do not implicate the relations among the traditional ERISA plan entities. Plaintiff's causes of action function irrespective of the existence of an ERISA plan. Defendant's liability is not premised on conditions in or a construction of defendant's employee benefits plan. The existence of an employee benefit plan is not a factor critical to establishing liability because the same causes of action would exist if an employee benefit plan were not in existence or was merely a fraudulent scheme. *See Smith*, 851 F. Supp. at 213. For the foregoing reasons, we hold that plaintiff's claims do not have the forbidden "connection with" an ERISA plan that would bring them within ERISA's preemption provision.

Defendant argues that the instant case is controlled by the decision in *Middleton v. Russell Group, Ltd.*, 126 N.C. App. 1, 483 S.E.2d 727, *disc. review denied*, 346 N.C. 548, 488 S.E.2d 805 (1997), where this Court held that several of the plaintiff's state law claims were preempted by ERISA. In *Middleton*, the defendant-employer hired the plaintiff as an advertising consultant and agreed to enroll the plaintiff and his family in its employee health insurance plan, which was administered by Life of Georgia (LOG). Approximately one month after the defendant-employer terminated the plaintiff's employment, the plaintiff's wife was injured when a brick wall fell on her. After admitting the plaintiff's wife for medical treatment, the hospital called LOG to verify health insurance coverage. LOG referred the hospital to the defendant-employer which informed the hospital that the plaintiff's wife was not covered. It was later discovered that the share of the plaintiff's health insurance premium had never been deducted from his paycheck, nor had he paid the premium share directly to the company. A letter was prepared notifying the plaintiff that he was entitled to continuation coverage under the health insurance plan pursuant to the Consolidated Omnibus Reconciliation Act, 29 U.S.C. §§ 1161-67 (COBRA). This letter was never mailed because the president of the defendant-employer determined that if the plaintiff had not paid his share of the premiums, he never had health insurance coverage, and, thus, the defendant-employer was not obligated to provide continuation coverage under COBRA. The plaintiff filed suit against the defendant-employer and LOG asserting claims for: (1) breach of contract; (2) failure to provide benefits under ERISA; (3) injunctive relief to provide COBRA benefits; (4) constructive fraud;

(5) negligent misrepresentation; and (6) unfair and deceptive trade practices. After the defendants failed in their attempt to remove the case to federal court, the trial court granted defendants' motion for summary judgment on all state law claims except negligent misrepresentation. This Court affirmed based on case law that has consistently found state law claims which involve redress for mishandling benefit claims or other maladministration of employee benefit plans to be preempted. Defendant contends that plaintiff's claims in the instant case are likewise preempted. We disagree.

The instant case is factually distinguishable from *Middleton*, in that here plaintiff's claims are premised upon an alleged anticipated breach of a promise that pension benefits will be determined based upon a certain date of hire, whereas, the state law claims held to be preempted in *Middleton* were premised on the plaintiff's health insurance benefits claim being mishandled. Further, our analysis of ERISA preemption law leads us to the conclusion that plaintiff's claims in the instant case are not preempted, and we so hold.

In conclusion, we reiterate that plaintiff's claims are not against defendant's employee benefits plan. Rather, they are against the defendant for its anticipated failure to abide by its promise to provide pension benefits based on an agreed upon date of hire. These claims neither concern the substance of the pension plan nor the plan's regulation. The plan is only incidentally or tangentially involved. Since plaintiff's claims are only tangential to the plan, his claims are not preempted by ERISA. *See Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 354 S.E.2d 746, *disc. review denied*, 320 N.C. 638, 360 S.E.2d 107 (1987).

Based on the foregoing, we hold that plaintiff's claims are not preempted by ERISA.

Reversed and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

LSB FINANCIAL SERVICES, INC., PLAINTIFF v. BRENDA S. HARRISON AND J.C. BRADFORD & CO., DEFENDANTS

No. COA00-515

(Filed 3 July 2001)

1. **Appeal and Error— appealability—order granting application to compel arbitration**

Although there is no right of appeal from an order granting an application to compel arbitration, the Court of Appeals exercised its discretionary authority under Rule 2 to grant the writ of certiorari and address the appeal on the merits.

2. **Arbitration and Mediation— federal statutes—transaction affecting interstate commerce**

Federal arbitration statutes apply to this case instead of state arbitration statutes because the securities transactions involved affect interstate commerce.

3. **Arbitration and Mediation— securities transactions—U-4 form agreement—third party beneficiary—equitable estoppel**

The trial court did not err in an action alleging that defendant violated the noncompete clause contained in her employment contract with plaintiff by staying court proceedings pending arbitration and by compelling plaintiff to submit to binding arbitration based on the fact that plaintiff is bound by the U-4 form agreement between defendant and UVEST compelling the arbitration of employment contract disputes even though plaintiff did not sign the agreement to arbitrate, because: (1) plaintiff was a third party beneficiary receiving the direct benefit of the contract between defendant and UVEST through commissions earned; (2) equitable estoppel prevents plaintiff from asserting that the lack of its signature on a written contract precludes enforcement of the contract's arbitration clause when it consistently maintained that other provisions of the same contract should be enforced to benefit it; (3) plaintiff required defendant to sign the U-4 form so that plaintiff would be in a lawful position to benefit from the business of securities transactions and so that defendant would be eligible to serve as a securities broker for plaintiff; and (4) the issue of the noncompete clause in the employment contract that gave rise to the dispute does arise out of defendant's employment as a securities broker.

Appeal by plaintiff from judgment entered 16 February 2000 by Judge Mark E. Klass in Superior Court, Davidson County. Heard in the Court of Appeals 15 March 2001.

Brinkley Walser, P.L.L.C., by Charles H. McGirt, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr., for defendants-appellees.

TIMMONS-GOODSON, Judge.

LSB Financial Services, Inc. ("plaintiff") appeals the order of the trial court staying court proceedings pending arbitration and compelling plaintiff to submit to binding arbitration. We affirm.

The present action stems from a suit instituted by plaintiff against Brenda S. Harrison ("defendant") and J.C. Bradford & Co. ("Bradford" or, together, "defendants"), alleging that defendant violated the noncompete clause contained in her employment contract with plaintiff. Defendant was an employee of Lexington State Bank from 1979 to 1998. She worked as a securities broker for plaintiff, the bank's financial services subsidiary, for the last two years of her employment. Until 1999, federal law prohibited banks from being members of the National Association of Securities Dealers, Inc. ("NASD"). Due to this prohibition, banks were not allowed to engage in the business of securities transactions unless they partnered with an NASD member. Plaintiff did partner with a NASD member, Liberty Securities Corporation ("Liberty") in 1996, and as such, qualified employees of plaintiff were allowed to engage in securities brokering. After about one year, plaintiff chose to replace their Liberty partnership with a partnership with Investment Services ("UVEST"), another NASD member.

As part of the arrangement, UVEST and plaintiff maintained employees, such as defendant, called "dual employees," as they worked under the supervision and control of both plaintiff and UVEST. The arrangement was such that plaintiff paid the employees, while UVEST and plaintiff shared the profits garnered from the dual employees' securities work.

While plaintiff was not allowed to become a NASD member, the dual employees were required to become NASD members in order to qualify for employment as securities brokers. In order to become a

NASD member, applicants, including defendant, were required to complete and sign a Uniform Application for Securities Industry Registration Form ("U-4 Form"). The U-4 Form, which is a standardized application form, includes a provision for submitting disputes between applicable people and organizations to arbitration.

The noncompete clause in the employment contract between plaintiff and defendant reads as follows:

> During Employee's employment hereunder and continuing thereafter for a period of one year, Employee shall not directly or indirectly compete or attempt to compete with the said Broker/Dealer or LSBFS Program within a 50 mile radius of any Service Center location or locations to which the Employee has been assigned during the term hereof, by (i) doing business with, interfering in the contracts or relationships with or soliciting, directing or taking away the business or patronage of the then existing or prospective clients, customers or accounts of the said Program, The Broker/Dealer LSBFS or LSBFS's affiliates or (ii) recruiting or inducing any employee of LSBFS, the Broker/Dealer engaged by LSBFS, or affiliates of LSBFS to terminate or otherwise cease his employment relationship with said Broker/Dealer or LSBFS or such affiliates.

Defendant voluntarily terminated her employment with plaintiff on 18 August 1998 and began working as a broker with Bradford, another NASD member. Several customers left plaintiff and began conducting business transactions with defendants. Plaintiff thereafter initiated a complaint against defendants, alleging a violation of the covenant not to compete and other provisions of the employment contract. In addition to seeking damages for breach of contract, plaintiff alleged willful or malicious interference with contract, libel and slander, unfair and deceptive trade practices, punitive damages and sought injunctive relief. A temporary restraining order was issued at the time of the initiation of the action. Defendant filed an answer on 24 September 1999 along with a motion to compel arbitration and stay judicial proceedings. On 10 December 1999, defendant filed an amended motion to compel arbitration and stay proceedings pending arbitration pursuant to sections 1-567.2 and 1-567.3 of the North Carolina General Statutes. On 27 January 2000, defendant filed an amended motion to compel arbitration and stay proceedings pending arbitration pursuant to the Federal Arbitration Act ("FAA") 9 U.S.C. § 2 and § 3.

On 16 February 2000, the trial court entered an order staying proceedings pending arbitration and compelling plaintiff to arbitrate all matters alleged in the complaint. The court found that the disagreement between plaintiff and defendant should be settled by binding arbitration because plaintiff was a third party beneficiary of the contract between defendant and UVEST, and because the contract between defendant and UVEST mandated binding arbitration between certain parties in the event of a dispute. From this order, plaintiff appeals. For the following reasons, we affirm the trial court decision.

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[1] A threshold question before analyzing the decisions of the trial court in this case is whether we should hear this appeal. Citing N.C. R. App. P. 21, plaintiff has moved the Court to grant its petition for certiorari and address the appeal on the merits. The petition for writ of certiorari filed by plaintiff correctly asserts that North Carolina General Statutes section 1-567.18 allows an appeal to be taken from an Order *denying* an application to compel arbitration under section 1-567.3, but the statute does not provide for an appeal from an Order *granting* an application to compel arbitration. The trial court entered an order compelling arbitration and, as such, there is no appeal of right. Pursuant to our authority under Rule 2, we grant the writ of certiorari and address the appeal on the merits.

[2] A second threshold question before analyzing the decisions of the trial court in this case is whether state or federal law governs. Both state and federal statutes regulate arbitration. The FAA provides, in pertinent part, as follows:

> A written . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable . . .

9 U.S.C. § 2 (2000).

Similarly, the applicable North Carolina's statutory provision regarding the validity of arbitration agreements reads as follows:

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

> agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C. Gen. Stat. § 1-567.2 (1999).

The essential distinction, for our purposes, between the federal and state arbitration statutes, is that the FAA governs contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2. For the FAA to apply, then, the contract must affect interstate commerce. *See e.g. Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 130 L. Ed. 2d 753 (1995). " 'Commerce' in its broadest sense comprehends intercourse for the purposes of trade in any form." *Johnson v. Insurance Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980). The FAA defines commerce broadly as "commerce among the several States . . . , or in the District of Columbia, . . . or between the District of Columbia and any state." 9 U.S.C. § 1.

Previous decisions strongly support the conclusion that this dispute involves commerce in such a way that the FAA was properly invoked by the trial court, as "[b]rokerage agreements . . . fall within the broad construction of the term 'involving commerce' under section 2 of the FAA." *Smith Barney, Inc. v. Bardolph*, 131 N.C. App. 810, 813, 509 S.E.2d 255, 257 (1998). Even more specifically, the U-4 Form has been held by the United States Supreme Court to be a contract that involves commerce. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991).

We conclude, therefore, that the securities transactions involved here affect interstate commerce and the FAA is applicable.

[3] We turn our attention, then, to the dispositive issue on appeal of whether plaintiff is bound by the agreement between defendant and UVEST compelling the arbitration of employment contract disputes when plaintiff did not sign the agreement to arbitrate. While neither party argues that an agreement to arbitrate is contained in the employment contract between plaintiff and defendant, defendant asserts that the fact that plaintiff and defendant do not have a written and signed contract directly requiring arbitration does not mean that

there is not an enforceable agreement to arbitrate between the two parties. We agree.

Arbitration of a claim is available only when the parties involved agree to arbitration by contract. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409 (1960). Whether parties must arbitrate a dispute is for the courts to decide on the basis of the contract. *Id.* While it is true that 9 U.S.C. § 2 overtly and clearly mandates that arbitration can only be compelled if there is a "written . . . contract . . . to settle by arbitration," and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *United Steelworkers of America*, 363 U.S. at 582, 4 L. Ed. 2d at 1417, "a variety of nonsignatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles." *In re Prudential Ins. Co. of America Litigation*, 133 F.3d 225, 229 (3rd Cir. 1998).

While *In re Prudential* is a decision by the Third Circuit, it is instructive in our decision. In *In re Prudential*, Prudential was sued by former agents and Prudential moved to compel arbitration. Prudential was not a signatory to the U-4 Form which was used in the case, but the plaintiffs had signed the form. Rather, Prudential was a third party beneficiary to the U-4 Form agreement, as found by the Court. In its opinion, the Court articulated some broad principles regarding the U-4 Form, the NASD, and third party beneficiaries:

> [I]t is clear from the text and purpose of Form U-4, that the parties to the agreement intended to benefit such non-signatory, third parties as Prudential. While Form U-4 is only an agreement between the NASD and the applicant, it was adopted as a broader effort by self-regulatory organizations, including the NASD, to regulate the securities industry (Citations omitted). The intention, as Form U-4 unambiguously indicates, was not limited to arbitrating disputes between the NASD and the applicant or member "firms" explicitly recognized in the text. Rather, the arbitration agreement and the NASD Code of Arbitration establish certain classes of individuals—member firms of the NASD, customers, and so on—who would benefit from the applicant's agreement with the NASD. The applicant, in return, would become a registered broker with the NASD and could properly conduct business under the federal securities laws. Therefore, we have no doubts that the parties to Form U-4 unequivocally

intended that each applicant would submit to arbitration against non-signatory third parties such as Prudential.

Id. at 230.

We accept the propositions set forth above. After all, in both *In re Prudential* and the case at bar, the third party beneficiary was a third party beneficiary because they were receiving the direct benefit of the contract.[1] Accepting the propositions set forth above, however, still leaves us with another question. The Court in *In re Prudential* held that a U-4 Form signator and a third party beneficiary to the U-4 Form can be compelled to arbitrate disputes under the authority of the NASD. In *In re Prudential*, however, it was the third party beneficiary that was trying to compel the actual signator to the U-4 Form to arbitrate, whereas in the case *sub judice*, the facts are reversed in that the U-4 Form signator wants to compel a third party beneficiary to arbitrate under the conditions of the U-4 Form. Defendant argues that through commissions earned, "LSB reaped the benefits of the U-4 Form . . . [and] must not be permitted to avoid its burdens." Defendant's position is supported by the fact that our case law establishes that "[i]f the third party is an intended beneficiary, the law implies privity of contract." *Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 236, 405 S.E.2d 208, 212 (1991). Defendant's position is also supported by the doctrine of equitable estoppel, a doctrine which prevents a party from asserting a right that "he otherwise would have had against another" when his conduct would make the assertion of those rights contrary to equity. *In re Varat Enterprises, Inc.* 81 F.3d 1310, 1317 (4th Cir. 1996). In the context of arbitration, the doctrine of equitable estoppel may be used to stop a party from asserting that, for example, "the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the

1. "To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (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 his direct, and not incidental, benefit." *Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-6, 263 S.E.2d 313, 317 (1980). Plaintiff directed defendant to enter into the U-4 Form contract in order to directly benefit plaintiff. The trial court properly found plaintiff to be a third party beneficiary to the contract between defendant and UVEST. Other case law supports the proposition that in the particular factual scenario as set out in the case at bar, plaintiff would be found to be a third party beneficiary. *See e.g. Seus v. John Nuveen & Co., Inc.*, 1997 WL 325792 at 4 (E.D. Pa. 1997) (holding the employer of a signer/submitter of a U-4 Form is a third-party beneficiary; "Nuveen is an intended third-party beneficiary who may enforce the Form U-4 arbitration agreement."), *aff'd*, 146 F.3d 175 (3rd Cir. 1998).

same contract should be enforced to benefit him." *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000).

In the case at bar, plaintiff has maintained that other provisions of the U-4 Form should be enforced to benefit them. Indeed, plaintiff required defendant to sign the U-4 Form so that plaintiff would be in a lawful position to benefit from the business of securities transactions. We agree, therefore, with defendant's argument that "LSB reaped the benefits of the U-4 Form in terms of commissions earned [so] it must not be permitted to avoid its burdens." Defendant's argument that plaintiff was properly compelled to arbitrate is further bolstered by the fact that defendant was an agent of plaintiff and plaintiff instructed defendant to submit the U-4 Form in order to be eligible to serve as a securities broker for plaintiff. "It is well established in the federal courts that an arbitration agreement may be enforced by *or against* a nonsignatory party under traditional principles of agency or contract law." *Stone v. Pennsylvania Merchant Group, Ltd.*, 949 F. Supp. 316, 320 (E.D. Pa. 1996) (emphasis added). Plaintiff partnered with Liberty and then UVEST, two NASD members, for the sole purpose of allowing plaintiff's employees to sell securities for the financial gain of plaintiff. As a dual employee of plaintiff and UVEST, defendant was required to become a member of NASD and to submit a U-4 Form to NASD, and, as such, agreed to abide by the NASD rules and regulations. Among these regulations was the requirement that certain disputes be submitted to arbitration. The NASD Code of Arbitration requires arbitration of suits between "an NASD member against a person associated with an NASD member." A "person associated with an NASD member" is defined by NASD By-laws, and includes "a . . . partner . . . of a member." Because plaintiff and UVEST were sharing profits on commissions earned by their joint employees, the trial court properly concluded that plaintiff is a "person associated with an NASD member." Sharing profits, after all, is prima facie evidence of the existence of a partnership. *Wilder v. Hobson*, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

The mere fact that plaintiff is associated with an NASD member, however, does not mean that it should be bound by the arbitration agreement to arbitrate any given dispute that may arise. Instead, the NASD Code of Arbitration states that issues "arising out of or in connection with the business of any member" and "arising out of the employment . . . of associated person(s) with any member" are among the issues that are arbitrable. As defendant points out in her brief, the

issue of the noncompete clause in the employment contract that gave rise to this dispute does "arise out of" the defendant's employment as a securities broker. The underlying dispute, after all, is about whether defendant, a securities broker who works for plaintiff, is allowed to transfer her skills and efforts to work as a securities broker for a competing business. Similar disputes have previously been subject to mandatory arbitration by federal courts. *See e.g. Merrill Lynch, Pierce, Fenner & Smith v. Schwartz*, 991 F. Supp. 1480 (M.D. Ga. 1998) (in which the case is subject to mandatory binding arbitration pursuant to the NASD when noncompete clause is allegedly breached).

Finding no error in the trial court's decision to stay court proceedings and to compel the plaintiff to submit to mandatory arbitration, the decision of the trial court is affirmed.

Affirmed.

Judges MARTIN and TYSON concur.

GERALD E. ARCHER, THOMAS S. CALLICUTT, LEIGH-ANN DODSON, JAMES HARPER, RONALD K. HARRIS, CHRISTIAN A. HICKS, THOMAS D. HOOKS, TAMARA LAWSON, MICHAEL E. THOMPSON, STEPHEN VAN AUSDALL, GALEN P. WARD, AND LISA WOOTEN-MARSHALL, PLAINTIFFS-APPELLEES v. ROCKINGHAM COUNTY, DEFENDANT-APPELLANT

No. COA00-793

(Filed 3 July 2001)

1. Immunity— sovereign—availability to counties—federal statute

Defendant county is accorded the State's sovereign immunity as a general matter because the counties are recognizable units that collectively make up the State. The Fair Labor Standards Act was passed pursuant to Congress' Article I powers and is not a proper vehicle by which Congress can alter North Carolina's sovereign immunity; whether defendant county may assert sovereign immunity is a question of state law.

2. Immunity— sovereign—employment action by county employees

Defendant County waived sovereign immunity by entering into an employment contract with plaintiff-EMTs even though the contract was implied and even though plaintiff alleged violations of the Fair Labor Standards Act (FLSA). Sovereign immunity is not a valid defense to suits arising from contract law and contracts may be express or implied. The statutory liquidated damages clause under the FLSA does not convert the contract action into a tort; liquidated damages can be found in a variety of everyday contracts.

Appeal by defendant from order entered 4 April 2000 by Judge Melzer A. Morgan, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 16 May 2001.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett and Stern & Klepfer, L.L.P., by Ronda L. Lowe, for plaintiff appellees.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr., for defendant appellant.

McCULLOUGH, Judge.

Plaintiffs are twelve former and current emergency medical technicians (EMTs) who work in Rockingham County, North Carolina. Sometime in the mid-1980s, the County began paying the full-time EMTs according to the "fluctuating workweek pay plan." This pay schedule is a recognized method of compensation under the federal Fair Labor and Standards Act of 1938 (FLSA) and is codified in 29 C.F.R. § 778.114 (2000). This compensation scheme assists employers in calculating an employee's regular and overtime pay rates and operates in situations where an employee works a different number of hours from week to week. The fluctuating workweek pay plan provided the Rockingham County EMTs with a base salary for the first forty hours they worked each week. When necessary, overtime hours (those in excess of forty hours) were compensated at a rate of at least one-half the base salary amount.

Shortly after implementation of the fluctuating workweek pay plan, Rockingham County Personnel Officer Ben Neal held meetings with the EMTs to explain the payment schedule to them and answer their questions. The Rockingham County Manager, Jerry Myers, also

met with the employees to go over the pay plan. The EMTs were paid every two weeks, and the pay stubs and deposit slips reflected a base salary, plus any amount due for overtime hours worked.

Plaintiffs filed a complaint on 18 December 1998, alleging that they were entitled to be paid a base salary and overtime pay at the rate of one and one-half times the regular rate of pay. They also alleged they were given compensatory time in lieu of overtime pay, but that the compensatory time was underpaid (less than one and one-half times their base salary). Plaintiffs also stated that defendant deprived them of an opportunity to choose between receiving overtime pay or compensatory time. Plaintiffs alleged damages in excess of $10,000.00; that figure was calculated based on the alleged underpayments, plaintiffs' request for liquidated damages under 29 U.S.C. § 216, attorney's fees, and costs.

The parties engaged in prolonged discovery for several months. Plaintiffs filed a motion for summary judgment on 8 September 1999, and defendant filed its own motion for summary judgment on 1 March 2000. Defendant also filed a Rule 12(b)(6) motion to dismiss for failure to state a claim on 15 February 2000. In an order entered 4 April 2000, the trial court denied the cross-motions for summary judgment and also denied defendant's motion to dismiss. Defendant appealed.

[1] Defendant County argues that the trial court should have granted its motion for summary judgment and its motion to dismiss because it is entitled to sovereign immunity, which shields it from plaintiffs' lawsuit. Defendant also argues that state law controls the outcome of the case, such that the County enjoys sovereign immunity in the plaintiffs' action for unpaid wages. While we agree that the County is entitled to the benefits of sovereign immunity as a general matter, we do not recognize it as a valid defense in this case because plaintiffs' claim for unpaid wages arises in contract, and the County has waived any immunity it had by entering into an implied employment contract with the EMTs.

Sovereign immunity "is firmly established in our law today, and by legislation has been recognized by the General Assembly as the public policy of the State." *Steelman v. City of New Bern*, 279 N.C. 589, 594, 184 S.E.2d 239, 242 (1971). In general, sovereign immunity operates to grant the state, its counties, and its public officials an unqualified and absolute immunity from suits brought 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). Defendant argues that it is entitled to sovereign immunity because it is "a subordinate division of the state[.]" *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952). We agree.

"It is well established that the State is immune from suit under the doctrine of sovereign immunity, until and unless it consents to be sued." *Slade v. Vernon*, 110 N.C. App. 422, 426, 429 S.E.2d 744, 746 (1993). Defendant urges us to consider the County as an arm of the state so that it may receive the benefits of sovereign immunity. We agree that defendant County, along with ninety-nine other counties, make up the state and are, literally, the state itself. Our case law has long held the view that

> [c]ounties are of and constitute a part of the State government. A chief purpose of them is to establish its political organization, and effectuate the local civil administration of its powers and authority. They are in their general nature governmental—mere instrumentalities of government—and possess corporate powers adapted to its purposes. It is not their purpose to create civil liability on their part, and become answerable to individuals civilly or otherwise. Indeed, they are not, in a strict legal sense, municipal corporations, like towns and cities organized under charters or particular statutes, and invested with more of the functions of corporate existence, intended to serve, not so much the purposes of the State, as, subject to its general laws, the advantage of particular communities in particular localities in the promotion and regulation more or less of trade, commerce, industries, and the business transactions and relations in some respects of the people residing or going there collectively and severally—their purposes are more general, and partake more largely of the purpose and powers of government proper.

Manuel v. Comrs., 98 N.C. 9, 10-11, 3 S.E. 829, 829 (1887). Simply stated, "[c]ounties are creatures of the General Assembly and constituent parts of the State government." *Harris v. Board of Commissioners*, 274 N.C. 343, 346, 163 S.E.2d 387, 390 (1968). The word "constituent" means "serving to form, compose, or make up a unit or whole." *Webster's Third New International Dictionary* 486 (1971). The counties are recognizable units that collectively make up our state, and are thus entitled to sovereign immunity under North Carolina law.

North Carolina has consistently exercised sovereign immunity in favor of its counties. *See White v. Commissioners*, 90 N.C. 437, 439-40 (1884) (stating that the counties' purpose is not to be civilly liable, since they are "political agencies and organizations intended to aid in the general administration of the state government"). Counties cannot be sued unless a particular statute grants a right of action against them. See *Prichard v. Commissioners*, 126 N.C. 908, 912, 36 S.E. 353, 355 (1900) (stating that counties are "instrumentalities of [state] government . . . and they are not liable for damages in the absence of statutory provisions giving a right of action against them").[1]

Plaintiffs correctly point out that the federal court system, as well as some other states, treat counties as something other than constituent parts of the state. Plaintiffs rely heavily on federal case law for the proposition that counties are lesser entities which do not enjoy sovereign immunity. However, we agree with defendant County's position that Congress cannot abrogate or waive the sovereign immunity of a state subdivision when it is being sued in a private suit for damages, as is the case here. *See* U.S. Const. art. I; and *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636 (1999).

Each state retains " 'a residuary and inviolable sovereignty' " that cannot be impugned by the federal government. *See Alden*, 527 U.S. at 715, 144 L. Ed. 2d at 653 (quoting The Federalist No. 39, at 245). Because the federal government cannot abrogate state sovereign immunity, this case is decided under state law, and plaintiffs' authority is not binding upon this Court. We hold that the determination of whether Rockingham County is entitled to the state's sovereign immunity is a question of state law. In that vein, we recognize that

> the States have wide authority to set up their state and local governments as they wish. Understandably, then, the importance of

1. In addition to statutory provisions which grant a right of action against a county, a county may also choose to waive its sovereign immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 153A-435(a) (1999). However, defendant maintains that it has not waived its sovereign immunity, and plaintiffs have alleged no such waiver. See *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990) (explaining the significance of a waiver of sovereign immunity). Defendant also presented the affidavit of Rockingham County Manager Jerry Myers, which clearly stated that the County had not purchased liability insurance for claims brought under the FLSA; "[i]n other words, the County has no insurance (as that term is used in G.S. § 153A-435) covering the claims brought by the plaintiffs in this lawsuit."

counties and the nature of county government have varied historically from region to region, and from State to State.

McMillian v. Monroe County, Alabama, 520 U.S. 781, 795, 138 L. Ed. 2d 1, 13 (1997). Each state has the right to decide how to politically organize itself and may grant sovereign immunity to the constituent parts of its choosing. North Carolina has chosen to cloak its counties with the protection of sovereign immunity; we decline to take away Rockingham County's sovereign immunity based on the state's organizational decision. We therefore accord Rockingham County the state's sovereign immunity as a general matter.[2]

[2] Having determined that the County is entitled to claim the State's sovereign immunity as a general matter, we must now decide whether sovereign immunity is a valid defense in the present situation. This, in turn, depends on whether the plaintiffs' lawsuit arises in tort or contract. While sovereign immunity remains a viable defense in tort actions, it is not a valid defense in suits arising from contract law. "Our Supreme Court abolished sovereign immunity in contract actions in 1976." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 681 n.1, 529 S.E.2d 458, 460 n.1, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). The *Herring* decision relied upon our Supreme Court's ruling in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

In *Smith*, a doctor sued the State for unpaid wages after he was discharged from his position as superintendent of a state mental hospital. *Id.* at 307, 222 S.E.2d at 416. The Court found that, because the doctor worked for the State, a valid contract " 'which [had] mutuality of obligation and remedy between the parties to it' " existed between the two. *Id.* at 316, 222 S.E.2d at 421 (quoting *George & Lynch, Inc. v. State*, 57 Del. 158, 162, 197 A.2d 734, 736 (1964)). Moreover, by entering into a valid contract, the Court found that the State had implicitly consented to being sued and sovereign immunity was not a valid defense. In reaching this decision, the Court noted that "[o]n the

2. Congress may alter a state's sovereign immunity in situations where Congress acts under a law passed via the Fourteenth Amendment, because the Fourteenth Amendment gives Congress power "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Congress cannot alter a state's sovereign immunity by using a law passed under its Article I powers. *See Florida Prepaid v. College Sav.*, 527 U.S. 627, 635-36, 144 L. Ed. 2d 575, 585-86 (1999) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73, 134 L. Ed. 2d 252, 276-77 (1996). As the FLSA was passed pursuant to Congress' Article I powers, it is not a proper vehicle by which Congress can alter North Carolina's sovereign immunity. Whether defendant County may assert the state's sovereign immunity is, therefore, a question of state law.

state level many courts have judicially abolished the doctrine of sovereign immunity as it applies to contract actions by holding that the state impliedly waives its sovereign immunity whenever it enters into a contract." *Id.* at 313, 222 S.E.2d at 419. The *Smith* Court went on to meticulously review decisions from thirteen sister states which abolished sovereign immunity in contract cases. *Id.* at 313-14, 222 S.E.2d at 419-20. The Court then explained

> [f]rom the foregoing cases we see that the courts which have held a state implicitly consents to be sued upon any valid contract into which it enters were moved by the following considerations: (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.
>
> We too are moved by the foregoing considerations. We hold, therefore, 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. Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant. . . .
>
> * * * *
>
> The legislature has already consented to be sued in many important contractual situations. For example, . . . G.S. § 153A-11 (1974) and G.S. § 160-11 (Supp. 1975) provide that counties and

> cities may contract and be contracted with and that they may sue and be sued. The General Assembly having consented to contract suits in these areas, we can perceive no sound reason why the doctrine of sovereign immunity should be a defense to any action for the breach of a duly authorized State contract.

Id. at 320-21, 222 S.E.2d at 423-24. See also *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001) (applying *Smith* where law enforcement officers sued the County over a longevity pay plan, and concluding that sovereign immunity was not a defense in personnel actions, which were contractual in nature).

"[T]he existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). Guided by this principle, as well as the reasoning in *Smith*, we hold that the County may not assert the defense of sovereign immunity in this case, even though plaintiff alleges the county has violated the FLSA. We agree with plaintiffs' assertion that the employment arrangement between the County and plaintiffs was contractual in nature, although the contract was implied. Employment contracts may be express or implied. An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding. *See* 3 Arthur L. Corbin, *Corbin on Contracts* § 564 (1964 & Supp. 2000) and *United States v. Maryland Casualty Co.*, 64 F.Supp. 522 (S.D.Cal. 1946). We do not limit *Smith* to written contracts; its reasoning is equally sound when applied to implied oral contracts.

The fact that there was a pay plan in place for employees such as the plaintiffs indicates that there was some agreement between them and the County, and an implied oral contract for services existed. The issue of whether or not the County's pay plan complies with the FLSA is not before us. Plaintiffs can challenge the pay plan on this basis because it is in the nature of a contractual obligation.

Defendant attempts to argue that plaintiffs' reference to 29 U.S.C. § 216, the statutory liquidated damages clause under which plaintiffs request recovery, makes the case a tort action rather than a contract action. We do not agree. The statutory liquidated damages clause is a contract provision that can be found in a variety of everyday con-

tracts. Its presence does not convert plaintiffs' contract action into a tort. See 5 Arthur L. Corbin, *Corbin on Contracts* § 1057 (1964 & Supp. 2000) (explaining that liquidated damages clauses which are reasonable in amount are enforceable as part of a contract and are not seen as penalty clauses).

Finally, we wish to make clear that we are not now concerned with the merits of plaintiffs' contract action. Whether the fluctuating workweek pay plan was properly followed by defendant and whether plaintiffs are ultimately entitled to relief are questions not properly before us. As the similarly situated *Smith* Court stated, "We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff[s] [are] not to be denied [their] day in court because [their] contract was with the State [subdivision]." *Smith*, 289 N.C. at 322, 222 S.E.2d at 424.

We therefore conclude that Rockingham County is generally entitled to the defense of sovereign immunity because it is a constituent part of the state. We further hold that the County waived the protection of sovereign immunity by entering into an employment contract with plaintiffs, such that plaintiffs have presented a proper cause of action. The trial court's dismissal of the cross motions for summary judgment and dismissal of defendant's motion to dismiss are

Affirmed.

Judges WALKER and THOMAS concur.

LORETTA JONES AND MICHAEL JONES, PLAINTIFFS v. GMRI, INC. AND RICH PRODUCTS CORPORATION, INC. DEFENDANTS

No. COA00-831

(Filed 3 July 2001)

1. Products Liability— sealed container—metal object in meatball

The trial court did not err in a products liability action arising from an alleged metal object in a meatball by submitting to the jury the N.C.G.S. § 99-2(a) defense that the seller was afforded no reasonable opportunity to inspect the product.

Defendant presented evidence that it removes whole meatballs from sealed bags, defrosts, and reheats them; that it does not slice or cut into the meatballs; that it probes some of the meatballs with a thermometer to check the temperature; and that plaintiff cut the meatball into eight pieces prior to eating it. Although it is possible that the restaurant appeared to the injured plaintiff to be the maker of the meatball and therefore liable, plaintiff presented no evidence on this point.

2. Appeal and Error— preservation of issues—motion for a new trial

Plaintiffs in a products liability action did not preserve the issue of spoliation of evidence where the argument was not made before they filed their motion for judgment notwithstanding the verdict and/or a new trial. A motion for j.n.o.v. is technically only a renewal of the motion for a directed verdict and a movant cannot assert grounds not included in the motion for a directed verdict.

3. Discovery— refusal to produce documents—spoliation of evidence

The trial court did not err by denying a motion for a new trial in a products liability action where the motion raised the issue of spoliation of evidence in the context of defendant failing to produce documents after being ordered by the court to do so. Whether to impose sanctions for failing to obey an order to provide discovery is within the discretion of the trial court and plaintiff has not shown an abuse of discretion.

4. Food— negligence—metal in meatball

The trial court did not err by granting a directed verdict for defendant on a negligence claim arising from an injury suffered when one plaintiff bit into a metal object in a meatball where plaintiffs offered no evidence showing breach of a duty or standard of care. The doctrine of res ipsa loquitur does not apply in a case involving an injury from the ingestion of an adulterated food product and there was no negligence per se under the North Carolina Pure Food, Drug, and Cosmetic Act because the Act does not provide a standard by which to comply with the general duty not to sell adulterated food.

Appeal by plaintiffs from judgment entered 7 January 2000 and order entered 28 March 2000 by Judge James E. Lanning in

Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2001.

Crews & Klein, P.C., by Paul I. Klein and Katherine Freeman, for plaintiff-appellants.

Dean & Gibson, L.L.P., by Christopher J. Culp and William T. Stetzer, for defendant-appellees.

MARTIN, Judge.

On 11 November 1994, Loretta Jones was injured when she bit into a meatball at an Olive Garden Restaurant owned by GMRI, Inc. ("defendant") in Pineville, North Carolina. Plaintiffs filed a complaint on 10 November 1997 against defendant and Rich Products Corporation, which allegedly supplied or manufactured the meatball, asserting claims of negligence, breach of implied warranty, and loss of consortium. Defendant answered, asserting as a defense to the implied warranty claim that it did not have a reasonable opportunity to inspect the meatball in a way that would have discovered the defect, as provided by G.S. § 99B-2(a).

During discovery, plaintiffs requested that defendant produce a copy of the restaurant's report investigating plaintiffs' incident, and documents showing proof that the meatball was supplied by Rich Products. Defendant did not produce these documents. Plaintiffs' motion to compel the incident report was granted by order dated 5 April 1999. Defendant contended that due to the three year time lapse between the date of the incident and the filing of the lawsuit, it no longer had the record to produce. Plaintiffs filed a voluntary dismissal as to their claim against Rich Products on 21 October 1999.

At the trial of plaintiffs' claim against defendant, plaintiffs presented the testimony of a friend who was present at the restaurant on the day of the incident, themselves, and three physicians. Plaintiffs' evidence tended to show that when plaintiff Loretta Jones attempted to take her first bite of the meatball, she bit down into an unidentified metal object. At that time, she experienced an "incredible stabbing pain in [her] tooth and [her] jaw," caused by a broken tooth. Because she was startled, she "sucked in and immediately sucked down the food" and the object. On cross-examination, plaintiff testified that she cut the meatball into eight pieces prior to taking the bite, and that she did not detect any foreign object in the meatball

at that time. At the close of plaintiffs' evidence, the trial court granted defendant's motion for directed verdict as to the negligence claim.

Defendant presented evidence tending to show that most of the restaurant's meatballs come into the store frozen and in sealed bags. The restaurant does a visual inspection of the sealed bags of meatballs, and sends back those that do not meet the inspection. The meatballs are put into the freezer at the restaurant until needed, then put into a plastic holding container and placed in a refrigerator. The meatballs, which are slightly larger than a golf ball, are then mixed with a tomato sauce, heated, and served whole. Restaurant personnel testified that they do not poke or slice the meatballs, other than to check the temperature with a probe.

At the close of all the evidence, defendant renewed an earlier motion for a directed verdict as to the implied warranty claim based on a G.S. § 99B-2(a) defense. The court denied the motion, and also denied plaintiffs' motion for a directed verdict as to the defense. The jury returned a verdict finding that defendant breached an implied warranty of merchantability to plaintiff, but that defendant did not have a reasonable opportunity to inspect the food in a way that would have revealed the claimed defect. Therefore, the jury awarded plaintiffs no recovery. Plaintiffs' motions for judgment notwithstanding the verdict or, in the alternative, for a new trial were denied and judgment was entered on the verdict. Plaintiffs appeal from the judgment and the order denying their post-trial motions.

I.

[1] Plaintiffs first assign error to the trial court's submission of the G.S. § 99B-2(a) defense to the jury. Plaintiffs argue this defense applies only to cases where the product is in a sealed container; they contend the defense is inapposite in this case because the meatballs were taken out of the sealed container by defendant.

In interpreting a statute, we must begin with the plain meaning of the words. *Sharpe v. Worland*, 137 N.C. App. 82, 527 S.E.2d 75, *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000). When the words are unambiguous, our analysis ends there. *Id.* G.S. § 99B-2(a) provides:

> No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a

> sealed container **or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect** the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession (emphasis added).

The plain meaning of the words of this statute are clear; it applies in situations when "the product was acquired and sold by the seller in a sealed container *or* when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product . . . ." (emphasis added). Therefore, we cannot agree with plaintiffs' argument that the defense does not apply to the case before us because the meatballs were not kept in a sealed container.

Plaintiffs next argue that the G.S. § 99B-2 defense should not have been submitted to the jury because defendant failed to offer sufficient evidence to carry its burden of proof on the issue. Specifically, plaintiffs contend that defendant failed to present evidence that it lacked the opportunity to inspect the meatball. The burden of proof of an affirmative defense is on the defendant. *Redding v. Shelton's Harley Davidson, Inc.*, 139 N.C. App. 816, 534 S.E.2d 656 (2000), *disc. review denied*, 353 N.C. 380, 546 S.E.2d 606 (2001). At issue, per the language of the statute, is whether "the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of . . . ." Defendant presented the following evidence on this issue: (1) the restaurant removes whole, already formed, meatballs from the sealed bags, defrosts, and reheats them, (2) the restaurant does not slice or cut into the meatballs because that would alter the nature of the dish, but (3) the restaurant does probe some of the meatballs with a thermometer to check the temperature. The evidence also showed that plaintiff cut the meatball into eight pieces prior to eating it and did not discover the object. Defendant argues that this evidence is sufficient for a jury to conclude that the restaurant lacked a reasonable opportunity to inspect the meatball in such a way that the restaurant could have found the alleged defect. We agree.

"If a party contends that certain acts or omissions constitute a . . . defense against the other party, the trial court must submit the

issue if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the . . . defense asserted." *Watson v. White*, 60 N.C. App. 106, 109, 298 S.E.2d 174, 176, (1982), *reversed on other grounds*, 309 N.C. 498, 308 S.E.2d 268 (1983). Viewing the evidence in the light most favorable to the defense, we hold that defendant presented sufficient evidence for the trial court to submit the defense to the jury.

Finally, plaintiffs argue in their brief that *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C. App. 222, 401 S.E.2d 801 (1991), should control this case because defendant was more than a "mere conduit" of the meatballs. In *Warzynski*, this Court held that a seller is precluded from asserting a § 99B-2 defense if he "holds himself out to the public as the manufacturer of a product." *Id.* at 225, 401 S.E.2d at 803. The court reversed summary judgment in favor of Empire, the defendant seller, because a genuine issue of material fact existed as to whether Empire was the apparent manufacturer of the heaters. *Id.* The evidence in that case showed that: (1) Empire and the manufacturer shared the expenses of advertising the product; (2) Empire serviced the product; (3) the product came with an Empire warranty; (4) all of the advertising promoting the heaters referred to Empire, and did not state that Empire was not the manufacturer; and (5) there was a decal on the product which said that it was made in Spain, which is where the manufacturer was incorporated and had its principal offices. *Id.* at 228, 401 S.E.2d at 804-05.

Warzynski adopts § 400 of the Restatement of Torts. Comment (d) to § 400 explains that sellers will be held liable as manufacturers where they put out a chattel as their own product. This can happen "where the actor appears to be the manufacturer of the chattel" or "where the chattel appears to have been made particularly for the actor." It is quite possible that the Olive Garden in this case appeared to the injured plaintiff to be the maker of the meatball in question. However, plaintiffs presented no evidence on this point whatsoever. All of the evidence presented at trial related to the actual incident where she injured her tooth, her complaints to the restaurant, and the damages she suffered thereafter. Therefore, the denial of plaintiff's motion for judgment notwithstanding the verdict was proper. *See Neihage v. Kittrell Auto Parts, Inc.*, 41 N.C. App. 538, 255 S.E.2d 315, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979) (holding summary judgment for a defendant was proper where plaintiff did not offer any evidence that the defendant held or represented itself

out to the public as having designed or manufactured the product.) Accordingly, this assignment of error is overruled.

II.

[2] Plaintiffs next argue that the trial court erred when it allowed the restaurant to benefit from its alleged spoliation of evidence. Specifically, plaintiffs argue that the § 99B-2 defense shifts the blame for the occurrence from the seller to the manufacturer, and that defendant has precluded plaintiffs from going forth with their claim against the alleged manufacturer, Rich Products, by failing to produce requested documents regarding the purchase of the meatballs or the investigation of the accident. Therefore, plaintiffs contend, defendant should have been precluded from relying on the § 99B-2 defense. Plaintiffs assign error to the court's denial of their motion to strike the § 99B-2 defense, which is in essence a motion for directed verdict as to the defense, the court's denial of their motion for judgment notwithstanding the verdict, and the court's denial of their motion for a new trial.

Plaintiffs, however, did not make the spoliation of evidence argument before the trial court until they filed their motion for judgment notwithstanding the verdict and/or a new trial. G.S. § 1A-1, Rule 50(a) provides that a party must state the specific grounds for its motion for directed verdict. In reviewing a ruling on a motion for directed verdict on appeal, our scope of review is limited to those grounds asserted by the moving party before the trial court. *Wilburn v. Honeycutt*, 135 N.C. App. 373, 519 S.E.2d 774 (1999). Because plaintiffs failed to assert spoliation of evidence as a ground for their motion for directed verdict as to this defense, this argument is not properly before the court. Moreover, a "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 [a] movant cannot assert grounds not included in the motion for directed verdict." *Lee v. Capitol Tire Co., Inc.*, 40 N.C. App. 150, 156, 252 S.E.2d 252, 256-57, *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (1979) (quoting *Love v. Pressley*, 34 N.C. App. 503, 511, 239 S.E.2d 574, 580 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978)). Therefore, we hold that plaintiffs have also failed to preserve their assignment of error as to the denial of their motion for judgment notwithstanding the verdict.

[3] Finally, plaintiffs argue the trial court should have granted their motion for a new trial pursuant to G.S. § 1A-1, Rule 59(a)(8) because

its denial of their motion to dismiss the § 99B-2 defense constituted an error in law. In their motion for a new trial, plaintiffs raised the spoliation of evidence argument and therefore we will consider this argument on appeal. On a motion for new trial, "where the motion involves a question of law or legal inference, our standard of review is *de novo*." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). The essence of the doctrine of spoliation of evidence is:

> where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case.

Yarborough v. Hughes, 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905). This principle was recently applied by this Court in *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712, *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). In *McLain*, the plaintiff requested a jury instruction which provided that if the jury determined that the defendant destroyed or failed to produce corporate records in its exclusive possession, then an adverse inference would arise against the defendant that the evidence withheld would be injurious to the defense. *Id.* at 182, 527 S.E.2d at 715. This Court held that the trial court's failure to instruct the jury as requested was reversible error. *Id.* As we noted above, plaintiffs in this case did not make this argument at trial and did not request such an instruction. Instead, plaintiffs argue in their appellate brief that the court should have used this doctrine as a basis to strike the defense pursuant to Rules 26(b)(3) and 37(b)(2)(B) of the North Carolina Rules of Civil Procedure because the court ordered that defendant produce the records of the investigation and defendant failed to do so. G.S. § 1A-1, Rule 37(b)(2) provides "[i]f a party . . . fails to obey an order to provide or permit discovery . . . a judge . . . may make such orders in regard to the failure as are just." Whether to impose sanctions under this rule is within the discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 524 S.E.2d 53 (1999). Plaintiff has not shown an abuse of discretion by the trial court in denying her motion to dismiss the defense as a sanction. Accordingly, we find no error in the trial court's denial of plaintiff's motion for a new trial.

III.

[4] Plaintiffs' final assignment of error is to the court's directed verdict for defendant as to the negligence claim. In ruling on a motion

for directed verdict, all of the evidence must be viewed in the light most favorable to the plaintiff. *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 467 S.E.2d 58 (1996). A directed verdict is rarely appropriate in a negligence action because application of the reasonably prudent person standard is usually for the jury. *Smith v. Wal-Mart Stores, Inc.*, 128 N.C. App. 282, 495 S.E.2d 149 (1998). However, it is appropriate where a plaintiff's evidence, even taken in its most favorable light, fails to "establish the elements of negligence . . . as a matter of law." *Newton*, 342 N.C. at 563, 467 S.E.2d at 65.

In order to make out a claim for negligence, the party asserting negligence must show that defendant owed a duty to the plaintiff, breached that duty, and that such breach was an actual and proximate cause of plaintiff's injuries. *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990). Plaintiffs argue that defendant violated the North Carolina Pure Food, Drug and Cosmetic Act and, therefore, its violation constitutes negligence *per se*. We disagree. In *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 18, 423 S.E.2d 444, 452-53 (1992), the Supreme Court rejected this argument, noting that although the Act imposes upon a restaurant a general duty not to sell adulterated food, it does not provide a "standard by which to comply with the duty." Therefore, the Court applied ordinary negligence principles. *Id.* at 19, 423 S.E.2d at 453.

In the case before us, plaintiffs' evidence at trial established that the *feme* plaintiff was injured after biting into a piece of a meatball. She offered no evidence showing defendant's breach of a duty or standard of care. This Court has previously held that the doctrine of *res ipsa loquitur* does not apply in a case involving an injury from the ingestion of an adulterated food product. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976) (where the plaintiff injured his teeth biting down on a shelled peanut contained in a jar of unshelled peanuts). Therefore, plaintiffs failed to establish the essential elements of negligence and the court did not err in granting a directed verdict for defendant as to the negligence claim.

No error.

Judges HUNTER and HUDSON concur.

REGINALD L. THORPE, PLAINTIFF-APPELLEE v. ELOISE PERRY-RIDDICK, ADMINISTRATRIX OF THE ESTATE OF CLYDE RIDDICK, DECEASED, DEFENDANT-APPELLANT

No. COA00-1289

(Filed 3 July 2001)

1. Costs— attorney fees—reasonable value of services

The trial court did not abuse its discretion in a negligence action arising out of an automobile accident by awarding attorney fees to plaintiff under N.C.G.S. § 6-21.1, because the trial court made adequate findings of fact to support its conclusion that the reasonable value of services rendered by plaintiff's attorney was $4,880.00.

2. Costs— attorney fees—offer of judgment—judgment finally obtained

The trial court did not err in a negligence action arising out of an automobile accident by awarding plaintiff costs and attorney fees under N.C.G.S. § 6-21.1 and N.C.G.S. § 1A-1, Rule 68 based on the conclusion that the judgment finally obtained exceeded the offer of judgment of $4,801.00, because: (1) the judgment finally obtained includes the jury's verdict, along with any applicable adjustments including pre-offer costs and costs incurred after the offer of judgment but prior to the entry of judgment by the trial court; and (2) plaintiff was awarded $1,134.30 in costs plus $4,880.00 in attorney fees in addition to the $4,500.00 awarded by the jury verdict, bringing the total for the judgment finally obtained to $10,514.30.

Appeal by defendant from judgment entered 18 September 2000 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 6 June 2001.

Jones, Martin, Parris and Tessener, L.L.P., by Sean A.B. Cole, for plaintiff appellee.

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

McCULLOUGH, Judge.

During the early morning hours of 23 May 1999, a northbound 1990 Cadillac driven by Clyde Riddick (defendant) collided with an eastbound 1993 Plymouth operated by Reginald Thorpe (plaintiff) at

a rural intersection in Johnston County, North Carolina. Following the accident plaintiff sought medical treatment for soft-tissue injuries he suffered as a result of defendant's negligence.

After eleven days of correspondence with defendant's insurance carrier, Allstate, plaintiff filed a complaint in the District Court Division of Wake County on 28 June 1999. In his complaint, plaintiff claimed defendant negligently operated his vehicle by failing to stop at the intersection and defendant's negligence proximately caused the accident which led to plaintiff's injuries, pain and suffering, lost wages, and medical expenses. Defendant answered with a defense of contributory negligence and plaintiff invoked the doctrine of last clear chance. Defendant supplemented his answer with a request that plaintiff provide a written statement of the amount of monetary relief sought. Plaintiff responded that a specific dollar amount of relief sought could not yet be determined. Plaintiff agreed to amend his response as soon as practical, but warned defendant the amount of relief sought could change depending on plaintiff's medical bills, lost wages, pain and suffering, and the permanency of his injuries.

On 1 December 1999, after the parties completed written discovery, defendant submitted an offer to settle in the amount of $4,800.00 to plaintiff's attorney. Plaintiff rejected that offer and made a counteroffer of $7,000.00 which was rejected by defendant. On 2 December 1999 defendant served plaintiff with a lump sum offer of judgment in the amount of $4,801.00, which plaintiff subsequently rejected.

Clyde Riddick died while the action was pending, and Eloise Perry-Riddick, his wife, was substituted as defendant in her capacity as administratrix of his estate. During the final pretrial conference, both parties contended the single contested issue to be tried by the jury regarded plaintiff's damages and told the court there had been full and frank discussion of settlement possibilities. Defendant never withdrew the defense of contributory negligence, but stipulated to liability at trial. On 22 August 2000, the jury returned a verdict for plaintiff in the amount of $4,500.00. Following entry of the jury verdict, counsel for plaintiff moved for attorney fees to compensate for 63 hours of time in rendering legal services to plaintiff at a rate of $122.00 per hour pursuant to N.C. Gen. Stat. § 6-21.1, and for costs totaling $1,207.95 pursuant to N.C. Gen. Stat. § 7A-305. In its order awarding attorney fees and costs, the trial court made the following findings of fact:

1. This is a personal injury action arising out of an automobile collision on May 23, 1999. The Complaint was filed by the Plaintiff on June 28, 1999.

2. On December 2, 1999, Defendant filed a Lump Sum Offer of Judgment of Four Thousand Eight Hundred One and No/100 Dollars ($4801.00) which included "all damages, attorney's fees taxable as costs, interest and the remaining costs accrued at the time" the offer was served.

3. On August 22, 2000, a jury returned a verdict for the Plaintiff in the amount of Four Thousand Five Hundred and No/100 Dollars ($4,500.00).

4. The judgment finally obtained exceeded Defendant's Offer of Judgment.

5. Costs to which Plaintiff is entitled to recover, exclusive of attorney fees under N.C.G.S. § 6-21.1, total $4,880.00.

6. Plaintiff Reginald Thorpe's recovery is less than $10,000, and the Court, in its discretion, finds that a reasonable attorney fee should be allowed and taxed as part of court costs.

7. Plaintiff Reginald Thorpe was represented by R.L. Pressley, attorney at law. Mr. Pressley provided legal services to the Plaintiff which consisted of drafting, filing, and handling pleadings; taking and defending depositions, conducting discovery; conferring with opposing counsel, the Judge, and the Clerk of Court; preparing for and attending trial and post trial motions. As counsel for Plaintiff Reginald Thorpe, Mr. Pressley expended at least 63 hours of time in rendering legal services to the Plaintiff. The customary charge for attorneys in this area with his level of experience is $122.00 dollars per hour.

8. The Court, in its discretion, and upon considering the *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 factors, awards attorney's fees totaling $4,880.00 to Plaintiff Reginald Thorpe.

The trial court made the following conclusions of law:

1. Based on the foregoing Finding of Fact, the Court concludes, as a matter of law and in its discretion, that the reasonable

value of services rendered by the Plaintiff's attorney in this matter was $4,880.00 and that those attorney fees should be taxed as costs to the Defendant pursuant to N.C.G.S. § 6-21.1.

2. Plaintiff is also entitled to costs of $1,134.30 in the Court's discretion and/or pursuant to N.C.G.S. § 7A-305.

Based on these findings of fact and conclusions of law, on 14 September 2000, the trial court entered an order awarding plaintiff attorney fees in the amount of $4,880.00 and costs in the amount of $1,134.30, in addition to the $4,500.00 jury verdict, as a matter of law. Defendant appealed.

Defendant makes seven assignments of error challenging the trial court's findings of fact and conclusions of law. All assignments of error are connected to a single dispositive issue; whether the trial court made sufficient findings of fact from the evidence and the entire record of the case to support its award of attorney fees and costs to plaintiff. For the reasons set forth, we hold the trial court properly awarded attorney fees and costs.

[1] Defendant first argues the trial court abused its discretion by failing to make sufficient findings of fact to support its award of attorney fees to plaintiff. North Carolina case law " 'is clear that to overturn the trial judge's determination, the defendant must show an abuse of discretion.' " *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999) (quoting *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983)). Abuse of discretion results where the court's ruling " ' "is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." ' " *Id.* "The 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). Without a showing of abuse of the trial judge's discretion, the trial judge's determination to award counsel fees will not be overturned. *Whitfield v. Nationwide Mutual Ins. Co.*, 86 N.C. App. 466, 469, 358 S.E.2d 92, 94 (1987).

"As a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs." *Washington*

v. Horton, 132 N.C. App. 347, 349, 513 S.E.2d. 331, 333 (1999). N.C. Gen. Stat. § 6-21.1 (1999) provides:

> 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.

This section creates an exception to the general rule that attorney fees are not allowable as part of the costs in civil actions. *Hill v. Jones*, 26 N.C. App. 168, 169, 215 S.E.2d 168, 169, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975). The obvious purpose of N.C. Gen. Stat. § 6-21.1 is to provide relief for a person who sustained injury or property damage in an amount so small that, if he must pay counsel from his recovery, it is not economically feasible to bring suit on his claim. *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973). "This [remedial] statute . . . should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases falling within its intended scope." *Id.* at 239, 200 S.E.2d at 42.

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *West v. Tilley*, 120 N.C. App. 145, 149, 461 S.E.2d 1, 3 (1995) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). Allowance of attorney fees under N.C. Gen. Stat. § 6-21.1 is, by the express language of the statute, in the discretion of the presiding judge. *Hillman*, 59 N.C. App. at 155, 296 S.E.2d at 309. However, the wording of N.C. Gen. Stat. § 6-21.1 contemplates some type of inquiry by the presiding judge before the court may exercise its discretion in awarding a fee to plaintiff's counsel. *Id.* at 154, 296 S.E.2d at 308.

Defendant is correct in arguing that a trial court's discretion under N.C. Gen. Stat. § 6-21.1 is not unbridled. In *Washington*, this Court stated

> the trial court is to consider the entire record in properly exercising its discretion, including, but not limited to the following

> factors: (1) settlement offers made prior to the institution of the action . . . (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose[;]" (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record.

132 N.C. App. at 351, 513 S.E.2d at 334-35 (citations omitted). If the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence. *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000).

Defendant argues the trial court made incomplete and inadequate findings of fact with respect to *Washington* factors five and six. We disagree. In the instant case, the trial court made a total of eight findings of fact to support its award of attorney fees to plaintiff. The timing and amount of settlement offers and the amount of the jury verdict are significant factors for the trial court to consider in determining whether to award attorney fees. *Culler v. Hardy*, 137 N.C. App. 155, 159, 526 S.E.2d 698, 702 (2000). However, the trial court is not required to make detailed findings for each factor. *Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001). As to factor five, the trial court found that on 2 December 1999, defendant filed a lump sum offer of judgment of $4,801.00 which included all damages, attorney fees taxable as costs, interest and the remaining costs accrued at the time the offer was served. As to factor six, the trial court found that on 22 August 2000, a jury returned a verdict for plaintiff in the amount of $4,500.00, and the judgment finally obtained exceeded defendant's offer of judgment. As to the final award of attorney fees taxed against defendant, the trial court made adequate findings of fact to support its conclusion that the reasonable value of services rendered by plaintiff's attorney was $4,880.00.

Defendant also argues the statement by the trial court verifying it considered all *Washington* factors is not a finding of fact which would allow meaningful appellate review of the trial court's exercise of discretion in this case. We disagree. Mere recitation by the trial court that it has considered all *Washington* factors without additional findings of fact would be inadequate and would not allow for

meaningful appellate review. The fact that the trial court in the instant case made additional findings of fact preserves its ruling on appeal. To support its award of attorney fees to plaintiff, the trial court made eight findings of fact. The trial court listed only those facts matching those *Washington* factors apposite to the instant case. Factor one is immaterial to the instant case because neither party made any settlement offers prior to the institution of the action. Factor three is irrelevant to the instant case because in consideration of *Washington* factors, the trial court did not mention that defendant may have unjustly exercised superior bargaining power. *See also Tew*, 143 N.C. App. at 537, 546 S.E.2d at 185. Factor four is inapplicable to the instant case. The trial court is not required to make an unwarranted refusal finding to award attorney fees in an automobile accident case, since such finding is only required in suits brought by an insured or a beneficiary against an insurance company defendant. *Washington*, 132 N.C. App. at 350, 513 S.E.2d at 334.

[2] Defendant next argues that the trial court erred in concluding the judgment finally obtained exceeded the offer of judgment. We disagree. Under the North Carolina Rules of Civil Procedure,

> [a]t 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). "[W]ithin the confines of Rule 68, 'judgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by *any applicable adjustments*, by the respective court in the particular controversy, not simply the amount of the jury's verdict." *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995), *reh'gs denied*, 342 N.C. 666, 467 S.E.2d 722 (1996) (emphasis added). In *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000), the North Carolina Supreme Court held that in calculating the judgment finally obtained, any applicable adjustments to a jury's verdict include not only pre-offer costs, but also costs incurred after the offer of judgment but prior to the entry of judgment by the trial court. In the instant case, costs include reasonable attorney fees. *See also Tew*, 143 N.C. App. at 538, 546 S.E.2d at 186.

Here, defendant made an original settlement offer in the amount of $4,800.00. The next day, defendant increased his previous settlement offer by only one dollar in the form of a lump sum offer of judgment in the amount of $4,801.00. Prior to entry of final judgment, plaintiff submitted costs totaling $1,207.00 and 63 hours of time for legal services at a rate of $122.00 per hour for a total of $7,686.00 in attorney fees. The trial court significantly reduced these amounts in its order dated 15 September 2000, and awarded plaintiff $1,134.30 in costs plus $4,880.00 in attorney fees. Even without including plaintiff's attorney fees in the judgment finally obtained, defendant's offer of judgment was clearly less favorable than the final judgment awarded to plaintiff. Proper inclusion of attorney fees into plaintiff's final judgment only increases the disparity between defendant's offer of judgment ($4,801.00) and plaintiff's judgment finally obtained ($1,134.30 + $4,880.00 + $4,500.00 = $10,514.30).

The trial court did not err in concluding that the judgment finally obtained by plaintiff was greater than the amount offered by defendant. We agree with the trial court that plaintiff's costs and attorney fees should be taxed against defendant pursuant to N.C. Gen. Stat. § 6-21.1 and Rule 68.

For the foregoing reasons, we reject defendant's assignments of error and affirm the judgment of the trial court.

Affirmed.

Judges WALKER and THOMAS concur.

STATE OF NORTH CAROLINA v. CARLTON LAMONT CRENSHAW

No. COA00-440

(Filed 3 July 2001)

1. Search and Seizure— traffic stop—cocaine—motion to suppress evidence

The trial court did not err in a possession with intent to sell or deliver cocaine case under N.C.G.S. § 90-95(a)(1) by denying defendant's motion to suppress evidence seized during a traffic stop of his vehicle, because: (1) defendant's illegal parking in an

area known for drug activity along with the inoperable taillight on his vehicle afforded the officers reasonable grounds to believe that criminal activity may be afoot, thus justifying a brief detention; (2) the duration of defendant's detention beyond his initial stop was not unreasonable; and (3) defendant failed to present evidence refuting the voluntariness of his consent to a search of his vehicle.

2. **Constitutional Law— double jeopardy—possession with intent to sell or deliver cocaine—drug taxation**

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine when it required defendant to pay taxes on the drugs seized from him under N.C.G.S. §§ 105-113.105 through 105-113.113, because North Carolina's drug tax does not violate the double jeopardy clause.

3. **Drugs— possession with intent to sell cocaine—lesser included offense of possession of cocaine—reinstruction to jury**

The trial court did not commit plain error by its reinstruction to the jury to correct the verdict and to indicate the correction on the verdict sheet after the jury initially convicted defendant of both possession with intent to sell cocaine and the lesser included offense of possession of cocaine.

Appeal by defendant from judgment entered 6 October 1999 by Judge Charles C. Lamm, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 28 March 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

WALKER, Judge.

On 6 October 1999, defendant was convicted of possession with intent to sell or deliver cocaine pursuant to N.C. Gen. Stat. § 90-95(a)(1) (1999). The trial court found defendant had a prior record level of IV and sentenced him to a minimum of nine months and a maximum of eleven months.

The State's evidence tends to show the following: On 6 November 1997 at approximately 9:00 a.m., Officer Timothy Splain (Splain) of the Asheville Police Department (department) was patrolling an area known for drug activity on South Market Street in Asheville, North Carolina. Splain noticed defendant sitting in the driver's seat of a vehicle parked in an area marked with a "No Trespassing" sign. Upon deciding to check defendant's vehicle and its occupants, Splain contacted Officer Joseph Palmer (Palmer) of the department's vice division for assistance. Splain then drove down Market Street, at which time defendant's vehicle left the parking lot and traveled behind Splain's vehicle.

Palmer arrived in the area, spotted defendant's vehicle and noticed one of its taillights was inoperable. Palmer then stopped defendant's vehicle and informed defendant he had been illegally parked and that his taillight was inoperable. Palmer asked for defendant's driver's license and registration just as Splain arrived on the scene. Defendant's driver's license and registration proved to be valid and Palmer and Splain were familiar with defendant's name. Palmer next asked defendant to exit his vehicle, at which time he frisked defendant "to make sure there were no weapons" and found a pager on him. Officer Darryl Fisher (Fisher), who was familiar with defendant's prior conviction of possession of a firearm by a felon, arrived and searched defendant's vehicle. The search revealed a screwdriver, a utility knife near the console and a small, black container in the glove compartment which held weight scales and cocaine. A further search of defendant's person at the detention center revealed additional cocaine hidden in his sweatshirt.

[1] In his first assignment of error, defendant contends the trial court committed reversible error by denying his motion to suppress evidence seized during the traffic stop. Defendant argues the search and seizure violated his state and federal constitutional rights because, under a totality of the circumstances, the officers detained him longer than necessary to issue a citation. Defendant further contends his consent to search his vehicle was not freely and voluntarily given. U.S. Const. amend. IV; N.C. Const. art. I, § 20.

We first note a "trial court's findings of fact following a suppression hearing concerning the search of [a] defendant's vehicle are conclusive and binding on the appellate courts when supported by competent evidence." *State v. Brooks*, 337 N.C. 132, 140, 446 S.E.2d 579, 585 (1994). However, whether a trial court's findings support its conclusions that an officer had reasonable suspicion to detain a defend-

ant is reviewable *de novo*. *State v. Munoz*, 141 N.C. App. 675, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001), *citing Brooks*, 337 N.C. at 141, 446 S.E.2d at 585.

A law enforcement officer may make a brief investigative stop, known as a *Terry* stop, of a vehicle if he is led to do so by specific, articulable facts giving rise to a reasonable suspicion of illegal activity. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994); *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968). The test implemented by the United States Supreme Court for constitutional searches and seizures pursuant to a *Terry* stop was summarized by our Supreme Court in *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982), where it stated:

> . . . if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily *detain* the suspect. If, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then *frisk* him as a matter of self-protection.

Id. (emphasis added); *State v. Sreeter*, 283 N.C. 203, 209-10, 195 S.E.2d 502, 506-07 (1973). In addition, a court must objectively " 'view the facts 'through the eyes of a reasonable, cautious officer, guided by his experience and training' at the time he determined to detain defendant.' " *Munoz*, 141 N.C. App. at 682, 541 S.E.2d at 222, *quoting State v. Parker*, 137 N.C. App. 590, 598, 530 S.E.2d 297, 302 (2000). *See also State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). As noted by another jurisdiction, " '[i]ndividually, any of the factors cited [in a *Terry* case] might not justify a search, but one cannot piecemeal this analysis. One piece of sand may not make a beach, but courts will not be made to look at each grain in isolation and conclude there is no seashore.' " Robert G. Lindauer, Jr., *State v. Pearson and State v. McClendon: Determining Reasonable, Articulable Suspicion from the Totality of the Circumstances in North Carolina*, 78 N.C. L. Rev. 831, 849 (2000), *quoting Commonwealth v. Shelly*, 703 A.2d 499, 503 (Pa. Super Ct. 1997).

Regarding the stop, search and seizure in the instant case, the trial court found "[t]hat when [Fisher] searched the glove container and opened [the small, black container therein], that he was searching in a place that was large enough to have contained some type of weapon, especially some type of bladed weapon." Based upon this finding, the Court concluded:

[1)] That based upon [Palmer's] observation of [defendant's] vehicle's rear lights and the information that he had received from [Splain], [Palmer] had probable cause and a reasonable and articulable suspicion to stop the defendant's vehicle to investigate possible improper equipment and to investigate trespassing. 2) Even though [Fisher] told the defendant that he was going to search the defendant's vehicle for weapons and may have told defendant—and the defendant may have been told by the officer that he had a right to do so, the defendant, nevertheless, voluntarily consented to this search of his vehicle, there being no evidence that he was threatened, or deceived in any manner, or that he was promised anything. 3) That none of the constitutional rights, either federal or state, of the defendant were violated by the stopping and searching of the defendant's vehicle or by the search of the defendant's person at the jail prior to his being incarcerated.

We first determine whether defendant's initial detention was a lawful *Terry* stop. The totality of circumstances surrounding the stop of defendant's vehicle supports the trial court's conclusions. Defendant's illegal parking in an area known for drug activity along with the inoperable taillight on his vehicle, afforded the officers reasonable grounds to believe that criminal activity may be afoot, thus justifying a brief detention.

We next determine whether the duration of defendant's stop was reasonable. Defendant contends the duration was invalid because it was longer than necessary to issue a citation by virtue of the following: (1) during the stop, defendant's driver's license and registration proved to be valid; (2) defendant was not charged with trespassing nor for improper equipment; (3) no evidence was introduced at trial to show defendant's taillight was inoperable nor that defendant was aware he had been illegally parked; and (4) a frisk of defendant's person revealed no weapon or contraband on him.

In *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992), our Supreme Court upheld a prolonged detention of a defendant to frisk for any weapons under a totality of the circumstances analysis. Defendant was on a corner specifically known for drug activity, was a stranger to the officer and attempted to move away from the officer after making eye contact with him. *Id.* at 232-34, 415 S.E.2d at 721-22. In addition, it was the officer's experience that people involved in drug traffic are often armed. *Id.* Although the Court

acknowledged the United States Supreme Court's mandate that "mere presence in a neighborhood frequented by drug users is not, standing alone, a basis for concluding that the defendant was himself engaged in criminal activity[,]" the additional circumstances were found to justify a *Terry* stop and frisk. *Id.* at 233-35, 415 S.E.2d at 722-23.

Likewise, in the instant case, the officers determined that to ensure their safety, it was necessary to ask defendant to step outside his vehicle so they could frisk him. This was based upon the officers' familiarity with defendant, defendant's presence in a specific area known for drug activity, and his having been illegally parked. Thus, the duration of defendant's detention beyond his initial stop was not unreasonable.

We next determine whether defendant's constitutional rights were violated on the basis that his consent to search his vehicle was not freely and voluntarily given. Defendant contends his mere acquiescence to Fisher's statement that he was going to search defendant's vehicle does not amount to clear and unequivocal consent.

When "the State seeks to rely upon [a] defendant's consent to support the validity of a search, it has the burden of proving that the consent was voluntary." *State v. Morocco*, 99 N.C. App. 421, 429, 393 S.E.2d 545, 549-50 (1990), *citing State v. Hunt*, 37 N.C. App. 315, 321, 246 S.E.2d 159, 163 (1978); *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973). When defendant's detention is lawful, the State need only show "that defendant's consent to the search was freely given, and was not the product of coercion." *Munoz*, 141 N.C. at 683, 541 S.E.2d at 223.

Defendant relies on *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998), where our Supreme Court held "[t]here must be a clear and unequivocal consent before a defendant can waive his constitutional rights." *Id.* at 277, 498 S.E.2d at 601, *citing State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967). In that case, the Court concluded defendant's acquiescence upon being informed by an officer that he would be frisked was not consent "considering all the circumstances." *Id.* However, the facts in *Pearson* differ from the facts of this case. In *Pearson*, the officers had defendant's written consent to search his vehicle. *Id.* at 274, 277, 498 S.E.2d at 600, 601. The officers also searched defendant's person without objection. *Id.* at 277, 498 S.E.2d at 601. The Court found the search of defendant's person to be error, as the written consent applied only to the vehicle. *Id.*

This Court addressed the voluntariness of consent to search a vehicle in *Munoz*, 141 N.C. App. 675, 541 S.E.2d 218. In that case, the State offered testimony of two troopers that defendant verbally consented to a search of his vehicle and signed a consent form. *Id.* at 684, 541 S.E.2d at 221. On appeal, defendant contended the search was unlawful. In addressing whether defendant's consent to the search was freely given or was the product of coercion, this Court found "[d]efendant did not attempt to refute the voluntariness of the consent on cross-examination nor by presenting his own evidence." Id. at 684, 541 S.E.2d at 223. We thus held that the search of defendant's vehicle was lawful, since the evidence supported the trial court's finding that the consent was voluntary. *Id.*

Here, Splain, Palmer and Fisher each testified that defendant verbally consented by answering "okay" when Fisher stated he wanted to search defendant's vehicle. Defendant did not produce any evidence to refute the voluntariness of his consent. In response to defendant's motion to suppress evidence, the trial court concluded that defendant voluntarily consented to the search of his vehicle and that no evidence to the contrary had been presented.

We agree with the trial court that the evidence supports a finding that defendant voluntarily consented to the search of his vehicle. The search was therefore lawful and this assignment of error is overruled.

[2] In his next assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver cocaine by requiring him to pay taxes on the drugs seized from him pursuant to the North Carolina Unauthorized Substances Taxes in N.C. Gen. Stat. § § 105-113.105 through 105.113.113 (1997). Defendant contends that his being prosecuted for this charge, in addition to paying such tax, amounts to double jeopardy in violation of his constitutional rights.

In support of his argument, defendant relies on a decision by the Fourth Circuit Court of Appeals in *Lynn v. West*, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813, 142 L. Ed. 2d 36 (1998). However, our Courts have stated on several occasions that the holding in *Lynn* is not binding on our State courts. *See State v. Adams*, 132 N.C. App. 819, 513 S.E.2d 588, *disc. review* denied, 350 N.C. 836, 538 S.E.2d 570, *cert. denied*, 528 U.S. 1022, 145 L. Ed. 2d 414 (1999) (stating this Court cannot declare the drug tax unconstitutional absent such a ruling by our Supreme Court, the United States Supreme Court, or leg-

islation by the General Assembly); State *v. Ballenger*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997) (affirming this Court's holding "that the North Carolina Controlled Substance Tax does not have such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the [d]ouble [j]eopardy [c]lause"); *State v. Creason*, 346 N.C. 165, 484 S.E.2d 525 (1997) (affirming this Court's holding that North Carolina's drug tax does not violate the double jeopardy clause). Accordingly, this assignment of error is overruled.

[3] In his last assignment of error, defendant contends the trial court committed plain error after the jury initially convicted defendant of both possession of cocaine with intent to sell and the lesser included offense of possession of cocaine. When presented with this initial verdict sheet out of the presence of the jury, the trial court informed counsel that he would give the jury another verdict sheet and "re[-]instruct them [sic] that they are to unanimously decide on only one of the three charges." Defendant contends the trial court should have re-instructed the jury on the differing elements of the two crimes, although defendant did not request such an instruction at trial.

The trial court re-instructed the jury as follows:

> . . . you marked two of the possible three verdicts. Let me instruct you that you are only to arrive at one of the possible three verdicts: either guilty of possession with intent to sell and deliver cocaine or guilty of possession of cocaine or not guilty. Only one of those three possibilities is to be found by the jury . . . . Does everyone understand that? Anybody have any questions about that? (No hands were raised.) . . .

In addition, the trial court polled the jury after the final verdict, at which time the jury unanimously agreed with and consented to the verdict.

Because defendant failed to object to the jury instructions before the jury retired to deliberate, he is only entitled to relief if he can show that the instructions complained of constitute "plain error." *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). "Plain error" exists where defendant can show that absent the error, a different result at trial would have been reached. *State v. Cummings*, 352 N.C. 600, 536 S.E.2d 36 (2000), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 641

(Apr. 23 2001) (No. 00-8618) (citations omitted). We fail to see how defendant was prejudiced by the trial court's re-instructing the jury to correct the verdict and to indicate the correction on the verdict sheet.

In sum, defendant received a fair trial free of prejudicial error.

No error.

Judges HUNTER and TYSON concur.

ANN FOREMAN, PLAINTIFF v. JOHN FREDERIC BENTON FOREMAN, DEFENDANT

No. COA00-524

(Filed 3 July 2001)

1. **Divorce— British spousal support order—enforcement—subject matter jurisdiction**

A North Carolina trial court had subject matter jurisdiction under UIFSA to enforce a British spousal support order. Orders of "another state" may be registered under UIFSA; England has reciprocity with the United States in issues of support and is treated as a "state" for UIFSA purposes. N.C.G.S. § 52C-1-101.

2. **Collateral Estoppel and Res Judicata— dismissal for lack of subject matter jurisdiction—not a judgment on the merits**

The trial court did not err by not dismissing a petition for enforcement of a British spousal support order under res judicata or collateral estoppel where the petition had been filed and dismissed under URESA for lack of subject matter jurisdiction before plaintiff filed this action under UIFSA. A dismissal for lack of subject matter jurisdiction is not on the merits and neither res judicata nor collateral estoppel applies.

3. **Divorce— British spousal support order—amounts accrued before UIFSA—registration date controls**

A North Carolina trial court had jurisdiction under UIFSA to award payments accrued under a British spousal support order prior to the effective date of UIFSA. UIFSA governs orders registered in North Carolina after 1 January 1996 regardless of when

the orders were entered and the order in this case was properly registered on 23 September 1997.

Appeal by defendant from judgment entered 22 February 2000 by Judge Paul G. Gessner in District Court, Wake County. Heard in the Court of Appeals 15 March 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Gerald K. Robbins, for plaintiff-appellee.

Allen and Pinnix, P.A., by M. Jackson Nichols, for defendant-appellant.

TIMMONS-GOODSON, Judge.

John Frederic Benton Foreman (defendant) appeals from an Order decreeing that the support order entered against him in England was valid and properly registered in North Carolina.

Ann Foreman (plaintiff) and defendant were married in England in 1963. After divorcing in 1990, they entered into a consent order (British support order) on 18 July 1990 whereby it was determined, *inter alia*, that defendant would pay 2,700 British pounds per year to plaintiff as spousal support.

Defendant later moved to North Carolina and plaintiff petitioned for enforcement of the British support order by registering it in Wake County on 6 April 1995 pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA). N.C.G.S. § 52A-29 repealed 1995 N.C. Sess. Laws 538 s. 7(a). The petition was dismissed for lack of subject matter jurisdiction on 28 September 1995. On 17 June 1997, plaintiff again petitioned for enforcement of the British support order, this time pursuant to the Uniform Interstate Family Support Act (UIFSA). N.C.G.S. § 52C (1995).

The trial judge concluded that the trial court had proper subject matter jurisdiction, that the British support order could properly be registered and enforced in Wake County, and that the matter was not barred by *res judicata* or collateral estoppel because the case had not previously been adjudicated on its merits. From these conclusions of law, defendant appeals.

The issues presented by this appeal are whether: (I) subject matter jurisdiction exists under UIFSA for a North Carolina court to enforce a British support order; (II) England has reciprocity with

North Carolina in issues of spousal support; (III) *res judicata* or collateral estoppel bar plaintiff's UIFSA claim because of the prior filing pursuant to URESA; (IV) support orders established prior to the effective date of UIFSA can be enforced.

[1] Defendant argues first that there is no subject matter jurisdiction for a North Carolina court to enforce a British support order. We disagree.

UIFSA is the applicable statute that gives authority to the district courts of North Carolina to deal with interstate family support matters. *See* N.C.G.S. § 52C-1-102 (1999). The registration of foreign support orders is a matter over which UIFSA has authority. N.C.G.S. § 52C-1-101. The case at bar deals with the attempted registration of a support order from England, a foreign jurisdiction. Thus, we conclude that the Wake County district court had subject matter jurisdiction to hear the plaintiff's claim that the foreign order should be registered under UIFSA, and to hear the defendant's claim that the order should not be so registered.

Orders of "another state" may be registered under UIFSA. N.C.G.S. § 52C-3-301(b)(3) (1999). Within the "definitions" section of UIFSA, N.C.G.S. § 52C-1-101(19), the following definition is given for the term, "state:"

> (19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:
>
> a. An Indian tribe; and
>
> b. A 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, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

The threshold question, then, is whether England is a "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." *Id.* If so, then North Carolina has statutory authority under UIFSA to register the British order.

We acknowledge that "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)). In fact, "UIFSA does not specify who is responsible for determining whether a foreign country is entitled to reciprocity." John Saxon, *International Establishment and Enforcement of Family Support*, 10 Family Law Bulletin at 10, footnote 5 (August 1999). Saxon notes that the "child support enforcement (IV-D) agency in each state should maintain a current list of foreign countries that are considered to be reciprocating foreign countries under UIFSA." *Id* at 10, footnote 6. In his article, he asserts that "[r]eciprocity currently exists under UIFSA between all American states and the following foreign jurisdictions: Australia, Austria, Bermuda . . . United Kingdom (England, Wales, Scotland, Northern Ireland)." *Id.* at 2.

Plaintiff's application for support is based on the New York Convention on the Recovery Abroad of Maintenance (the treaty). 268 U.N.T.S. 3. The treaty "was promulgated by the United Nations . . . [and] is comparable to URESA." Arnold H. Rutkin, Family Law and Practice § 48.11(4) (5 vol. 2001). Although the United States is not a signatory nation to the treaty, we find reciprocity between England and North Carolina based on a 1972 British Act (the Act). *Maintenance Orders (Reciprocal Enforcement) Act*, 1972, ch. 18 (Eng.). The Act has two parts, either of which justify our finding of reciprocity. Under part one of the Act, reciprocity is established between England and any country that is not a party to the treaty if that country is specified in a statutory instrument executed pursuant to section 1 or section 40 of the Act. *Id.* A 1995 British statutory instrument states that England "is satisfied that arrangements have been made in the States of the United States of America . . . to ensure that maintenance orders made by courts in the United States can be enforced there . . . [and] that in the interest of reciprocity it is desirable to ensure that maintenance orders made by courts in those States can be enforced in the United Kingdom." *Reciprocal Enforcement of Maintenance (United States of America) Order*, S.I. 1995, No. 2709. This statutory instrument applies part one of the Act to "maintenance orders made by courts in the United Kingdom and to maintenance orders made by courts in a specified State," including North Carolina, pursuant to section 40 of the Act. *Id.* Under part two of the Act, reciprocity is established between England and any coun-

try that is not a party to the treaty if that country is specified in a statutory instrument executed pursuant to section 25 or section 40 of the 1972 Act. A 1993 British statutory instrument expressly applies part two of the 1972 Act to North Carolina. *Recovery of Maintenance (United States of America) Order*, S.I. 1993, No. 591. We hold that England, then, has reciprocity with North Carolina in issues of support. *Id.* As such, England is treated as a "State" for purposes of the application of UIFSA. *Id.*

This Court recently spoke in a similar case involving the nation of Switzerland. *Haker-Volkening v. Haker*, 143 N.C. App. 688, 547 S.E.2d 127 (2001). The rule announced by the Court in *Haker-Volkening* requires a determination by the trial court of whether the foreign jurisdiction has "enacted a *law* for the issuance and enforcement of support orders that is 'substantially similar to the procedures under [UIFSA or URESA].' " *Id.* at 694, 547 S.E.2d at 131. The Court held that the burden was on the petitioner to produce "evidence in the record documenting" that such a law exists. *Id.* This rule is appropriate where, as in *Haker-Volkening*, the foreign jurisdiction is not given reciprocal status by law, treaty or international agreement. Where, as in the case at bar, however, the foreign jurisdiction is given reciprocal status, such requirement is not necessary.

[2] Defendant next assigns error to the trial court's failure to dismiss the case on a theory of *res judicata*. *Res judicata*, or claim preclusion, is the theory whereby whenever a final judgment is rendered in a court of law, the claim that was settled may not be relitigated by the same parties or by parties in privity with the same parties. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (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 further directions of the court"). While this case involved the same cause of action and the same parties as a previous case (the initial 1995 Wake County petition), there had not been a final judgment in that previous case. There was a dismissal based on a lack of subject matter jurisdiction, which is not on the merits and thus is not given res judicata effect. *Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988). Accordingly, the plaintiff was not precluded from bringing her claim before the court again; *res judicata* should not apply.

Defendant also argues that the case should have been dismissed based on the theory of collateral estoppel or issue preclusion.

> [In order] to assert a plea of collateral estoppel under North Carolina law as traditionally applied, [defendant] would need to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [parties] were either parties to the earlier suit or were in privity with parties.

McInnis at 429, 349 S.E.2d at 557.

Res judicata is distinct from collateral estoppel in that the former focuses on specific claims while the latter focuses on specific issues. "Thus, while *res judicata* precludes a subsequent action between the same parties or their privies based on the same *claim*, collateral estoppel precludes the subsequent adjudication of a previously determined *issue*, even if the subsequent action is premised upon a different claim." *Hales v. N.C. Insurance Guaranty Assn.*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994) (emphasis in original). For our purposes today, however, the differences are unimportant as the threshold question under both theories is whether there was a final judgment on the merits. If there was a final judgment on the merits, then either theory might apply, depending on the other facts. If there was not a final judgment on the merits, then neither theory should apply regardless of the other facts. Again, in the case *sub judice*, the original action was dismissed for a lack of subject matter jurisdiction. Therefore, there was never a judgment on the merits and the same parties should not be precluded from raising the same issue. *See, e.g., Cline*, 92 N.C. App. at 264, 374 S.E.2d at 466. The trial court therefore did not err in failing to dismiss because of collateral estoppel.

[3] Defendant next argues that the trial court had no jurisdiction to award payments established prior to the date UIFSA came into effect. Defendant asserts that UIFSA governs foreign support orders registered in North Carolina only after 1 January 1996. Defendant argues that, because § 52C is effective only for orders registered as of 1 January 1996, the trial court lacked the authority to require plaintiff's payments accruing from June 1994 until January 1996. This argument also fails.

It is true that UIFSA did not come into effect until 1 January 1996 when it replaced URESA, the previously applicable statute. UIFSA,

however, governs orders, regardless of when entered, so long as the orders were registered in North Carolina after 1 January 1996.

Indeed, this Court has addressed this issue before when we wrote:

> [I]t is important that we address the applicability of UIFSA to an order issued prior to the effective date of the Act. We now hold that UIFSA governs the proceedings over any foreign support order which is registered in North Carolina after 1 January 1996, UIFSA's effective date. . . . [O]ur interpretation saves the courts from the arduous task of attempting to determine arrearage based on the application of two different sets of law to the same order. Other states addressing this issue have also applied the effective date of their own UIFSA laws in a similar way. *See Child Support Enforcement v. Brenckle*, 675 N.E.2d 390 (Mass. 1997) (applying UIFSA retroactively); *Cowan v. Moreno*, 903 S.W.2d 119 (Tex Ct. App. 1995) (applying UIFSA to a 1982 foreign support order where UIFSA became effective in 1993).

Welsher v. Rager, 127 N.C. App. 521, 527, 491 S.E.2d 661, 664-65 (1997).

In the present case, the British support order was properly registered in Wake County on 23 September 1997. Registration having taken place after 1 January 1996, we conclude that the trial court properly registered and enforced payments for claims prior to 1 January 1996. Defendant's argument therefore fails.

Having found no error in the issues raised on appeal, the judgment of the trial court is affirmed.

Affirmed.

Judges MARTIN and TYSON concur.

STEWART C. VELEZ, PLAINTIFF v. DICK KEFFER PONTIAC-GMC TRUCK, INC., AND CENTURA BANK, DEFENDANTS

No. COA00-786

(Filed 3 July 2001)

1. Appeal and Error— appealability—interlocutory discovery order—appeal by codefendant—effect on jurisdiction of trial court

In a car purchaser's action against the dealer and a bank for fraud and unfair trade practices, the trial court had jurisdiction to enter an order compelling discovery against defendant bank even though defendant dealer's appeal of an order compelling discovery against it was then pending where the order against the dealer was interlocutory and not immediately appealable.

2. Discovery— bank customer's financial records—production by bank—not violation of Financial Privacy Act

The trial court's order compelling the production of documents by defendant bank in a car purchaser's action for fraud and unfair trade practices against the bank and the car dealer did not violate the Financial Privacy Act because (1) the Act applies only to access to financial records by a government authority; (2) although the superior court is, in a general sense, an agency of the State, the fact that the superior court compelled discovery pursuant to plaintiff's motion did not transform plaintiff's discovery request into a request by a government authority; and (3) it was not necessary for plaintiff to comply with the stringent service requirements of N.C.G.S. § 53B-5 in order to obtain discovery of a bank customer's financial records from the bank.

3. Discovery— factual work product—hardship requirement—safeguards

The trial court did not abuse its discretion in an action for misrepresentation and unfair and deceptive trade practices arising out of plaintiff's purchase of a vehicle by concluding plaintiff was entitled to discovery of certain factual work product information created by defendant bank based on the trial court's determination that plaintiff met the hardship requirement, because: (1) plaintiff adequately demonstrated that he has a substantial need of this information to prepare his case; (2) plaintiff demonstrated he is unable to obtain this informa-

tion from any other source; (3) the trial court ordered this information be presented under a protective order; (4) the trial court ordered that any information the bank believed to contain opinion work product may be submitted first to the trial court for an in camera review; and (5) the trial court ordered that prior to the use of any information gleaned, that information must be disclosed to the bank's counsel and any party affected, and they must be allowed an opportunity to be heard.

Appeal by defendant Centura Bank from order entered 19 April 2000 by Judge Melzer A. Morgan, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 14 May 2001.

Homesley, Jones, Gaines, Homesley & Dudley, by L. Ragan Dudley, for the plaintiff-appellee.

James, McElroy & Diehl, P.A., by John S. Arrowood, for defendant-appellant Centura Bank.

EAGLES, Chief Judge.

Defendant Centura Bank, (hereinafter "Centura"), appeals from an interlocutory order compelling certain discovery. Because we conclude that this discovery order does not affect a substantial right of Centura, we dismiss the appeal.

Plaintiff filed a complaint on 26 April 1999 seeking compensatory and punitive damages, treble damages and injunctive relief for fraud, misrepresentation and unfair and deceptive trade practices, stemming from plaintiff's purchase of a 1998 Pontiac Sunfire. On 17 May 1999, plaintiff served interrogatories and requests for production of documents on Defendant Dick Keffer Pontiac-GMC Truck, Inc. (hereinafter "Dick Keffer") and Centura. During the 25 October 1999 civil session, the trial court heard plaintiff's motion to compel discovery from Dick Keffer for failure to provide certain documents and answers to the discovery requests. On 9 December 1999, the trial court issued a protective order and compelled discovery from Dick Keffer.

Also on 9 December 1999, the trial court heard plaintiff's motion to compel discovery from Centura. The trial court took the matter under advisement without objection. Before the trial court ruled on the motions against Centura, Dick Keffer filed notice of appeal on 7 January 2000. In its 19 April 2000 order compelling discovery from

Centura, the trial court found as a fact that the discovery issues between plaintiff and Dick Keffer and plaintiff and Centura were not affected by each other. It is from the 19 April 2000 order that Centura appeals.

A. Jurisdiction

[1] Centura first argues that the trial court was without jurisdiction to enter the April 2000 order due to the pending appeal of Dick Keffer. We disagree.

Dick Keffer's appeal has been dismissed today by this Court because it is interlocutory and fails to assert a substantial right. When a litigant appeals from an appealable interlocutory order, the appeal operates as a stay of all proceedings in the trial court relating to the issues included therein. G.S. 1-294; *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E.2d 496 (1946); *Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 382 (1950).

However, a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court. *Veazey*, 231 N.C. at 364, 57 S.E.2d at 382. Our Supreme Court in *Veazey* further stated as follows:

> Our conclusion on this aspect of the controversy finds full sanction in previous decisions of this Court adjudging that when an appeal is taken to the Supreme Court from an interlocutory order of the Superior Court which is not subject to appeal, the Superior Court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the Supreme Court.

Id. at 364, 57 S.E.2d at 383; *State v. Davis*, 203 N.C. 316, 166 S.E. 292 (1932); *Goodman v. Goodman*, 201 N.C. 794, 161 S.E. 688 (1931).

Our Supreme Court in *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961), held "where an interlocutory order is not subject to appeal, the Superior Court need not stay proceedings pending dismissal of the appeal in Supreme Court." *Id.* at 761, 117 S.E.2d at 730. In *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 603, 481 S.E.2d 347, 348 (1997), plaintiffs appealed the denial of a motion *in limine*. *Id.* The trial court proceeded with trial and plaintiffs refused to put on any evidence. This Court held: "In this case because plaintiffs had no right to appeal the granting of the

motion *in limine*, the trial court was not deprived of jurisdiction and did not err in calling the case for trial and dismissing it when plaintiffs failed to offer any evidence. *See* N.C.G.S. § 1A-1, Rule 41(b) (1990) (allowing dismissal of action for failure to prosecute)." *T&T Development*, 125 N.C. App. at 603, 481 S.E.2d. at 348.

Although both of these cases were heard by this Court 14 May 2001, Dick Keffer's notice of appeal was filed 7 January 2000 and the record was settled by 14 February 2000. Centura's notice of appeal was filed 12 May 2000 and the record was settled by 7 July 2000. These appeals were heard together because of factual similarities. Since Dick Keffer had no right of immediate appeal regarding the discovery order, there was no stay of proceedings. *Veazey*, 231 N.C. at 364, 57 S.E.2d at 383. Thus, on this record we hold that the trial court retained jurisdiction over all matters relating to Iredell County No. 99 CVS 911.

B. Financial Privacy Act

[2] Centura next argues that interrogatories #10 and #11 and request for production of documents #5 are in violation of the Financial Privacy Act, Chapter 53 of the General Statutes. Thus, although this appeal is interlocutory, Centura argues that it has asserted a substantial right, which if not immediately addressed will work irreparable injury. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). While certainly if the Financial Privacy Act was implicated here, it would raise a substantial right; we disagree that the act covers this discovery request.

It is the stated policy of the Financial Privacy Act "that financial records should be treated as confidential and that no financial institution may provide to any government authority and no government authority may have access to any financial records except in accordance with the provisions of this Chapter." G.S. 53B-3 (Reg. Sess., 1986). The statute further defines a "government authority" as "an agency or department of the State or of any of its political subdivisions, including any officer, employee, or agent thereof." G.S. 53B-2(4). The statute denotes the situations under which a government authority may access a customer's financial record held by a financial institution. There is a "catchall provision" which has specific mandatory service requirements that are delineated in G.S. 53B-5. Centura argues that in order for the Superior Court to order production of these interrogatories, the Superior Court must ensure that the service requirements of G.S. 53B-5 have been met. We disagree.

The plaintiff made this discovery request pursuant to N.C.R. Civ. P. 33 and 34. That Centura objected and the Superior Court compelled discovery pursuant to a motion made by plaintiff does not somehow transform the plaintiff's discovery request into a request by a government authority. Discovery rules "should be liberally construed in order to accomplish the important goal of 'facilitat[ing] the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial.' " *Williams v. N.C. Dept. of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995); *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (1979). To hold that the Financial Privacy Act applies to discovery requests made by private parties in the midst of litigation would severely limit the application of available discovery methods. Financial institutions could use the act inappropriately as a sword to frustrate any litigant's attempt to hold the institution liable for its actions, rather than as a shield to protect customers from unwarranted government intrusion. The General Assembly, when enacting the Financial Privacy Act, did not intend to relieve financial institutions from accountability for their actions by permitting the institutions to refuse to participate in discovery in litigation.

"[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Petty v. Owen*, 140 N.C. App. 494, 499, 537 S.E.2d 216, 219 (2000); *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979). Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible. *Clark v. ITT Grinnell Industrial Piping, Inc.*, 141 N.C. App. 417, 426, 539 S.E.2d 369, 375 (2000); *Meyer v. Walls*, 122 N.C. App. 507, 512, 471 S.E.2d 422, 427 (1996). Accordingly, we hold that although the Superior Court is, in a general sense, an agency of the State, the General Assembly did not intend for financial institutions to be able to utilize the Financial Privacy Act to shield themselves from private rights of action and court orders. Otherwise, financial institutions could regularly refuse to comply with litigation-related discovery requests from private entities, force litigants to resort to motions to compel and then be shielded from production by their interpretation of the stringent requirements of G.S. 53B-5.

C. Work Product

[3] Centura also excepted to the trial court's order that any factual work product created by Centura be disclosed to the plaintiff pursuant to interrogatory #16. In *Evans v. USAA*, 142 N.C. App. , 541 S.E.2d 782, *disc. rev. denied*, 353 N.C. 371, S.E.2d (2001), this Court addressed work product stating:

> The protection given to matters prepared in anticipation of trial, or "work product," is not a privilege, but a "qualified immunity." *Willis v. Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). "The protection is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." Id. If a document is created in anticipation of litigation, the party seeking discovery may access the document only by demonstrating a "substantial need" for the document and "undue hardship" in obtaining its substantial equivalent by other means. N.C. Gen. Stat. § 1A-1, Rule 26(b) (3). Materials that are prepared in the ordinary course of business, however, are not protected by the work product immunity. *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Furthermore, work product containing the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought" is not discoverable. N.C. Gen. Stat. § 1A-1, Rule 26(b) (3); National Union Fire Ins. v. Murray Sheet Metal, 967 F.2d 980, 983-84 (4th Cir. 1992).

Id. at —, 541 S.E.2d at 788-89. At the hearing, plaintiff's counsel presented his affidavit stating that he was in substantial need of the information requested and that he had no other means of obtaining the information. Centura argues that a "bare bones" affidavit which espouses the correct standard but is without detail is not sufficient to sustain the trial court's holding.

The trial court found as a fact that "plaintiff has adequately demonstrated that he has a substantial need of this information to prepare his case. The Court further concludes that Plaintiff is unable to obtain this information from any other source, thus he has met the hardship requirement of obtaining work product information." The trial court's order was not based solely on this affidavit. The trial court stated that its order was based on "pleadings, memoranda, affidavits and arguments of counsel." As the oral arguments of counsel

are not in the record on appeal, we are unable to review the showing of substantial need and undue hardship made by the plaintiff. It is "well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Evans*, 142 N.C. App. at —, 541 S.E.2d at 788; *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480 (1977).

We note that the trial court ordered that this information be presented under a protective order. Further, the court ordered that any information that Centura believed to contain opinion work product may be submitted first to the trial court for an *in camera* review. Finally the court ordered that prior to the use of any information gleaned, in any hearing of this case, that information must be disclosed to Centura's counsel and any party affected; and they must be allowed an opportunity to be heard. Since the trial court put stringent safeguards in place to protect against abuse and discovery orders are within the trial court's discretion, on this record, we hold that the trial court did not err in compelling discovery of Centura's factual work product. The defendant's appeal is dismissed in part. The trial court's order is affirmed in part.

Accordingly the defendant's appeal is

Dismissed in part, affirmed in part, and remanded.

Judges McGEE and TYSON concur.

DEBRA LYNNE AUSTIN JONES, PLAINTIFF v. LARRY WAYNE JONES, DEFENDANT

No. COA00-618

(Filed 3 July 2001)

Divorce— alimony—consent order—termination for cohabitation—separation agreement not affected

An order directing defendant former husband to pay monthly alimony to plaintiff former wife was a consent order rather than an order of specific performance of the parties' separation agreement which required defendant to pay alimony to plaintiff where the parties did not submit the separation agreement to the trial

court for approval and the court did not incorporate the separation agreement or any part thereof into its order. Therefore, this order was modifiable, and the trial court erred by denying defendant's motion to terminate alimony under the consent order pursuant to N.C.G.S. § 50-16.9 on the ground of cohabitation by plaintiff where plaintiff admitted she was cohabiting with an adult male. However, the termination of defendant's court-ordered alimony obligation does not affect defendant's contractual alimony obligation under the parties' separation agreement.

Appeal by defendant from order entered 25 February 2000 by Judge Robert A. Evans in District Court, Wilson County. Heard in the Court of Appeals 28 March 2001.

Connor, Bunn, Rogerson & Woodard, P.L.L.C., by Elizabeth McKinney Whitt, for the plaintiff-appellee.

Craft, Levin & Abney, L.L.P., by Wesley Abney, for the defendant-appellant.

WYNN, Judge.

This appeal arises from the trial court's denial of the defendant's motion to terminate alimony under N.C. Gen. Stat. § 50-16.9.

The plaintiff and the defendant were married on 3 July 1975 and separated on 23 September 1992. Two children were born of the marriage. The parties executed a valid Separation Agreement on 26 January 1994, which provided, *inter alia*, for monthly alimony and child support payments by the defendant to the plaintiff. The alimony provision required the defendant to make monthly payments of $450.00 to the plaintiff "on or before the 5th day of each month," but provided for the termination of such obligation "upon the death of [the defendant], the death or remarriage of [the plaintiff], whichever comes first." The parties subsequently divorced but the Separation Agreement was not incorporated into the divorce judgment.

On 21 October 1997, the plaintiff filed a complaint seeking specific performance of certain provisions of the Separation Agreement. The trial court entered a consent order on 3 December 1998 requiring the defendant to, *inter alia*, continue making monthly child support payments to the plaintiff. The parties' older child reached eighteen years of age on 29 January 1999, and on 6 May 1999, the defendant

moved to modify the child support payments required by the 3 December 1998 consent order.

On 27 May 1999, the trial court entered an order reducing the defendant's monthly child support obligation. The trial court's order also made the following finding of fact:

> 13. The parties have agreed that defendant shall also pay the sum of $450.00 per month in alimony to plaintiff, said payment to be made directly to plaintiff and not through the office of the Clerk of Superior Court. Said alimony payment shall be paid in full by the fifteenth day of each month.

The trial court thereby ordered, by consent, that:

> 5. Defendant shall pay the sum of $450.00 per month in alimony to plaintiff, said payment to be made directly to plaintiff and not through the office of the Clerk of Superior Court. Said alimony payment shall be paid in full by the fifteenth day of each month. Except as modified herein, the previous order of December 03, 1998 remains in full force and [e]ffect.

On 15 July 1999, the defendant moved to terminate alimony under N.C. Gen. Stat. § 50-16.9 (1995), on the grounds of cohabitation by the plaintiff, as such term is defined in the statute. On 25 February 2000, the trial court entered an order wherein the court concluded that the defendant's contractual obligation to pay alimony pursuant to the Separation Agreement "is not terminated by plaintiff's cohabitation as the terms of the parties' Separation Agreement are not an order or judgment of the court." Accordingly, the trial court denied the defendant's motion and ordered the defendant to continue paying alimony to the plaintiff "pursuant to the terms of the Consent Order dated May 27, 1999." From this 25 February 2000 order, the defendant appeals.

The defendant's sole argument on appeal is that the trial court erred in denying his motion to terminate court-ordered alimony pursuant to the 27 May 1999 consent order, and in ordering the defendant to continue paying alimony pursuant to that court order. The defendant contends that his obligation to pay alimony pursuant to the 27 May 1999 order was subject to modification or termination pursuant to N.C. Gen. Stat. § 50-16.9. For the reasons below, we agree.

In *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964), our Supreme Court discussed at length the nature of two types of consent judgments regarding alimony:

> Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. [] In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony.
>
> A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings and, insofar as it fixes the amount of support for the wife, it cannot be changed or set aside except with the consent of both parties in the absence of a finding that the agreement was unfair to the wife or that her consent was obtained by fraud or mutual mistake.
>
> . . .
>
> A judgment of the second type, being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper. The fact that the parties have agreed and consented to the amount of the alimony decreed by the court does not take away its power to modify the award or to enforce it by attachment for contempt should the husband wilfully fail to pay it.

Id. at 69, 136 S.E.2d at 242-43 (citations omitted). As stated in *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982):

> Parties to a divorce may enter into a valid agreement settling the question of alimony, and unless the court then orders alimony to be paid, the terms of the agreement are binding and can only be modified by the consent of both parties.

306 N.C. at 524, 293 S.E.2d at 797. However, where the court incorporates the terms of a separation agreement into its judgment, the agreement is superseded by the court's order. *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967).

The bifurcated approach to consent judgments discussed in *Bunn* came to an end with our Supreme Court's decision in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983). The Court therein noted that a trial court may exercise its contempt powers to enforce

all provisions of a court-adopted separation agreement, "since it is the court's order and not the parties' agreement which is being enforced." *Id.* at 385, 298 S.E.2d at 341. The Court abolished the then-existing dual consent judgment approach, establishing a rule that:

> [W]henever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Id. at 386, 298 S.E.2d at 342.

In *Erhart v. Erhart*, 67 N.C. App. 189, 312 S.E.2d 534 (1984), this Court considered the question of whether, by entering an order for specific performance of the terms of a deed of separation, the trial court thereby derives the power to subsequently modify an alimony provision contained in the deed of separation. This Court held that the mere entry of an order of specific performance does not empower the trial court to alter the terms of the contract, stating:

> The [trial c]ourt can, in the exercise of its powers in equity, order specific performance of only such amount [of alimony] as it finds to be proper. This, however, does not alter [the dependent spouse's] rights at law under the agreement. "We hold that the Court in the exercise of its powers in equity could modify the prior judgment ordering specific performance of the separation agreement of the parties but that this modification did not affect the parties' rights at law under the agreement." *Harris v. Harris*, 307 N.C. 684, 685-86, 300 S.E.2d 369, 371 (1983).

Id. at 191, 312 S.E.2d at 535. That is, where the trial court orders the specific performance of a separation agreement, the court may subsequently modify the specific performance order, but such modification affects *only* the order of specific performance, and does not affect the rights and obligations of the parties under the original separation agreement. *See id.*; *Harris*, 307 N.C. at 688, 300 S.E.2d at 372-73.

In the instant case, the plaintiff's "Complaint for Specific Performance" filed on 21 October 1997 requested that the trial court

"specifically enforce" the Separation Agreement. The 2 December 1998 consent order entered by the trial court concluded that "[t]he parties executed a valid separation agreement and the Plaintiff is entitled to specifically enforce the terms and conditions set forth therein." This consent order did not address the Separation Agreement's alimony provision.

However, the 27 May 1999 consent order, entered by the trial court in response to the defendant's motion to modify child support, included a finding that the parties agreed that the defendant shall pay the plaintiff $450.00 monthly in alimony. Notably absent from this finding of fact is any reference to the Separation Agreement. Likewise, the directive ordering the defendant to make such payments to the plaintiff makes no reference to the Separation Agreement. It is not apparent from the record that the parties brought the Separation Agreement, or any portion thereof, before the trial court for approval as a judgment of the court; nor does it appear that the parties requested that the court order the specific performance of the Separation Agreement's alimony provision. We further note that the court-ordered alimony differs from the contractual alimony provision in the Separation Agreement, extending the payment deadline to the fifteenth day of each month, rather than the fifth day of each month as mandated by the Separation Agreement.

The trial court's 27 May 1999 order, which directs the defendant to make monthly alimony payments, is in the nature of a consent order rather than an order for specific performance. This order does not direct such alimony payments to be made under the terms of the Separation Agreement, nor does it order specific performance of the alimony provision therein. Rather, the court order finds as fact that "[t]he parties have agreed that defendant shall [] pay," and accordingly orders the defendant to pay, such alimony.

We conclude that the trial court's 27 May 1999 order constituted a consent order rather than an order of specific performance of the Separation Agreement, and therefore the order of alimony therein was subject to modification by the trial court under N.C. Gen. Stat. § 50-16.9. *See Rowe v. Rowe*, 305 N.C. 177, 184, 287 S.E.2d 840, 844 (1982) (by enacting N.C. Gen. Stat. § 50-16.9, our legislature "clearly expressed that it is the public policy of this state that consent orders to pay alimony are modifiable").

N.C. Gen. Stat. § 50-16.9(b) provides that where "a dependent spouse who is receiving . . . alimony from a supporting spouse under

a judgment or order of a court of this State . . . engages in cohabitation, the . . . alimony shall terminate." The defendant alleges in his motion to terminate alimony, and the plaintiff acknowledges in her response thereto, that she "is engaged in cohabitation with an adult male," as that term is defined in N.C. Gen. Stat. § 50-16.9. As such, the trial court erred in denying the defendant's motion to modify its 27 May 1999 order pertaining to alimony by terminating the defendant's court-ordered alimony obligation.

Nonetheless, we emphasize that the termination of the defendant's court-ordered alimony obligation under the 27 May 1999 consent order in no way affects the defendant's contractual alimony obligation under the parties' Separation Agreement, as the parties neither submitted the Separation Agreement to the trial court for approval, nor did the trial court specifically incorporate the Separation Agreement, or any terms thereof, into the 27 May 1999 consent order. *See Walters*, 307 N.C. at 386-87, 298 S.E.2d at 342 (parties to a separation agreement can avoid having agreement treated as a modifiable court-ordered judgment by not submitting the agreement to the court; parties may choose to submit portions of the agreement to the court for approval, rendering such portions, and such portions alone, enforceable and modifiable as a court order); *Pitts v. Broyhill*, 88 N.C. App. 651, 655, 364 S.E.2d 738, 741 (1988) ("once a separation agreement is incorporated into a court order, it loses its character as a contract and becomes a court order"). Where a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles. *See Walters*, 307 N.C. at 386, 298 S.E.2d at 342. The 27 May 1999 order was a consent order, and the alimony provision therein was by consent of the parties, without any apparent basis in the Separation Agreement; thus, the termination of the defendant's alimony obligation under the 27 May 1999 order does not diminish or affect his contractual alimony obligation under the Separation Agreement.

The trial court's 25 February 2000 order is therefore reversed and remanded for entry of an order not inconsistent with this opinion.

Reversed and remanded.

Judges TIMMONS-GOODSON and HUDSON concur.

DOWD F. GREENE, JR. AND WIFE, NANCY P. GREENE v. PELL & PELL, L.L.P., GERALD A. PELL AND RALPH W. GORRELL

No. COA00-651

(Filed 3 July 2001)

Attorneys— malpractice—negligent representation—bankruptcy proceeding

The trial court did not err by granting a directed verdict in favor of defendants in a professional malpractice action based on defendant attorneys' alleged negligent representation of plaintiffs in a bankruptcy proceeding, because: (1) whether the bankruptcy judge would have granted a motion for a stay if defendants had requested one is mere speculation; (2) plaintiffs did not present any evidence they would have prevailed on appeal when plaintiffs' own expert testified he saw no error on the part of the bankruptcy judge when the witness reviewed the bankruptcy proceeding transcript; and (3) plaintiffs failed to show proximate cause in order to have the issues decided by the jury.

Appeal by plaintiffs from judgment entered 28 September 1999 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 29 March 2001.

Brown & Associates by Donald M. Brown, Jr. for plaintiffs-appellants.

Henson & Henson by Perry C. Henson, Jr. and Amanda M. Willis for defendants-appellees.

THOMAS, Judge.

Plaintiffs Dowd and Nancy Greene appeal from a directed verdict granted in favor of defendants in an action for professional malpractice. Plaintiffs set forth one assignment of error. For the reasons stated herein, we affirm.

The facts are as follows: Plaintiffs operated a garage-door business and owned five separate properties, including a house, a rental house, a commercial building, a 139-acre tract and a 55-acre tract. They filed for bankruptcy in 1993. After having one of the parcels sold at what they considered to be a low price, plaintiffs sought the services of defendants, the law firm of Pell & Pell, L.L.P., and two attorneys with the firm, Gerald A. Pell and Ralph W. Gorrell. Plaintiffs had

earlier been represented by two different law firms at various stages of the bankruptcy proceeding.

Defendants were retained for the overall purpose of challenging the order already entered confirming the sale of the property. Plaintiffs claim they were told that if they could post a bond of $50,000 to $100,000, defendants would obtain a stay enjoining the bankruptcy trustee from closing on the properties. At the hearing, defendants asked the court to set aside the sale, but the motion was denied. Then, upon inquiry of the court regarding a stay, defendants said that part of the motion was moot because it was intended only for the time period until the court could hear the motion to set aside.

Defendants then filed notice of appeal as to the order confirming sale, and a motion to stay, but prior to the hearing of that motion, the trustee sold the property. At the hearing itself, the bankruptcy court found that the motion to stay pending the outcome of the appeal had been rendered moot. Defendants had failed to request an expedited hearing for the motion to stay. Plaintiffs' testified they told defendants from the very beginning they could post an adequate bond if a stay were granted.

Defendants represented plaintiffs for several additional months in the bankruptcy action, but eventually plaintiffs brought suit against defendants both under breach of contract and professional malpractice in the case at bar.

Prior to the start of trial, the court granted defendants' motion to dismiss the breach of contract claim. A jury was empaneled to hear the malpractice claim, however, with both sides presenting evidence. At the close of the evidence, both sides moved for a directed verdict. The trial court denied plaintiffs' motion, but granted that of defendants. The court found, first, that plaintiffs failed to present evidence of any negligent act and, second, that they failed to show any proximate cause between the acts of defendants and the alleged damages. Plaintiffs appeal to this Court.

By their only assignment of error, plaintiffs argue two grounds for the reversal of the trial court's order. First, they contend there is a genuine issue of material fact which should have been submitted to the jury. Second, they contend the court improperly refused to allow plaintiffs to submit an offer of proof concerning an expert's testimony. We disagree with the former. We do not reach the latter because it was not assigned as error and is thus not properly be-

fore us, pursuant to Rule 10(c)(1)) of the N.C. Rules of Appellate Procedure.

A directed verdict is proper when there is *no* evidence of an essential element of plaintiff's claim. *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E.2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987) (emphasis added). To establish a claim for professional malpractice, the plaintiff must show: (1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs. *Reich v. Price*, 110 N.C. App. 255, 429 S.E.2d 372, *cert. denied*, 334 N.C. 435, 433 S.E.2d 178 (1993).

It is the last element at issue in the instant case. Plaintiffs argue defendants proximately caused them injury by failing to ask the trial court for a stay at the 7 April 1999 bankruptcy hearing and by failing to request an expedited hearing for a stay pending appeal before the actual sale of the properties. Plaintiffs' alleged injuries result from the low sale price of the properties and from the legal fees spent after the alleged malpractice occurred.

Plaintiffs cite *Gram v. Davis*, 128 N.C. App. 484, 495 S.E.2d 384 (1998), as authority. In *Gram*, the plaintiff sued his attorney because the attorney, after performing a title search, failed to inform him that the lot he purchased, which was adjacent to lakefront property, had a restrictive covenant preventing him from using the lakefront property to access the lake. He was unable to sell the lots after he had completed grading services on the property because the grading company recorded a lien on the property in the amount of $76,000, which the plaintiff assigned as damages. The defendants argued the proximate cause of the plaintiff's injuries was the lien. This Court found that "the lien was not an insurmountable obstacle to prevent plaintiff from selling the property; thus, it was not the proximate cause of [the] plaintiff's damages." *Id.* at 489, 495 S.E.2d at 387. We held a directed verdict was not appropriate where the plaintiff had testified that he would have paid the lien amount in order to sell the lots. *Id.*

However, in the instant case, defendants argue plaintiffs failed to show proximate cause because they did not establish that the motion for a stay would have been granted had defendants requested it at the April hearing. To guess at whether the bankruptcy judge, now deceased, would have granted the motion would be speculation. We note, however, that the bankruptcy judge stated

> I don't think I have seen many cases that have been anymore hard fought by the debtors than [plaintiffs] have fought in this case. At an early stage they filed . . . a voluntary Chapter 13 pro se . . . [T]hey decided to convert it to Chapter 11 . . . .
>
> And we proceeded and nothing went well in the case, and it got converted. And they changed attorneys again. . . . [A]t the last minute [the plaintiffs' attorney] comes in and wants me to sign an ex parte order enjoining . . . this sale[.] And for the third time I, again, benefitted the debtors, but I assured him that when I did so that if he didn't come up with his sale that this auction was going to take place.

Further, plaintiffs did not present any evidence they would have prevailed on appeal. Plaintiffs' own expert witness testified he saw no error on the part of the bankruptcy judge when he reviewed the bankruptcy proceeding transcript. Thus, even if a stay had been granted, there is no evidence plaintiffs' position would ultimately have differed.

In a motion for a directed verdict, all of the evidence favoring the non-moving party must be taken as true, giving the non-moving party the benefit of every reasonable inference which may be legitimately drawn therefrom with all contrasts, conflicts and inconsistencies resolved in the non-moving party's favor. *Murphy v. Edwards*, 36 N.C. App. 653, 659, 245 S.E.2d 212, 216-17, *disc. review denied*, 295 N.C. 551, 248 S.E.2d 728 (1978). Plaintiffs have shown some evidence of each of the elements of professional malpractice, except the crucial element of proximate cause, which keeps them from having the issues decided by a jury. It is well-settled that directed verdicts, or any summary adjudications for that matter, are not well-suited for negligence cases because the issues are for the jury. *Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449 (1994); *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987); *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). However, in this case, plaintiffs did not put forth any evidence to show defendants proximately caused an injury.

AFFIRMED.

Judges MARTIN and BIGGS concur.

ELLIS LESTER SELPH, JR., AND STACY WADE HARRIS v. SCOTT H. POST AND OBSERVER TRANSPORTATION CO.

No. COA00-56

(Filed 3 July 2001)

1. Process and Service— time period for filing summons—calculation of weekends

The trial court erred in a personal injury case arising out of an automobile accident by holding that plaintiffs' claim violated the statute of limitations based on the trial court's miscalculation of the allowable time period for the filing of the summons even though seven calendar days elapsed between the filing of the complaint and issuance of summons, because the seven days included an intervening weekend which means the calculation results in the summons being issued in five days. N.C.G.S. § 1A-1, Rule 6(a).

2. Process and Service— finding of improper service—summons

The trial court's additional finding of improper service in a personal injury case is reversed because although an improper summons amounts to improper service of process, the Court of Appeals already held the summons was proper.

3. Attorneys— pro hac vice admission—requirements

Although the trial court erred in a personal injury case arising out of an automobile accident by admitting plaintiffs' attorney pro hac vice where the motion failed to supply the trial court with three of the five requirements for pro hac vice representation under N.C.G.S. § 84-4.1, plaintiffs were not prejudiced because they failed to express any concern about the competency of their attorney during the court proceedings.

Appeal by plaintiffs from judgment entered 20 September 1999 by Judge James R. Vosburgh in Durham County Superior Court. Heard in the Court of Appeals 14 February 2001.

Kirk D. Lyons, pro hac vice, *Austin, TX, and Norman & Gardner by Larry E. Norman, Louisburg, NC, for plaintiffs-appellants.*

Yates, McLamb and Weyher by John W. Minier for defendants-appellees.

THOMAS, Judge.

Plaintiffs Ellis Lester Selph, Jr. and Stacy Wade Harris appeal from a motion to dismiss granted in favor of defendants Scott Post (Post) and Observer Transportation Company (OTC) based on the statute of limitations. Plaintiffs assert two assignments of error.

The facts are as follows: On 31 January 1996, plaintiffs were allegedly injured when their vehicle collided with a truck driven by Post. The truck was owned by OTC. Plaintiffs retained Kirk D. Lyons (Lyons), a Texas attorney, to represent them in a negligence action against defendants.

On Friday, 29 January 1999, plaintiffs, through Lyons, filed a complaint against defendants, with a summons being issued for both defendants on the following Friday, 5 February 1999. Plaintiffs also filed a motion for *pro hac vice* admission of Lyons to represent them, naming Larry Norman (Norman) of Louisburg, North Carolina as associated local counsel. This motion was granted on 29 January 1999. In July 1999, defendants filed a motion to dismiss, based *inter alia* on improper service and a violation of the statute of limitations. In September 1999, plaintiffs filed a motion for enlargement of time. Both motions were heard on 13 September 1999. At the hearing, Lyons was present to represent plaintiffs, but Norman was unavailable. On 20 September 1999, the trial court granted defendants' motion to dismiss based upon the plaintiffs' "fail[ure] to effect proper service of process upon defendants" and plaintiffs' "fail[ure] to commence [the] action within the statutory limitations period[.]"

Plaintiffs appeal from this order.

[1] By plaintiffs' first assignment of error, they argue the trial court erred in holding their claim violated the statute of limitations by miscalculating the allowable time period for the filing of the summons. We agree and reverse the trial court.

A party must commence an action seeking recovery for personal injuries from a motor vehicle accident within three years. N.C. Gen. Stat. § 1-52(16) (2000). An action is commenced by the filing of a complaint or the issuance of a summons. *Roshelli v. Sperry*, 63 N.C. App. 509, 305 S.E.2d 218, *rev. denied* 309 N.C. 633, 308 S.E.2d 716 (1983) (*Roshelli* II). Under N.C. Gen. Stat. § 1A-1, Rule 4(a), the summons must be issued within five days of filing a complaint. When a proper summons is not issued within five days of the filing of a complaint, the action abates. *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E.2d 355

(1982) (*Roshelli* I). Under *Roshelli* II, an action for negligence is not barred by the statute of limitations if the complaint is filed within the statute of limitations period, as long as the summons is proper and issued within five days of the file date of the complaint, even if the summons is issued after the three years have passed.

In the instant case, seven calendar days elapsed between the filing of the complaint and issuance of summons. Nothing else appearing, the filing of the summons would not relate back to the date of the filing of the complaint because the summons was not issued within five days. The action would be deemed commenced on 5 February 1999, the date of the summons issuance, which is outside the statute of limitations period. However, here, the seven days included an intervening weekend. Rule 6(a) of the N.C. Rules of Civil Procedure provides in pertinent part:

> In computing *any* period of time *prescribed or allowed by these rules*, by order of court or any applicable statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. *When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation.*

N.C. Gen. Stat. § 1A-1, Rule 6(a) (2000). (Emphasis added). Accordingly, the calculation results in the summons being issued in five days because Saturday and Sunday are statutorily excluded.

Defendants, however, argue the language of Rule 4(a) requiring summons to be issued "in any event within five days" negates the application of Rule 6(a) regarding the calculation of time. Rule 6(a) explicitly applies to "any period of time prescribed or allowed by [the Rules of Civil Procedure.]" We thus reject this argument, holding the cut-off date was met precisely, and plaintiffs' action was timely commenced. Therefore, as to plaintiffs' first assignment of error, we agree and reverse the trial court.

[2] Plaintiffs further contend the trial court's additional rationale of improper service of process was erroneously mentioned in the order, stating that in the motion to dismiss hearing, there was no discussion

about improper service. In the transcript of the motion to dismiss hearing, the trial judge specifically stated he based the grant of the motion to dismiss on the ruling in the *Roshelli* I case. As aforementioned, that case held an action will abate if the proper summons is not issued within five days of the filing of the complaint. We find an improper summons amounts to improper service of process and was correctly mentioned in the order. However, as we have already held the summons was indeed proper, the finding of improper service is likewise reversed.

[3] By plaintiffs' second assignment of error, they argue the trial court erred in admitting plaintiffs' attorney *pro hac vice* with plaintiffs not being properly represented by counsel at the hearing to dismiss. We agree, but find no prejudicial error.

N.C. Gen. Stat. § 84-4.1 delineates the requirements which govern the admission of out-of-state attorneys to practice *pro hac vice*.

> Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of that state and in good standing therein, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina . . . may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the litigation.

(1999). The statute further provides five requirements for *pro hac vice* representation to be granted: 1) the attorney's full name, address, bar number and status; 2) the client's address, along with a statement that the client has retained the attorney for representation; 3) the attorney's statement to represent the client until a final determination is made (unless allowed to withdraw sooner) and to be subject to N.C. orders and disciplinary actions as if the attorney were a member of the N.C. State Bar in good standing; 4) a statement that the state from which the attorney comes grants like privileges to N.C. attorneys in good standing; and 5) a statement that the moving attorney is associated with a local attorney who will accept service, etc. on behalf of the moving attorney. In the instant case, Lyons, in his motion to appear *pro hac vice*, failed to supply the trial court with the second, third and fourth requirements in section 84-4.1. We note Lyons repeated identical mistakes in his motion to appear *pro hac vice* before this Court despite plaintiffs' argument in their brief about the inadequacy of the motion in the trial court. This Court, accord-

ingly, denied without prejudice his motion to appear before us. Lyons later satisfied the requirements of N.C. Gen. Stat. § 84-4.1 regarding the appeal and his motion to appear *pro hac vice* was granted.

Where attorneys neither licensed by the North Carolina State Bar nor authorized to appear in court in compliance with section 84-4.1 purport to represent litigating parties, the attorneys are not considered to be participating attorneys. *State v. Daughtry*, 8 N.C. App. 318, 174 S.E.2d 76 (1970). However, we have also held that where there is non-compliance with the statutory requirement of section 84-4.1, some showing of prejudice must be made to reverse on this issue because the *pro hac vice* statute was not designed to protect a party from his own attorney. *See Pope v. Jacobs*, 51 N.C. App. 374, 276 S.E.2d 487, (1981); *State v. Scarboro*, 38 N.C. App. 105, 247 S.E.2d 273, (1978), *review denied* 295 N.C. 652, 248 S.E.2d 256, *cert. denied*, 440 U.S. 938, 59 L. Ed. 2d 497 (1979). In *Scarboro*, we held the defendant could not complain where he did not express concern regarding the competency of his attorney during the proceedings. Moreover, we held section 84-4.1 "does not vest in [a defendant] rights to counsel other than what he would ordinarily possess in the absence of [section 84-4.1.]" *Scarboro*, 38 N.C. App. at 107-08, 247 S.E.2d at 274. The *Scarboro* Court concluded that "any error resulting from non-compliance with G.S. 84-4.1 on these facts is found to be harmless." Likewise, in the instant case, plaintiff has not noted any expression of concern during the proceedings. We therefore hold any error is not prejudicial and reject this assignment of error.

For the reasons discussed herein, we reverse in part as to the dismissal based on the statute of limitations and improper service and remand for trial. We affirm in part as to the *pro hac vice* motion.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

Judges WYNN and McGEE concur.

FRANCES V. ANDALORO, PLAINTIFF v. RHONDA JONES SAWYER, DEFENDANT

No. COA00-735

(Filed 3 July 2001)

Appeal and Error— appealability—sanctions in arbitration—underlying issues still pending—interlocutory

An appeal was dismissed as interlocutory where the appeal was solely from a grant of attorney fees imposed as a sanction for failing to participate in arbitration in good faith and for failing to produce an individual with authority to settle the case at the arbitration proceeding. The appeal of the arbitration award is still pending before the trial court and the issues in this appeal are best left until the underlying action has been resolved.

Appeal by defendant from order entered 11 January 2000 by Judge Wayne L. Michael in Iredell County District Court. Heard in the Court of Appeals 21 May 2001.

Pope, McMillan, Kutteh, Simon & Privette, P.A., by Anthony S. Privette and Ryan D. Bolick, for plaintiff-appellee.

Steven J. Colombo, P.A., by Steven J. Colombo, Kenneth M. Gondek and Marc. H. Amin, for defendant-appellant.

EAGLES, Chief Judge.

Defendant is appealing from a sanctions order that the trial court issued based on defendant's conduct in an arbitration proceeding.

On or about 14 May 1998, plaintiff, Frances Andaloro, was waiting in her automobile at a stoplight. Defendant, Rhonda Sawyer, was directly behind her. When the light turned green, defendant began to move forward without noticing that the plaintiff remained still. Defendant hit plaintiff's car. Plaintiff alleged that the impact injured her. Consequently, she filed suit seeking $3,000 in damages. Defendant admitted that she breached her duty but denied that the plaintiff suffered any injuries.

On 10 August 1999, the trial court notified the parties that they must attend court-ordered non-binding arbitration pursuant to G.S. § 7A-37.1 (1999). Plaintiff's attorney only raised the issue of "damages for injury" on the pre-arbitration submission. The only individuals present at the hearing were counsel and the parties. Following the

hearing, the arbitrator entered an award for the plaintiff for $5,500. Defendant timely appealed this award to the trial court. The record does not indicate that the trial court took any further action on the appeal from the arbitration award.

Subsequent to the award, plaintiff's counsel moved for sanctions against the defendant. Plaintiff alleged that the defendant had failed to participate in the proceedings in good faith violating N.C.R. Arbitration 3(p) and 3(l) as promulgated by the North Carolina Supreme Court. Specifically, plaintiff contended that the defendant had failed to produce someone with authority to settle the claim and that defendant's counsel commented that the defendant had never intended to settle the claim during arbitration.

On 17 November 1999, the trial court held an evidentiary hearing on the motion for sanctions. On 11 January 2000, the court granted attorney's fees to the plaintiff for $1,823.75. The court concluded that the defendant had failed to participate in good faith and failed to produce an individual with authority to settle the case at the arbitration proceeding. Defendant appeals from the grant of sanctions. Because we hold that the defendant's appeal is interlocutory, we dismiss.

Generally, there is no immediate appeal from the entry of an interlocutory order. *Summey v. Barker*, 142 N.C. App. 688, 544 S.E.2d 262 (2001). "The purpose of this rule 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." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578-79 (1999) (citation omitted). However, a party may appeal from an interlocutory order in two instances. First, if the order is final as to some but not all claims or parties and the trial court certifies there is no just reason to delay appeal pursuant to North Carolina Rule of Civil Procedure 54(b), an immediate appeal may lie. *Bishop v. Lattimore*, 137 N.C. App. 339, 343, 530 S.E.2d 554, 558 (2000). Second, an appeal is permissible if the trial court's decision deprives a party of a substantial right that will be lost absent immediate review. *Id.*

In her brief, defendant admits that the appeal is interlocutory. However, defendant contends that she has a substantial right under *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999) and *Willis v. Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). We disagree. In *Sharpe*, our Supreme Court defined a substantial right as being, "a legal right affecting or involving a matter of substance as distin-

guished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579. However, our Courts have stressed that it is necessary to resolve the substantial right question by considering the particular facts and procedural context of each case. *Id.* at 162-63, 522 S.E.2d at 577. We also note that this Court has determined that we should strictly construe the concept of "substantial right" to uphold the purposes underlying the rule preventing interlocutory appeals. *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982).

We conclude that *Sharpe* and *Willis* are distinguishable from the present case and therefore they do not bind us here. In *Sharpe*, the Supreme Court held that a hospital had a substantial right to appeal from a discovery order compelling them to produce allegedly privileged documents. *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. According to the Court, the hospital's alleged statutory privilege amounted to a substantial right that the hospital could lose by complying with the order. *Id.* The *Sharpe* Court cited the earlier *Willis* decision as a basis for its holding. *Id.* at 163, 522 S.E.2d at 580. In *Willis*, the Supreme Court determined that an interlocutory discovery order was immediately appealable when the trial court accompanied that order with a court order of contempt. *Willis*, 291 N.C. at 30, 229 S.E.2d at 198. The Court wrote:

> [W]hen a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order itself where, as here, the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains.

Id.

First, we note that the present case does not deal with an order compelling discovery. Defendant contends that the common thread between the cases is that both trial courts used N.C.R. Civ. Pro. 37(b) to sanction the respective defendants. Likewise, defendant contends that the trial court used Rule 37(b) to sanction her in the present case. Defendant's argument misapprehends the facts here and the *Sharpe* and *Willis* decisions.

The Rules of Arbitration provide that a court may sanction a party for failing or refusing to participate in arbitration proceedings in good faith. N.C.R. Arbitration 3(l). Once the court makes that determination, then the court may choose to use any of the sanctioning methods prescribed in N.C.R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(C) or G.S. § 6-21.5. *Id.* Contrary to the defendant's contention, the trial court did not cite any particular rule when it sanctioned the defendant. Notably, the three rules referred to in Arbitration Rule 3(l) all permit the award of attorney's fees. Therefore, the Court could have used any of the authorized sanctioning methods and was not necessarily limited to Rule 37.

Further contrary to defendant's argument, the *Willis* Court did not rely solely on the trial court's use of Rule 37. The Court found that the trial court's use of a finding of contempt accompanying an order compelling discovery created a substantial right. *Willis*, 291 N.C. at 30, 229 S.E.2d at 197. The only way to relieve the contempt order was to comply with the discovery order. *Id.* In effect, the *Willis* trial court used the sanction as an enforcement mechanism. In that instance, the Supreme Court held that the defendant had a substantial right to appeal. *Id.* Here, the trial court did not use the payment of attorney's fees as an enforcement mechanism. The trial court did not hold the defendant in contempt and did not include any condition by which the defendant could relieve herself of the penalty. Given the differences between *Sharpe* and *Willis* and the instant case and our emphasis to construe substantial rights strictly, we do not believe that those cases bind us.

This Court has stated that an order imposing sanctions is ordinarily interlocutory and not appealable. *Routh v. Weaver*, 67 N.C. App. 426, 428, 313 S.E.2d 793, 795 (1984). Additionally, this Court has stated that an "order granting attorney's fees is interlocutory as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500, 503 (1988) (citation omitted). Here, the defendant is appealing solely from a grant of attorney's fees. The defendant's appeal of the arbitration award is still pending before the trial court. The very purpose of the interlocutory appeals rule is to prevent appeals of this preliminary nature. The issues here are best left until the underlying action has been resolved and the appeals process can address all the issues in the case in one appeal.

Appeal dismissed.

Judges McGEE and TYSON concur.

MARISSA A. OLSON, MICHAEL A. OLSON, AND MARLENE A. OLSON, PLAINTIFFS V. REGINALD V. McMILLIAN AND WILLIE McMILLIAN, DEFENDANTS

No. COA00-1036

(Filed 3 July 2001)

1. Costs— attorney fees—offer of judgment—findings

The trial court did not abuse its discretion in a negligence action arising from an automobile accident by awarding attorney fees pursuant to N.C.G.S. § 6-21.1 where the court found that defendants made a settlement offer of $1,000 and that the jury verdict was for $1,930. Although the court did not make any findings regarding the timing of the settlement offer or the exercise of superior bargaining power, the date was shown by the undisputed evidence and the court made adequate findings on the whole record to support an award of attorney fees. Additionally, it was noted that there is nothing in N.C.G.S. § 6-21.1 that limits the trial court's consideration of unwarranted refusals to settle by individual defendants.

2. Appeal and Error— appealability—order not reduced to writing

An assignment of error to an oral order denying the return of a filing fee after arbitration was overruled where no written order was entered. A trial court order not reduced to writing cannot support an appeal.

Appeal by defendants from judgment filed 12 May 2000 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 5 June 2001.

Armstrong & Baggett, by Talmage S. "Tal" Baggett, Jr., for plaintiff-appellees.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Gay Parker Stanley, for defendant-appellants.

GREENE, Judge.

Reginald V. McMillian (Reginald) and Willie McMillian (Willie) (collectively, Defendants) appeal from a judgment filed 12 May 2000 awarding attorney's fees to Marissa A. Olson (Marissa).

The record shows that on 15 October 1999, Marissa, Michael A. Olson, and Marlene A. Olson (collectively, Plaintiffs) filed a complaint against Defendants alleging claims for negligence. Plaintiffs' claims arose out of an 18 October 1996 automobile accident in which a vehicle driven by Marissa was allegedly struck by a vehicle driven by Reginald and owned by Willie. On 16 December 1999, Defendants filed an answer to Plaintiffs' complaint denying any alleged negligent conduct. Additionally, on 16 December 1999, Defendants filed an Offer of Judgment (settlement offer) in which they offered Plaintiffs $1,000.00 for settlement of their claims. The settlement offer stated "if this offer is not accepted within ten (10) days following service, it shall be deemed withdrawn." Plaintiffs did not accept the settlement offer.

On 29 December 1999, Plaintiffs' case was selected for court-ordered, nonbinding arbitration pursuant to N.C. Gen. Stat. § 7A-37.1. On 10 March 2000, subsequent to an arbitration hearing, an arbitration award and judgment was filed awarding Plaintiffs $4,000.00. On 15 March 2000, Defendants requested a trial *de novo* pursuant to Rule 5(a) of the Court-Ordered Arbitration Rules. A jury trial was therefore held on Plaintiffs' claims. Subsequent to trial, the jury found Marissa was injured by the negligence of Reginald and it awarded Marissa $1,930.00 for personal injuries.

After the jury verdict was returned, Defendants made an oral motion requesting that the filing fee for the trial *de novo* be returned to them pursuant to Rule 5(b) of the Court-Ordered Arbitration Rules (filing fee returned to demanding party if position of demanding party is improved subsequent to trial *de novo*). The trial court orally denied this motion; however, no written order was entered. Additionally, Marissa made a motion for an award of attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1. In a judgment filed 12 May 2000, the trial court made the following pertinent findings of fact:

I.

The jury, after hearing the evidence presented by the parties and having been duly impaneled, answered the issues as follows:

Issue 1—Was [Marissa] injured by the negligence of [Reginald]?

Answer: Yes

Issue 2—What amount, if any, is [Marissa] entitled to recover for personal injuries?

Answer: $1,930.00

. . . .

III.

That . . . Defendant[s] made [a settlement offer] in the amount of $1,000.00 in this case.

IV.

That this case was arbitrated according to the local rules of District Court within Cumberland County, North Carolina; that the arbitrator made an award of $4,000.00, which in the opinion of the [c]ourt, included attorney['s] fees; that . . . Defendant[s] appealed this award to a jury trial in District Court.

V.

That the [c]ourt makes a finding that virtually no settlement negotiations were made by . . . Defendants; that such inaction by . . . Defendants constitutes an unwarranted refusal by . . . Defendants to pay the claim which constitutes the basis of such suit.

Based on these findings, the trial court concluded Marissa "is entitled to an award of attorney['s] fees under [N.C. Gen. Stat. §] 6-21.1 and costs incurred in the trial of this matter in addition to the jury award of $1,930.00." The trial court, therefore, awarded Marissa $1,930.00 in compensatory damages, $2,100.00 in attorney's fees, and $378.10 in costs.

The issues are whether: (I) the trial court abused its discretion by awarding Marissa attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1; and (II) Defendants preserved for appellate review the issue of whether the trial court erred by denying their motion requesting the return of their filing fee.

I

[1] Defendants argue the trial court abused its discretion by awarding Marissa attorney's fees pursuant to section 6-21.1. We disagree.

Section 6-21.1 provides that a trial court, in its discretion, may award attorney's fees to the plaintiff in a personal injury or property damage suit "where the judgment for recovery of damages is ten thousand dollars ($10,000) or less." N.C.G.S. § 6-21.1 (1999). In determining whether to award attorney's fees under section 6-21.1, the trial court must consider the entire record, including the following pertinent factors:

> (1) whether any settlement offers were made prior to the institution of the action; (2) whether the defendant unjustly exercised superior bargaining power in the settlement negotiation process; (3) the timing of the settlement offers; [and] (4) the amount of the settlement offers as compared to the jury verdict.

Culler v. Hardy, 137 N.C. App. 155, 158, 526 S.E.2d 698, 701 (2000). While the trial court must make adequate findings of fact based on the whole record to support an award of attorney's fees, "detailed findings are not required for each factor." *See Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001). Additionally, a trial court's ruling on a motion for attorney's fees under section 6-21.1 "will not be disturbed on appeal absent a showing of abuse of discretion." *Culler*, 137 N.C. App. at 157, 526 S.E.2d at 700.

In this case, the trial court found as to the first factor that Defendants made a settlement offer of $1,000.00. Although the trial court did not make any findings regarding the timing of the settlement offer under the third factor, the undisputed evidence shows the settlement offer was made on or about 16 December 1999.[1] Additionally, as to the fourth factor, the trial court made findings that the settlement offer was in the amount of $1,000.00 and the jury verdict was in the amount of $1,930.00. Thus, the findings show the jury verdict was for an amount nearly twice the settlement amount offered by Defendants. Based on these findings of fact, the trial court did not abuse its discretion by awarding Marissa attorney's fees under section 6-21.1. Although the trial court did not make any findings

1. Defendants argue in their brief to this Court that "[D]efendants' liability carrier offered the amount of $1,000.00 in settlement of . . . [P]laintiffs' claim over two years prior to the filing of suit." The record, however, does not contain any evidence regarding the existence of this settlement offer.

regarding whether Defendants exercised "superior bargaining power" over Marissa pursuant to the second factor, the absence of such a finding does not require reversal when the trial court made adequate findings on the whole record to support an award of attorney's fees. *See Tew*, —— N.C. App. at ——, 546 S.E.2d at 185 (trial court did not abuse its discretion by awarding attorney's fees pursuant to section 6-21.1 when trial court made findings as to the settlement offers and jury verdict but failed to make findings regarding any superior bargaining power of the defendant). Accordingly, the trial court's 12 May 2000 judgment is affirmed.[2]

II

[2] Defendants argue the trial court erred by denying their oral motion requesting that the filing fee for a trial *de novo* be returned to them pursuant to Rule 5(b) of the Court-Ordered Arbitration Rules.

"When [a trial court's] oral order is not reduced to writing, it is non-existent and thus cannot support an appeal." *Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co.*, 136 N.C. App. 695, 702, 526 S.E.2d 197, 201 (2000) (citation omitted).

In this case, the trial court orally denied Defendants' motion requesting the return of their filing fee. The trial court's 12 May 2000 order, however, does not contain a ruling on Defendants' oral motion. Accordingly, this assignment of error is overruled.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

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2. Defendants argue in their brief to this Court that the trial court "erred in finding that the [a]rbitration [a]ward included attorney['s] fees, and that it did not exceed the [j]udgment finally obtained." In this case, however, the trial court's findings of fact make no comparison of the arbitration award to "the [j]udgment finally obtained." Additionally, the record shows the trial court based its award of attorney's fees, in its discretion, on Defendants' settlement offer, the lack of settlement negotiations, and the jury verdict. Whether the arbitration award included attorney's fees, therefore, is not relevant to the trial court's judgment awarding attorney's fees to Marissa. Accordingly, this assignment of error is overruled.

Defendants also argue in their brief to this Court that any "unwarranted refusal" by Defendants to settle Plaintiffs' claims is not relevant because Defendants are not an insurance company; therefore, the trial court erred by considering any "unwarranted refusal." We disagree. While a trial court must consider any "unwarranted refusal by the defendant insurance company" under section 6-21.1, there is nothing in section 6-21.1 that limits the trial court's consideration of "unwarranted refusal[s]" by individual defendants. N.C.G.S. § 6-21.1.

IN RE: DAVID WAYNE FULLER, JR., A MINOR CHILD

No. COA00-1117

(Filed 3 July 2001)

Termination of Parental Rights— failure to appoint guardian ad litem—failure to object at trial

The trial court erred by terminating respondent father's parental rights without appointing a guardian ad litem to represent the interests of the juvenile despite respondent's failure to object to the violation of N.C.G.S. § 7B-1108(b) at trial, because: (1) respondent denied material allegations set forth in the petition, and N.C.G.S. § 7B-1108(b) states the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile if an answer denies any material allegation of the petition seeking termination; and (2) the appellate rules are suspended since the juvenile did not attend the termination hearing and was unable to lodge objections to the trial court's error in the proceeding below or on appeal.

Appeal by respondent from order entered 22 March 2000 by Judge William G. Hamby, Jr. in District Court, Cabarrus County. Heard in the Court of Appeals 22 May 2001.

Margaret B. Markey for petitioner-appellee.

Baucom & Robertson, by Scott C. Robertson, for respondent-appellant.

TIMMONS-GOODSON, Judge.

David Wayne Fuller, Sr. ("respondent") appeals an order terminating his parental rights pursuant to section 7B-1100 *et seq.* of our General Statutes. Upon review of the record and arguments of counsel, we reverse the termination order and remand for proceedings *de novo*.

The facts pertinent to the appeal are as follows: David Wayne Fuller, Jr. ("the juvenile"), born 7 November 1991, is the son of respondent and Arrah Elizabeth Kline ("petitioner"). Petitioner and respondent were married on 18 August 1990 and subsequently divorced on 25 January 1994. Petitioner was awarded legal custody of the juvenile, who now resides with petitioner and his stepfather in Cabarrus County, North Carolina.

On 20 July 1999, petitioner, represented by counsel, filed a petition seeking to terminate respondent's parental rights based on grounds which included abandonment and failure to maintain support. Respondent, also represented by counsel, filed an answer, denying several of the material allegations set forth in the petition. At no time before or during the termination proceedings below did the trial court appoint a guardian ad litem for the juvenile or otherwise insure his representation. Following a trial in the matter, the trial court concluded that the best interests of the juvenile would be served by terminating respondent's parental rights and consequently entered an order of termination on 22 March 2000. Respondent now appeals.

The dispositive issue on appeal is whether the trial court erred by terminating respondent's parental rights without appointing a guardian ad litem to represent the interests of the juvenile. Section 7B-1108(b) of the North Carolina General Statutes provides: "If an answer denies any material allegation of the petition [seeking termination], the court *shall* appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile . . . ." N.C. Gen. Stat. § 7B-1108(b) (1999) (emphasis added). Because respondent denied material allegations set forth in the petition, the trial court's failure to appoint a guardian ad litem clearly violated section 7B-1108(b).

Petitioner acknowledges on appeal that the trial court erred in failing to appoint a guardian ad litem for the juvenile, but argues that the court's order should not be reversed because respondent failed to object to the violation of section 7B-1108(b) at trial. We disagree.

The North Carolina General Assembly recently enacted Section 7B-1108(b),[1] and as such, our appellate courts have yet to examine whether the statute mandates reversal for noncompliance, where a court's violation of the statute was not objected to at trial. However, in *In re Barnes*, 97 N.C. App. 325, 388 S.E.2d 237 (1990), this Court examined the propriety of the statute which preceded section 7B-1108(b) and which contained substantially the same language. We find *Barnes* dispositive of the issue presented by the present appeal.

The *Barnes* Court was concerned with section 7A-289.29(b) of the North Carolina General Statutes which stated: "If an answer

1. We recognize that the General Assembly has amended section 7B-1108(b) since the inception of the present action. *See* N.C. Gen. Stat. § 7B-1108(b) (effective date Oct. 1, 2000). However, these most recent amendments do not affect the disposition of the present appeal.

denies any material allegation of the petition, the court shall appoint a guardian ad litem for the child to represent the best interests of the child . . . ." N.C. Gen. Stat. § 7A-289.29(b) (1990) (repealed by 1998 N.C. Sess. Laws ch. 202, effective Jan. 1, 1999). In *Barnes*, as in the present case, the trial court failed to appoint a guardian ad litem for the minor child. However, in violation of North Carolina's Rules of Appellate Procedure, respondent failed to object to the trial court's failure to comply with section 7A-289.29(b) during the termination proceedings or to assign error to that noncompliance on appeal.

Despite the respondent's failure to comply with our appellate rules, the *Barnes* Court was "unwilling[]" to dismiss the appeal for appellate rule violations because "the termination statute requir[ed] that termination proceed only in the best interests of the child . . . , and the child aged twenty-two months, a party to the proceeding, was not represented and obviously could not enter the required objections at trial or in the appellate record." *Id.* at 326, 388 S.E.2d at 238. The Court, therefore, suspended the Appellate Rules and accepted the appeal pursuant to its authority under Rule 2 of our Rules of Appellate Procedure. *Barnes*, 97 N.C. App. at 327, 388 S.E.2d at 238; N.C. R. App. P. 2.

Concerning the merits of the appeal, the Court concluded that the trial court had indeed violated "[the] statutory mandate" of section 7A-289.29. *Id.* at 327, 388 S.E.2d at 238. The Court further found that "where the respondent, as here, was represented by counsel, 'fundamental fairness require[ed] that the minor child be represented by counsel.' " *Id.* (quoting *In re Clark*, 303 N.C. 592, 600-01, 281 S.E.2d 47, 53 (1981)). Accordingly, the Court reversed the order of termination and remanded for the appointment of a guardian ad litem and for new termination proceedings. *Id.* at 327, 388 S.E.2d at 239 (citation omitted).

We are persuaded by the *Barnes* decision that the same disposition is required in the case *sub judice* for the trial court's violation of section 7B-1108(b).[2] In contravention of a statutory scheme

2. We find no import to the repeal of section 7A-289.29(b) as it relates to our application of *Barnes* to the present case. Section 7A-289.29(b) was one of many statutes in Chapter 7A concerning proceedings to terminate parental rights which was recodified into Chapter 7B, effective 1 July 1999. As noted *supra*, section 7B-1108(b) contains substantially the same language as section 7A-289.29(b). In fact, the only modification between section 7A-289.29(b) and 7B-1108(b) is the reference to the minor child in 7B-1108(b) as a "juvenile," rather than a "child." *Cf. In re Blackburn*, 142 N.C. App. 607, 609, 543 S.E.2d 906, 908 (2001) (stating that "[a]mong other modifications, references to 'child' have been changed to 'juvenile' in Chapter 7B.")

intended to preserve the best interest of the minor child, *see* N.C. Gen. Stat. § 7B-1100(3), the trial court failed to appoint a guardian ad litem to represent the party who is the intended beneficiary of section 7B-1108(b). Like the minor child in *Barnes*, the nine-year-old juvenile in the present case, who coincidentally did not attend the termination hearing, was unable to lodge objections to the trial court's error in the proceeding below or on appeal.

Accordingly, despite respondent's noncompliance with our rules, we too are unwilling to forgo reversal based upon a violation of section 7B-1108(b). Therefore, in accordance with *Barnes*, we suspend our appellate rules to reverse the termination order in the present case. *See* N.C.R. App. P. 2. We further remand the case for appointment of a guardian ad litem for the juvenile and for the trial court to conduct appropriate *de novo* proceedings not inconsistent with section 7B-1108(b) and this opinion.

Reversed and Remanded.

Judges GREENE and BRYANT concur.

SUSAN SESSLER, PAINTIFF v. LORETTA McDERMOTT MARSH, DEFENDANT

No. COA00-801

(Filed 17 July 2001)

1. Brokers— expired real estate listing—procuring cause of sale

The trial court did not err in a nonjury trial by concluding that plaintiff-realtor was the procuring cause of the sale of a commercial building where plaintiff, as building manager and leasing agent, had ongoing conversations with an occupant about purchasing the building dating back to the early 1990s; plaintiff entered an exclusive right to sell listing contract with defendant when defendant decided to sell in 1996; the first contract with the occupant fell through due to unexpected costs for bringing the building into compliance with building codes; the occupant entered a second contract to purchase the property, eventually formed another business incorporated for the purpose of closing on the property, and assigned its rights under the conract to the

corporation; the corporation closed on the property; plaintiff did not participate in negotiations for the second contract; and the purchaser testified that he had no prior contact with defendant or her family and would not have been negotiating for the purchase of the building without plaintiff's efforts. The sale was the proximate result of plaintiff's efforts even though the listing agreement had expired when the second contract was entered.

2. Brokers— real estate commission—expiration of listing—no break in continuity of events

A realtor's right to a commission for the sale of a commercial building was not extinguished by the expiration of her listing contract where the purchaser testified that plaintiff was the party who procured him and that he would not have otherwise entered into negotiations for the purchase of the building. The listing contract is not rendered perpetual because there was no break in the continuity of events.

3. Brokers— real estate listing—modification

An alleged modification to a real estate listing between two contracts was not enforceable because there was no benefit to plaintiff or detriment to defendant which would constitute consideration.

4. Brokers— real estate listing—consideration

The trial court did not err by granting summary judgment for plaintiff-realtor on the defense of lack of consideration for the listing agreement where the listing contract provided valuable and legal consideration on its face. Where there is consideration on the face of the document, the court will not look for the adequacy of the consideration without fraud and there is no evidence here that the document was fraudulent as to defendant.

5. Unfair Trade Practices— real estate commission—failure to pay—second contract

The trial court did not err by granting summary judgment for defendant on plaintiff's claim for unfair and deceptive practices arising from two contracts to sell real estate and the failure to pay a commission. The evidence undisputedly demonstrated that the inability to close on the first contract and the creation of a new entity to purchase the property was caused by the purchaser's difficulty obtaining financing, not by any effort by defendant to deceive plaintiff.

Appeal by plaintiff and defendant from order entered 24 September 1998 by Catherine C. Eagles and appeal by defendant from judgment entered 6 March 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 17 May 2001.

Floyd and Jacobs, L.L.P., by Jack W. Floyd, Robert V. Shaver, Jr., and James H. Slaughter, for plaintiff.

Adams Kleemeier Hagan Hannah & Fouts, by David A. Senter and David S. Pokela, for defendant.

MARTIN, Judge.

Plaintiff brought this action to recover a real estate commission allegedly due her in the amount of $60,000. She alleged claims for breach of contract, unfair and deceptive practices, and *quantum meruit*. In her complaint, plaintiff alleged that she entered into an exclusive right to sell listing contract ("listing contract") with defendant for the sale of The Commerce Building property, located at 19 West Hargett Street in Raleigh. The listing contract provided, in pertinent part:

> This EXCLUSIVE RIGHT TO SELL LISTING CONTRACT ("Listing Contract") is entered into this ____ day of _____, 19___ between Loretta McDermott Marsh as owner(s) ("Owner") of the property described below (the "Property") and Susan W. Sessler, as Listing Firm ("Agent").
>
> 1. In consideration of the Owner agreeing to list the Property for sale and in further consideration of Agent's services and efforts to find a buyer, Agent is hereby granted the exclusive right to sell the Property for a period of 4 months from July 15 1996 to and including November 15, 1996 for a cash price of $1,060,000.00.
>
> 2. Owner agrees to pay Agent a fee of 5.6604% if
>
> (a) Agent produces a buyer who is ready, willing, and able to purchase the Property on the terms described above or on any terms acceptable to Owner, or
>
> (b) the Property is sold or exchanged by Agent, Owner, or by any other party before the expiration of this Listing Contract; or

> (c) the Property is sold or exchanged by Agent, Owner, or by any other party within 60 days after the expiration of this Listing Contract (the "protection period") to any party with whom Agent or any cooperating REALTOR or cooperating real estate broker has negotiated as a prospective buyer, provided Agent has notified Owner in writing within 10 days of the expiration of this Listing Contract of the name(s) of said prospective buyer(s).
>
> However, Owner shall not be obligated to pay such fee if a valid listing contract is entered into between Owner and another real estate broker and the Property is sold, conveyed, or transferred during the protection period.

Plaintiff alleged that the property was sold by defendant and that plaintiff was the procuring cause of the sale.

In her answer, defendant denied that she owed a commission to plaintiff because the sale of the property did not occur within the exclusivity period of the listing contract and the property was not sold to the prospect procured by plaintiff. Defendant also asserted several affirmative defenses to the enforcement of the contract, including illegality of the contract, lack of consideration, laches, and failure to perform the condition precedent, as well as defenses to the unfair and deceptive practices claim, including the unconstitutionality of Chapter 75 and exemption. Defendant also asserted that plaintiff's claim in *quantum meruit* was barred by the express contract.

Plaintiff moved for summary judgment. At the conclusion of the summary judgment hearing, Judge Eagles ruled that plaintiff was entitled to partial summary judgment as to the amount of damages recoverable by her, if the jury found in her favor on the issue of defendant's breach of contract. Judge Eagles also granted plaintiff summary judgment as to the defenses of illegality, lack of consideration and unclean hands. Judge Eagles ruled that defendant was entitled to partial summary judgment as to plaintiff's claims for *quantum meruit* and unfair trade practices, and as to the claims that defendant breached paragraph 2(b) or 2(c) of the listing contract. The court found there was a disputed issue of material fact as to whether plaintiff produced a buyer pursuant to paragraph 2(a) of the listing contract, but stated "[t]o the extent defendant claims plaintiff cannot recover pursuant to paragraph 2(a) because the property was not sold before [it's] expiration [] or within 60 days of the expiration of the Listing Contract, Summary Judgment is allowed for the plaintiff."

The disputed issue came on for trial before Judge Albright, sitting without a jury, on 14 February 2000. Plaintiff's evidence tended to show that plaintiff was the manager and leasing agent for The Commerce Building property from 1987 to 1994. During this period, defendant desired to sell the property and plaintiff testified that she was the listing agent. Plaintiff left the position and moved to Greensboro in 1994. However, in 1996, defendant's daughter, Andrea Marsh, asked for plaintiff's assistance in selling the building and plaintiff later negotiated the listing contract with Andrea, who held defendant's power of attorney. William Horton testified that he is the sole owner of a real estate development business called DFI Group, Inc. ("DFI"), which was an occupant of The Commerce Building. He stated that he knew plaintiff as the building manager, and had ongoing conversations with her dating back to the early 1990s about the possibility of DFI purchasing The Commerce Building property. He further testified that he and plaintiff had a meeting with Andrea Marsh in 1995 or 1996 to discuss a purchase agreement, and that Andrea stated the sales price was $1,000,000. This meeting, Horton testified, was the first contact he had with any member of the Marsh family. After the meeting, he suggested that plaintiff add a sixty thousand dollar commission to the purchase agreement. The resulting contract ("first contract"), dated 1 August 1996, provided for a $1,060,000 purchase price and contained a provision that $60,000 would be due to plaintiff upon closing as a brokerage commission. Horton testified that DFI encountered problems obtaining the financing for the property because there were significant amounts of unexpected costs and future obligations to bring the building into compliance with applicable codes in Raleigh. DFI received extensions from defendant under the first contract to address these problems, but eventually was forced to enter into another contract ("second contract"), which was executed 15 January 1997. Horton testified that plaintiff was not involved in the negotiations for the second contract. Because DFI was unable or elected not to obtain the financing under the second contract, it assigned its rights under the contract to The Commerce Building, L.L.C. ("L.L.C.") on 23 January 1997. Horton testified that he is a seventy percent owner of L.L.C., which was a new entity incorporated for the purpose of closing on The Commerce Building property. The sale closed in March of 1997 at a price of $1,060,000. Horton additionally testified that it was his understanding that the assignment of rights under the contract would not affect the commissions owed to plaintiff, and that he would not have paid the additional $60,000 if he had realized that plaintiff was

not going to be paid her commission. Defendant's motion for directed verdict at the close of plaintiff's evidence was denied.

Defendant presented her own testimony, that of her son, Charles Marsh, and three attorneys who were involved in the negotiations. She testified that plaintiff was not involved in procuring the deal with L.L.C. She further testified that she signed a deed to convey the property to DFI, but later authorized her attorney to change the grantee's name to L.L.C. Charles Marsh testified that he took over the negotiations related to the sale of the property in the latter part of August 1996, and that the first contract expired for lack of performance because DFI could not get the financing. He testified that plaintiff was not involved in the negotiations for the second contract, which did not provide for a commission; instead the contract was for a "flat" purchase price of $1,060,000. The attorneys testified to the substance of the negotiations and the reason for the delays in closing.

At the conclusion of the trial, the court made findings of fact and conclusions of law and entered a judgment for plaintiff in the amount of $60,000 plus pre-judgment interest. Defendant appeals from this judgment and both parties appeal from the order granting partial summary judgment.

I.

[1] The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 362 S.E.2d 807 (1987). Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. *Id.* at 112, 362 S.E.2d at 811.

Defendant contends the trial court's findings of fact nos. 2, 3, 13, 16 and 17 were erroneous for various reasons. We find competent evidence in the record to support findings of fact nos. 2, 3 and 13, in which the trial court found that plaintiff worked on the sale of the property prior to July 1996 at the request of defendant and Andrea Marsh, that plaintiff approached Horton, who was the 100% owner of DFI, about the feasibility of DFI purchasing the property, and that DFI assigned its rights to purchase the property under the second contract to L.L.C. of which Horton was a 70% owner. We agree with plaintiff that findings of fact no. 16 and no. 17 are not supported by the record. In finding of fact no. 16, the court quotes language from

the mutual indemnity and release agreement, which was not before the court at trial. Finding of fact no. 17 provides:

> Throughout all transactions it was readily apparent to the parties that William Horton through DFI, Group, Inc. could not close due to difficulties known to the parties. Discussions were held between the parties regarding DFI, Group Inc.'s difficulties in closing on the Property. In addition, the threat of condemnation of the building led the Seller to want to sell the Property.

In fact, however, DFI's inability to close was not apparent until September 1996 and therefore was not apparent "throughout all transactions." However, we deem these errors to be immaterial because the findings are not essential to the judgment entered. *See Teague v. Teague*, 84 N.C. App. 545, 353 S.E.2d 242 (1987).

Defendant next contends the trial court's findings of fact do not support its conclusions of law and judgment. Defendant assigns error to the following conclusions of law:

> 3. Plaintiff produced The Commerce Building, L.L.C. as a buyer pursuant to paragraph 2(a) of the Listing Contract.
>
> 4. Plaintiff originated a series of events which, without break in their continuity, resulted in the accomplishment of the prime objective of employment, which was the sale of the subject Property.
>
> 5. Plaintiff produced a buyer who was ready, willing, and able to purchase the Property on the terms described in the Exclusive Right to Sell Listing Contract or on terms acceptable to Defendant Marsh.
>
> 6. Plaintiff fulfilled her obligations under the Exclusive Right to Sell Listing Contract and is entitled to her commission of $60,000.00.

Defendant first argues the conclusions of law are erroneous because plaintiff did not produce L.L.C. as a buyer who was ready, willing, and able to purchase the property pursuant to paragraph 2(a) of the listing contract. Defendant contends the original purchaser, DFI, was unable to purchase the property, and the property was ultimately sold to L.L.C. without plaintiff's intervention.

The general rule is that a broker is entitled to a commission "whenever he procures a party who actually contracts for the pur-

chase of the property at a price acceptable to the owner." *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 250-51, 162 S.E.2d 486, 491 (1968).

> The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to 'a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms.'

Id. (quoting 12 C.J.S. Brokers § 91, p. 209 (1938)).

Defendant argues that a broker is not the procuring cause when the broker's prospect does not purchase the property individually but later, without the intervention of the broker, purchases the property as part of a partnership or syndicate, and cites 12 Am.Jur.2d Brokers § 238 and *Marshall v. White*, 245 F.Supp. 514 (W.D.N.C. 1965), in support of this contention. The pertinent language in § 238 provides:

> [W]here a broker's prospect refuses or is unable to purchase the property individually, and thereafter, without the intervention of the broker, the property is sold to a partnership or syndicate of which the prospect was a member at the time of the broker's negotiation, or with which the prospect subsequently became associated for the purpose of purchasing the property, the broker is not entitled to compensation.

In *Marshall*, the broker introduced the seller to a prospective lessee, Gilbert Winkenwerder. The lessor ultimately leased the property to a separate entity, which was owned by Winkenwerder's sons. The court noted that "but for" the broker's introduction of the lessor to Winkenwerder, the sale would not have taken place; however, the court said "[t]he term 'procuring cause', as used in describing a broker's activity, means more than 'but for' causation." *Marshall*, 245 F.Supp at 517. The court held that the broker was not entitled to a commission, relying in part on the above-quoted language from Am.Jur.2d. *Id.*

Other jurisdictions, however, have not reached the same conclusion as the court in *Marshall*. In *Regional Redevelopment Corp. v.*

Hoke, 547 A.2d 1006 (1988), the District of Columbia Circuit Court of Appeals stated " 'it is the general rule in this country that a broker's right to a commission is not affected by the fact that the customer procured by him became associated with others who joined with such customer in the purchase of property.' " *Id.* at 1010 (quoting *Zetlin v. Scher*, 241 Md. 590, 217 A.2d 266, 269 (1966). In a footnote, the court stated "[c]ases cited for the opposite result generally involve more extended time periods or clearer termination of broker negotiations than in the case before us; e.g., *Marshall v. White*, 245 F.Supp. 514, 516-17 (W.D.N.C. 1965); *English v. William George Realty Co.*, 55 Tex. Civ. App. 137, 117 S.W. 996 (1909)." *Id. See also Perdue v. Gates*, 403 So.2d 165, 170 (Ala. 1981) (stating "there is conflicting authority on whether a realtor is entitled to a commission for introducing a prospective buyer who brings in partners or other parties as co-purchasers").

The dispositive issue in these cases appears to be one of proximate cause. As the Supreme Court noted in *Duckworth*, "[t]he broker is the procuring cause if the sale is the direct and proximate result of his efforts or services." 274 N.C. at 251, 162 S.E.2d at 491. We hold, under the circumstances of this case, that the trial court did not err in concluding that plaintiff was the procuring cause of the sale because the sale was the proximate result of plaintiff's efforts. Unlike *Marshall* where the broker only introduced the parties, was uninvolved in the negotiations, and never had a listing contract or discussed the issue of a commission, the record in this case reflects that plaintiff was involved in the negotiations pertaining to the first contract with DFI and that there was no break in continuity between the first and second contracts. Moreover, Horton testified that he had no prior contact with defendant or her family and, without plaintiff's efforts, would not have been negotiating for the purchase of the building. Therefore, it was not error for the trial court to conclude that plaintiff was the procuring cause of the sale in this case.

Defendant also assigns error to the denial of her motion for summary judgment on the issue of whether plaintiff produced a buyer who was ready, willing, and able to purchase the property because she argues there was no genuine issue of material fact. "[T]he denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Therefore, this argument is not properly before the Court.

II.

[2] Defendant next argues that the court erred in granting summary judgment for plaintiff as to the effect of the listing contract's expiration on plaintiff's recovery under paragraph 2(a). She argues that even if plaintiff produced a buyer who was ready, willing, and able to purchase the property, this was not accomplished until after the contract expired on its terms and, therefore, plaintiff should be precluded from recovering her fee under the contract. Defendant points to the limited four month period of the contract, the language in paragraph (2)(b), which states, "Owner agrees to pay Agent a fee . . . if . . . the Property is sold or exchanged . . . before the expiration of this Listing Contract," and the language in paragraph (2)(c) which provides for payment of the fee if the property is sold by any party within 60 days after the expiration of the contract.

In *Collins v. Ogburn Realty Co.*, 49 N.C. App. 316, 271 S.E.2d 512 (1980), the sellers of a home attempted to make a similar argument where the exclusive listing contract gave the broker 120 days to sell the house at a designated price, and provided for a commission if a prospect to whom the broker showed the home purchased it within 90 days from the expiration of the listing contract. In that case, an offer to purchase was made within the 120-day period but the buyers were unable to sell their previous home, and the contract was not closed until one year later. *Id.* at 317-18, 271 S.E.2d at 513. The court held:

> There exists no dispute that the [broker] performed the duty of presenting to the [sellers] a party who actually contracted to purchase their property upon terms acceptable to them and that this was done well within the 120-day period set forth in the listing agreement. Plaintiffs' contention that defendants are precluded from recovering a commission because of their failure to effect a sale of the property within the 120-day period is unavailing in view of the fact that, as noted above, it is defendants' procurement of 'a party who actually contracts for the purchase of the property,' which determines entitlement to a realtor's commission.

Id. at 320, 271 S.E.2d at 514-15 (citation omitted). Defendant argues that the present case is distinguishable from *Collins* because the second sales contract, which is the contract that actually produced the sale, was not put in force during the period of the listing contract. This distinction, in our view, makes no difference to the outcome of

the case. During the period of the listing agreement, defendant sought a $1,000,000 sales price and plaintiff produced DFI Group, a corporation owned solely by Horton, which entered into a contract for the purchase of the building. Horton testified that plaintiff was the party who procured him and that he would not have otherwise entered into negotiations for the purchase of the building. Because of difficulty in obtaining funding, DFI entered into the second contract for the purchase of the property and later assigned its rights in this contract to L.L.C., a corporation in which Horton is a seventy percent shareholder. L.L.C. eventually purchased the property for $1,060,000. As this Court said in *Collins*, "it is defendants' procurement of 'a party who actually contracts for the purchase of the property,' which determines entitlement to a realtor's commission." *Id.* Having held that plaintiff's efforts in procuring DFI were the procuring cause of the eventual sale, we hold that the court did not err in granting summary judgment to plaintiff on the issue of the contract's expiration.

In addition, we disagree with defendant's argument that such an interpretation of the listing contract renders a broker's contractual rights perpetual. As noted above, to recover a commission, a broker must procure the party who then purchases the property. *Duckworth*, 274 N.C. at 251, 162 S.E.2d at 491. To be the procuring cause, the broker must set "in motion a series of events which, *without break in their continuity*" lead to the procurement of a purchaser who is ready, willing and able to purchase the property. *Id.* (emphasis added). Contrary to defendant's argument, no perpetual contractual rights are created because the broker's right to recover is extinguished when there is a break in the continuity of events. In the case before us, there was no break in the continuity of events; therefore, plaintiff's right to recover was not extinguished.

[3] Finally, we reject defendant's argument that plaintiff's right to recover a commission under paragraph 2(a) was barred by the terms of paragraph 14 of the first contract, which provided:

> No party shall have any obligation for commission unless a closing occurs pursuant to the terms of this Contract. . . . Susan Sessler joins in this Contract for the purposes of acknowledging that the foregoing constitutes her exclusive commission agreement with Seller and Buyer with respect to the property.

To give effect to defendant's argument, we would have to conclude that the first contract, executed 1 August, modified the terms of para-

graph 2(a) of the listing contract, executed prior to 15 July. However, to be enforceable a modification to a contract must be supported by consideration. *Labarre v. Duke University*, 99 N.C. App. 563, 393 S.E.2d 321, *disc. review denied*, 327 N.C. 635, 399 S.E.2d 122 (1990). Under the listing contract plaintiff promised to procure a buyer willing to purchase the property for $1,000,000 in return for a commission of 5.6604%, which equals $60,000. Paragraph 14 of the first contract provides, however, that plaintiff is entitled to recover a commission of $60,000 only upon closing of the contract between Horton and defendant for $1,000,000. There is no benefit to plaintiff or detriment on the part of defendant which would constitute consideration for this modification. Accordingly, it is unenforceable and defendant's argument must be rejected.

III.

[4] Defendant next argues, in the alternative, that the court erred by granting summary judgment in favor of plaintiff with respect to the defense asserting a lack of consideration for the listing agreement. She contends issues of material fact exist pertaining to plaintiff's consideration for the listing contract, and that the listing contract is unenforceable because defendant and Horton already knew each other in a landlord/tenant relationship. She argues, in addition, that the commission provision was added after the sale of the property had already been discussed with Horton.

To be enforceable, a contract must be supported by consideration. *Lee v. Paragon Group Contractors, Inc.*, 78 N.C. App. 334, 337 S.E.2d 132 (1985), *disc. review denied*, 316 N.C. 195, 345 S.E.2d 383 (1986). Consideration "consists of 'any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.' " *Id.* at 338, 337 S.E.2d at 134 (citation omitted). The listing contract provides that defendant will pay plaintiff a commission if plaintiff procures a buyer who is ready, willing and able to purchase the property upon the seller's terms, specified in the contract. On its face, the document provides valuable and legal consideration. Where there is consideration on the face of the document, the court will not look for the adequacy of the consideration unless it constitutes "a fraud upon the party sought to be restrained." *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 666, 158 S.E.2d 840, 845 (1968). There is no evidence that the document was fraudulent as to defendant. Therefore we hold the trial court did not err in granting summary judgment for plaintiff on the issue of consideration.

IV.

[5] Plaintiff cross-appeals the grant of partial summary judgment as to her claim for unfair and deceptive practices. A court may grant summary judgment if in viewing "the pleadings, affidavits and discovery materials available in the light most favorable to the nonmoving party, to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997); N.C.R. Civ. P. 56 (2000). Defendant argues that a genuine issue of material fact existed as to whether defendant's actions were unfair or deceptive within the definition of G.S. § 75-1.1. "To establish a *prima facie* claim for unfair and deceptive practices, plaintiff must show that: '(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, N.C. Gen. Stat. 75-1.1, and (3) the act proximately caused injury to the plaintiff.' " *Prince v. Wright*, 141 N.C. App. 262, 268, 541 S.E.2d 191, 196 (2000) (quoting *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995)). An unfair practice is one that is " 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers.' " *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980)). A practice is deceptive "if it 'has the capacity or tendency to deceive.' " *Id.*

> It is well recognized, however, that actions for unfair or deceptive trade practices are distinct from actions for breach of contract . . . and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.

Id. (citation omitted). Instead, a plaintiff must " 'show substantial aggravating circumstances attending the breach to recover under the Act.' " *Id.* (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)).

In ruling on the motion for summary judgment, Judge Eagles had before her the contracts, the affidavits of plaintiff, Charles Marsh, and four attorneys who were involved in the negotiations, as well as letters from Horton attesting to plaintiff's role in the negotiations and in procuring him as the buyer. This evidence indisputably demon-

strated that the inability to close on the first contract and the delay in closing on the second contract were caused by DFI's difficulty in obtaining the financing to purchase the building, and not by any effort on the part of defendant to deceive plaintiff. Though plaintiff contends in her brief the revisions of the agreements between defendant and Horton were a "façade of paperwork" to give the appearance of a new transaction with a new buyer, the evidence before the trial court belies this characterization. Gilbert C. Laite, III, an attorney who represented defendant during the negotiations, testified that he attended a meeting in February 1997 in which an accountant for DFI stated that it "could not make the deal work financially on its own and that DFI needed a guarantor to make the purchase" and was "having difficulty obtaining guarantors because of certain building code requirements." The incorporation of L.L.C. to purchase the property is consistent with DFI's difficulty in obtaining guarantors. Even taking the evidence that was before the court on this motion in the light most favorable to plaintiff, we hold that the court did not err in granting summary judgment on this issue because plaintiff has failed to show substantial aggravating circumstances attending the breach of contract.

Affirmed.

Judges HUNTER and HUDSON concur.

STATE OF NORTH CAROLINA v. GREGORY LEE NOWELL AND MICHAEL LYNN TAYLOR

No. COA00-697

(Filed 17 July 2001)

1. Search and Seizure— warrantless search of residence— exigent circumstances—drugs

The trial court erred in a drug possession and trafficking in marijuana case by concluding there were exigent circumstances to permit the law enforcement officers' warrantless entry into a defendant's residence and the evidence obtained as a result of this unlawful entry must be suppressed, because: (1) evidence the parties were going to destroy the amount of marijuana required for one "joint" from the approximately fifty pounds of

marijuana present in the residence is not an exigent circumstance; and (2) defendant's consent to the search was tainted by the illegal entry into the residence.

2. Drugs— possession—trafficking in marijuana—motion to dismiss—sufficiency of evidence

The trial court erred in a marijuana possession and trafficking in marijuana case by failing to grant defendant's motion to dismiss the charges against him, because the evidence viewed in the light most favorable to the State does not show defendant had both the power and intent to control the marijuana located in his codefendant's residence at the time law enforcement officers entered the residence.

Judge JOHN concurring in part and dissenting in part.

Appeal by defendants from judgments dated 8 December 1999 by Judge Richard B. Allsbrook and appeal by defendant Nowell from a 7 June 1999 order by Judge Quentin T. Sumner in Halifax County Superior Court. Heard in the Court of Appeals 15 May 2001.

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

Moseley, Elliott, Sholar and Dickens, L.L.P., by William F. Dickens, Jr., for defendant-appellant Nowell.

Jesse F. Pittard, Jr. for defendant-appellant Taylor.

GREENE, Judge.

Gregory Lee Nowell (Nowell) appeals from judgments dated 8 December 1999 entered after a jury rendered verdicts finding him guilty of possesion of marijuana with intent to sell or deliver, knowingly possessing drug paraphernalia with the intent to use it, knowingly keeping and maintaining a dwelling house for the purpose of keeping and selling controlled substances, and trafficking in marijuana by possessing in excess of 10 pounds but less than 50 pounds of marijuana. Nowell also appeals from the trial court's 7 June 1999 order denying his motion to suppress evidence. Additionally, Michael Lynn Taylor (Taylor) appeals judgments dated 8 December 1999 entered after a jury rendered verdicts finding him guilty of trafficking in marijuana by possessing in excess of 10 pounds but less than 50 pounds of marijuana and possessing marijuana with intent to sell or deliver. Nowell and Taylor were tried in a joint trial.

Suppression hearing

The record shows that prior to trial, Nowell filed a motion to suppress evidence obtained as a result of a 3 March 1999 search of his residence. Specifically, Nowell sought suppression of "any article, thing[,] or testimony obtained as a result of this illegal arrest, illegal search, [and] illegal seizure." At a hearing on Nowell's motion, the State presented evidence that on 3 March 1999, Lieutenant Don Stanfield (Stanfield) was employed by the Halifax County Sheriff's Department as "Lieutenant in charge of all narcotics operations." On that day, Stanfield was notified by a law enforcement officer that approximately fifty pounds of marijuana had been seized from a vehicle traveling on Interstate 95 in Cumberland County. The vehicle was driven by Jerry Strickland (Strickland), and Juan Valles (Valles) was a passenger in the vehicle. Additionally, the law enforcement officer provided Stanfield with a map to a residence located in Halifax County where the law enforcement officer believed the marijuana was to be delivered. Stanfield subsequently determined that Nowell lived at the residence.

Later that day on 3 March 1999, law enforcement officers from Cumberland County arrived at the Halifax County Sheriff's Department, and Strickland was in the officers' custody. Strickland informed Stanfield that he had had "numerous dealings" with Nowell in the past. As part of those "dealing," Strickland and Nowell would schedule a delivery of marijuana, and Strickland would transport the marijuana to Nowell's residence. After Strickland arrived at Nowell's residence, Nowell usually "would have to go get the rest of the money and leave [Strickland] there until . . . Nowell would return with the money and the deal would be done in the selling of marijuana." Based on this information, Stanfield decided law enforcement officers would participate with Strickland in a "controlled delivery" of marijuana to Nowell. Strickland agreed to wear a "body wire" and to deliver the marijuana to Nowell; however, Sergeant E.M. Buffaloe (Buffaloe) of the Halifax County Sheriff's Department, rather than Valles, would accompany Strickland during the delivery. Tim Byers (Byers), a narcotics investigator for the Weldon Police Department, was able to listen to the activities taking place during the delivery through the body wire placed on Strickland. Additionally, Stanfield was in radio contact with Buffaloe.

After Strickland and Buffaloe arrived at Nowell's residence to make the controlled delivery, Strickland carried one of the suitcases into the residence while Buffaloe remained in the vehicle. Strickland

subsequently returned to the vehicle and informed Buffaloe that Nowell "had to go get the rest of the money" and "wanted to carry a piece of the marijuana with him." Buffaloe, however, refused to permit Nowell to leave the premises with any of the marijuana. While Buffaloe and Strickland remained at Nowell's residence, Nowell left the residence to obtain the "rest of the money." Sometime later, Nowell returned to the residence accompanied by Taylor, and Strickland, Taylor, and Nowell went inside the residence. Stanfield was then contacted via radio by Byers, and Byers informed him that "the deal had been talked about, how good the sh— was, and they were in the process of asking for rolling papers and want to roll a doobie and smoke a joint." Stanfield "felt like that was the time that [the officers] needed to make an arrest before [Nowell and Taylor] could consume any drugs." Stanfield directed the other officers to enter the residence and Stanfield entered the residence "seconds" after the other officers. Nowell and Taylor were standing in the kitchen area when Stanfield entered the residence, and Stanfield saw "approximately fifty pounds of marijuana open, some of it cut open, and strewed on the counter along with big wads of money." The money amounted to "[c]lose to forty thousand dollars." Nowell and Taylor were arrested, and Buffaloe asked Nowell whether "he could have consent to search the rest of the [residence]." Nowell responded that he "didn't give a sh— but [that] he [would not] sign nothing." The residence was then searched and drug paraphernalia was recovered.

Byers testified at the suppression hearing that he was involved in monitoring the 3 March 1999 controlled delivery of marijuana to Nowell's residence. Through a listening device placed on Strickland, Byers was able to hear Strickland's conversation inside Nowell's residence. Based on what he was able to hear, Byers became aware that Nowell and Taylor were preparing to "consume" marijuana and he also became aware of "the actual purchase of the approximate fifty pounds of marijuana." At that time, Byers communicated to Stanfield through a radio transmission that "the consumption was about to take place and [they] needed to move in." Stanfield then "gave the order to . . . Buffaloe and the other members of his team to enter the residence and effect the arrest."

At the conclusion of the suppression hearing, the trial court stated:

> The [c]ourt finds that this is an arrest supported by probable cause, that the officers in fact had probable cause, that [Nowell] was arrested, that [Nowell] voluntarily gave a consent for the

> search and the [c]ourt finds specifically that [Nowell] in reference to the question, "Can we search the residence?" replied, ["]He didn't give a sh— but he wasn't going to sign nothing.["] The [c]ourt finds that viewing the totality of circumstances[,] . . . that is a voluntary consent and officers were proper in executing that consent based on voluntariness of response to their question.

The trial court therefore denied Nowell's motion to suppress.

Trial

The State presented evidence at trial that on 3 March 1999, Carey Lewis (Lewis), a law enforcement officer employed by the North Carolina Division of Motor Vehicles Enforcement Section, was patrolling Interstate 95 in Cumberland County. Lewis testified that on that morning he pulled over a vehicle driven by Strickland and in which Valles was a passenger because the vehicle was "weaving over into the emergency lane." Strickland appeared nervous, and Lewis asked Strickland for permission to search the vehicle. Strickland gave verbal consent for Lewis to search the vehicle, and Lewis found two suitcases in the trunk of the vehicle containing what he believed to be marijuana. Lewis notified the Cumberland County Narcotics Unit and, after other law enforcement officers arrived at the scene, Strickland and Valles were arrested and transported to the Cumberland County Sheriff's Department. Later that day, Strickland and Valles were transported to Halifax County for the purpose of arranging a controlled delivery of the marijuana to Nowell.

Strickland testified that on 3 March 1999, he was taken into custody for possession of marijuana and, after being taken into custody, he admitted to law enforcement officers that he "had made arrangements with . . . Nowell to pick up the drugs, bring them back from Texas to North Carolina and bring them to [Nowell's] house." Strickland agreed with law enforcement officers to participate in a controlled delivery of the marijuana to Nowell. Strickland also consented to wear a body wire during the controlled delivery. Several hours after Strickland agreed to participate in the controlled delivery, he and Buffaloe, who was acting as Valles, drove to Nowell's residence. When they arrived, Buffaloe remained in the vehicle while Strickland went into the residence carrying one of the suitcases containing marijuana. Inside the residence, Strickland opened up the suitcase and "took out a brick [of marijuana] that had already been cut open and showed [Nowell] what it was, what it smelled like, and an approximation of how many pounds that [Strickland] had." Nowell

determined the marijuana "was a good quality" and informed Strickland that Nowell "would have to go and get the rest of the money from . . . Taylor." The total cost of the marijuana was $850.00 per pound and the delivery included approximately fifty pounds. Nowell told Strickland that there was approximately $11,000.00 or $12,000.00 in Nowell's residence at that time. Nowell then left his residence for approximately one hour and Strickland waited in the vehicle with Buffaloe. When Nowell returned to his residence, Strickland went into the residence carrying the second suitcase. Strickland placed the second suitcase on the couch beside the first suitcase. A few minutes later, Taylor arrived at the residence and went inside. The money that was already in the residence was placed on the kitchen counter and Taylor placed some additional money on the kitchen counter. Either Nowell or Taylor "cut open the brick [of marijuana] further" and Taylor stated that he "was going to smoke [some of the marijuana]." Law enforcement officers then entered the residence and handcuffed the defendants.

Byers testified that during the controlled delivery, he remained in a law enforcement vehicle in the area of Nowell's residence. Byers was able to listen to Strickland's activities through transmissions from the body wire Strickland was wearing. After Strickland's initial entry into Nowell's residence, Strickland returned to his vehicle and spoke to Buffaloe. Buffaloe asked Strickland some general questions regarding who was inside the residence, and Buffaloe instructed Strickland "to proceed on with the deal." Byers then heard Nowell say that he had to leave the residence to obtain the rest of the money for the marijuana from Taylor. After Nowell returned to the residence, Byers continued to listen to the parties through the wire transmissions. Strickland asked Nowell if he "ha[d] the money," and Nowell responded that "[Taylor was] on his way." Taylor then arrived at the residence and informed Strickland that he had "the money." Next, Byers heard Taylor say "let's roll one or let's burn one or something to that extent." Byers immediately notified the other law enforcement officers "that they were going to smoke one and that [the law enforcement officers] needed to enter [the residence]." Law enforcement officers, including Byers, then entered the residence. Inside the residence, Byers saw a "brick" of marijuana on the kitchen "bar," as well as "marijuana residue," a razor, and "a large amount of cash."

Buffaloe testified that he accompanied Strickland to Nowell's residence during the controlled delivery. Buffaloe remained in a vehicle

located outside of the residence while Strickland went inside the residence. After Strickland carried one suitcase containing marijuana inside the residence, Nowell left the residence for approximately one hour and forty-five minutes. Nowell then returned to the residence and Taylor arrived thereafter. Approximately two or three minutes after Taylor entered the residence, Buffaloe received a radio transmission instructing him to enter the residence. Upon entering, Buffaloe saw Strickland standing "in the living room area just a foot away from the kitchen counter." Additionally, Buffaloe saw Taylor and Nowell standing behind the kitchen counter. Taylor was "standing behind a single brick of marijuana" and Nowell was "standing behind a brick of marijuana" and was "trying to peel it open." Buffaloe could see money on the counter.

Stanfield gave testimony at trial consistent with his testimony during the suppression hearing.

At the close of the State's evidence, Nowell and Taylor made motions to dismiss the charges against them. The trial court denied the motions. Neither Nowell nor Taylor offered any evidence at trial.

The issues are whether: (I) exigent circumstances existed to permit the law enforcement officers' warrantless entry into Nowell's residence and, if not, whether evidence obtained as a result of the unlawful entry into Nowell's residence should have been suppressed; and (II) the record contains substantial evidence Taylor possessed marijuana.

I

Nowell

[1] Nowell argues exigent circumstances justifying a warrantless search of his residence were not present; therefore, Nowell's motion to suppress all evidence obtained as a result of the search of his residence should have been granted.

Warrantless search

When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, "how the [warrantless search] was exempted from the general constitutional demand for a warrant." *State v. Cooke*, 306 N.C. 132, 135, 291

S.E.2d 618, 620 (1982). "A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary." *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991). Exigent circumstances sufficient to make search without a warrant necessary include, but are not limited to, the probable destruction or disappearance of a controlled substance. *Id.* at 731, 411 S.E.2d at 197; *State v. Smith*, 118 N.C. App. 106, 113, 454 S.E.2d 680, 685, *reversed on other grounds*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 143 L. Ed. 2d 779 (1996). A determination of whether exigent circumstances are present must be based on the "totality of the circumstances." *State v. Yananokwiak*, 65 N.C. App. 513, 517, 309 S.E.2d 560, 563 (1983).

In this case, it is undisputed that law enforcement officers entered Nowell's residence without a warrant. Evidence presented at the suppression hearing shows law enforcement officers participated in a controlled delivery of approximately fifty pounds of marijuana to Nowell's residence. After the marijuana had been taken into Nowell's residence by Strickland, Taylor and Nowell asked for rolling papers so that they could "smoke a joint." Immediately thereafter, law enforcement officers entered Nowell's residence. This evidence, which was not controverted, shows that the amount of marijuana required for one "joint" was going to be destroyed at the time law enforcement officers made a decision to enter Nowell's residence without a warrant. Based on the totality of the circumstances, evidence the parties were going to destroy the amount of marijuana required for one "joint" from the approximately fifty pounds of marijuana present in the residence is not an exigent circumstance. Thus, because exigent circumstances did not exist to enter Nowell's residence without a warrant, the entry into Nowell's residence violated the Fourth Amendment of the United States Constitution.[1]

1. In its order denying Nowell's motion to suppress, the trial court did not make any findings regarding the warrantless entry into Nowell's residence. Rather, the trial court addressed only the arrest of Nowell, made after law enforcement officers had entered the residence, and Nowell's subsequent consent to law enforcement officers' request to search the residence. Generally, review of a trial court's denial of a motion to suppress is limited to "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." *Smith*, 118 N.C. App. at 111, 454 S.E.2d at 683. Nevertheless, because the evidence regarding the entry of law enforcement officers into Nowell's residence is not controverted, we need not remand this case to the trial court for the entry of an order containing findings of fact. *See State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995) (trial court's failure to make findings of fact at suppression hearing is not reversible error when there is not a material conflict in the evidence).

Exclusion of evidence

Under the exclusionary rule, evidence seized pursuant to an unlawful search may not be admitted into evidence. *State v. Wallace*, 111 N.C. App. 581, 589, 433 S.E.2d 238, 243, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993). Thus, in this case, testimony by law enforcement officers regarding the location and condition of marijuana inside Nowell's residence, as well as the location of money inside the residence, should have been suppressed. Furthermore, although the trial court concluded at the suppression hearing that Nowell consented to the search of his residence, this consent occurred moments after law enforcement officers had made an illegal entry into the residence. Thus, Nowell's consent is tainted by the illegal entry into the residence and the drug paraphernalia seized as a result of the search should have been suppressed. *See Yananokwiak*, 65 N.C. App. at 518, 309 S.E.2d at 564 (evidence obtained after the defendant signed a consent form permitting police to search his house must be suppressed when the consent form was signed approximately five minutes after police made an illegal entry into the defendant's house). Accordingly, the trial court's order denying Nowell's motion to suppress testimony and evidence obtained as a result of the unlawful search of his residence is reversed. Additionally, the trial court's 8 December 1999 judgments as to Nowell are reversed and this case is remanded to the trial court for a new trial.[2] *See State v. Allen*, 332 N.C. 123, 129, 418 S.E.2d 225, 229 (1992) (case remanded to trial court for new trial when trial court erred by denying the defendant's motion to suppress evidence).

Because we reverse the trial court's 8 December 1999 judgments as to Nowell, we need not address Nowell's additional assignments of error.

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2. The State argues in its brief to this Court, pursuant to the inevitable discovery exception to the exclusionary rule, that evidence Nowell's residence contained marijuana should not be suppressed because "officers knew of the existence of the marijuana in the residence even before they entered the residence." *See State v. Garner*, 331 N.C. 491, 502, 417 S.E.2d 502, 507-08 (1992) (discussing inevitable discovery exception to the exclusionary rule). The State, however, did not raise this theory of admissibility at the suppression hearing; thus, the State has abandoned this theory of admissibility and we do not address it. *See Cooke*, 306 N.C. at 136-37, 291 S.E.2d at 621 (appellate court will not address theory of admissibility not raised in trial court). Additionally, we note that Nowell sought to suppress not only the marijuana seized as a result of the unlawful entry into his residence, but also testimony of law enforcement officers based on the unlawful entry. Thus, even assuming the presence of marijuana in the residence was admissible under the inevitable discovery exception, the testimony of law enforcement officers based on the unlawful entry would nevertheless have to be suppressed.

II

Taylor

[2] Taylor argues the record does not contain substantial evidence he possessed marijuana; therefore, the trial court should have granted his motion to dismiss the charges against him. We agree.[3]

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

Possession is an element of both trafficking in marijuana, pursuant to N.C. Gen. Stat. § 90-95(h)(1), and possessing marijuana with the intent to sell or deliver, pursuant to N.C. Gen. Stat. § 90-95(a). N.C.G.S. § 90-95(a) (1999); *State v. Moose*, 101 N.C. App. 59, 65, 398 S.E.2d 898, 901 (1990), *disc. review denied*, 328 N.C. 575, 403 S.E.2d 519 (1991). A defendant possesses marijuana within the meaning of section 90-95 when he has "both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

In this case, the State presented evidence Strickland brought approximately fifty pounds of marijuana into Nowell's residence and Taylor subsequently arrived at the residence. Taylor then placed an amount of money on the kitchen counter, and either Taylor or Nowell "cut open" a brick of marijuana. Taylor then stated he "was going to smoke [some of the marijuana]." Immediately after Taylor made this statement, law enforcement officers entered Nowell's residence and observed Taylor and Nowell behind the kitchen counter. The kitchen counter contained a "brick" of marijuana, some "marijuana residue," a razor, and a "large amount of cash"; and Strickland was standing "a

3. We note that evidence admitted at trial that should have been suppressed pursuant to Nowell's motion to suppress may not have been admissible against Taylor because Taylor and Nowell were tried jointly. Nevertheless, Taylor does not address this issue in his brief to this Court and we, therefore, do not reach this issue.

foot away from the kitchen counter." This evidence, viewed in the light most favorable to the State, does not show Taylor had both the power and intent to control the marijuana located in Nowell's residence at the time law enforcement offers entered the residence. *See State v. Wheeler*, 138 N.C. App. 163, 165, 530 S.E.2d 311, 312-13 (2000) (handling of drugs "for inspection purposes does not constitute possession within the meaning of section 90-95(h)(3)"); *Moose*, 101 N.C. App. at 65, 398 S.E.2d at 901 (party who placed finger in cocaine and touched the substance to his lip did not have the power and intent to control the substance). The record, therefore, does not contain substantial evidence Taylor possessed marijuana and the trial court consequently erred by denying Taylor's motion to dismiss the charges against him. Accordingly, the trial court's 8 December 1999 judgments as to Taylor are reversed. Because we reverse these judgments, we need not address Taylor's additional assignments of error.

Case Nos. 99CRS001922; 99CRS001923; 99CRS001924; 99CRS001925: Reversed and remanded.

Case Nos. 99CRS001926; 99CRS001928: Reversed.

Judge TIMMONS-GOODSON concurs.

Judge JOHN concurs in part and dissents in part with a separate opinion.

JOHN, J., concurring in part and dissenting in part.

I agree with the majority as to its disposition of the cases against defendant Michael Lynn Taylor and therefore concur in the reversal of cases 99 CRS 001926 and 001928. However, I am unable to join in the reversal of the trial court's denial of defendant Gregory Lee Nowell's motion to suppress. Accordingly, I respectfully dissent in cases 99 CRS 001922-25.

Citing no authority in support thereof, the majority herein announces a new "de minimis" exception to the exigent circumstances exception to the general constitutional requirement that a search warrant be obtained prior to execution of a search by law enforcement officers. However, the majority concedes that courts nationwide have recognized "the probable destruction or disappearance of a controlled substance" as an exigent circum-

stance excusing the necessity of obtaining a search warrant. *See U.S. v. Sangineto-Miranda*, 859 F.2d 1501, 1511 (6th Cir. 1988) ("[t]his court has recognized along with many others that exigent circumstances will be present when there is an urgent need to prevent evidence from being lost or destroyed"). Indeed, "the possibility of destruction of evidence" constitutes one of " 'the most common and compelling bases that establish[es] exigency." *U.S. v. Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) (citation omitted), *cert. denied*, 513 U.S. 1128, 130 L. Ed. 2d 883 (1995); *see also State v. Hughes*, 233 Wis. 2d 280, 293, 607 N.W. 2d 621, 628 ("[m]arijuana and other drugs are highly destructible"), *cert. denied*, — U.S. —, 148 L. Ed. 2d 90 (2000).

In the case *sub judice*, the majority recites uncontroverted testimony that "Taylor and Nowell asked for rolling papers so that they could 'smoke a joint.' " Law enforcement officers thereupon entered Nowell's residence and the latter was observed "standing behind a brick of marijuana" and "trying to peel it open." Although "concrete proof" that evidence was "on the verge of [being] destroy[ed]," *U.S. v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991), *cert. denied*, 500 U.S. 945, 114 L. Ed. 2d 486 (1991), is not required, the destruction of evidence under the instant circumstances was indisputably imminent, *see Sangineto-Miranda*, 859 F.2d at 1512 (warrantless entry to prevent loss or destruction of evidence justified if prosecution demonstrates: "1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that [] the destruction of evidence is [imminent]").

Nonetheless, the majority imposes upon law enforcement officers and our already over-burdened trial courts the new requirement of factoring the probability of destruction of all, some, or only a small portion of the evidence, into the decision as to whether exigent circumstances may reasonably be considered to be present. *See id.* ("inquiry focuses on what an objective officer could reasonably believe"). Under the majority's novel test, North Carolina courts and police, in attempting to make exigent circumstances determinations, must now climb the slippery slope of hair-splitting assessments of both the quantity and indeed the quality of evidence subject to probable destruction or disappearance.

In *U.S. v. Rivera*, 248 F.3d 677 (7th Cir. 2001), a case involving approximately fourteen hundred pounds of marijuana, the Seventh Circuit rejected a similar approach as follows:

> Essentially, [defendant] asks us to adopt a rule that exigent circumstances do not exist until a substantial portion of the evidence is in danger of being removed or destroyed. We decline that invitation. First, it is a completely unworkable standard. In determining whether exigent circumstances exist, we analyze the situation from the perspective of the officers at the scene [], and it is virtually impossible for officers to make the type of proportionality analysis recommended by [defendant]. Officers should not have to engage in a guessing game as to how much evidence has been removed or how much remains, before they can bring depletion to a halt. Moreover, even the destruction or removal of a relatively small amount of evidence can have significant consequences at sentencing, where the drug quantity impacts the sentence.
>
> . . . .
>
> If we were to define exigent circumstances as requiring that a certain quantum of evidence is in danger of destruction or removal—a magic number that must be reached before they can end the depletion—we would be imposing an unworkable standard on law enforcement officers who must make quick decisions at the site.

Id. at 681 (citation omitted).

I agree with the majority's statement in footnote 1 that the "evidence regarding the entry of law enforcement officers into Nowell's residence is uncontroverted," and its determination that remand for findings of fact is unnecessary. *See State v. Lovin*, 339 N.C. 695, 705-06, 454 S.E.2d 229, 235 (1995). Rather, based upon the uncontroverted evidence regarding the warrantless entry into Nowell's residence and for the reasons stated above, I vote no error in cases 99CRS 1922-25.

IN RE APPEAL OF CHAPEL HILL DAY CARE CTR., INC.

[144 N.C. App. 649 (2001)]

IN THE MATTER OF THE APPEAL OF CHAPEL HILL DAY CARE CENTER, INC., FROM THE DENIAL OF PROPERTY EXEMPTION BY THE ORANGE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR TAX YEAR 1997

No. COA00-998

(Filed 17 July 2001)

1. **Taxation— daycare center—ad valorem exemption—wholly and exclusively educational standard—custodial services**

The Property Tax Commission did not err by concluding that petitioner daycare center was not entitled to an exemption from property taxation under N.C.G.S. § 105-278.4(a)(4)'s wholly and exclusively educational standard for the 1997 tax year based on the fact that the educational services are merely incidental to its custodial services, because: (1) the daycare did not assign error to the Tax Commission's finding that it was not a "qualified owner" under the statute; (2) the daycare's accreditation is further evidence that the daycare is custodial in nature since the accrediting body does not accredit educational facilities; and (3) while some of the daycare's activities serve to educate the children enrolled there, it is not enough to trigger tax exempt status.

2. **Taxation— daycare center—ad valorem exemption—equal protection—preferential treatment for church-affiliated daycare centers**

The Property Tax Commission's conclusion that petitioner daycare center is not entitled to exemption from ad valorem taxation does not violate the daycare's equal protection rights based on the alleged preferential tax treatment to church-affiliated daycare centers while non-affiliated daycare centers are denied favorable tax exemptions, because: (1) all of the fifty states have similar tax exemptions for property used for religious purposes; and (2) the procedures in N.C.G.S. §§ 105-278.3 and 105-289.4 were followed so that there were no constitutional violations.

Appeal by petitioner from final decision entered 13 April 2000 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 23 May 2001.

Northen Blue, LLP, by David M. Rooks, III, for petitioner appellant.

Coleman, Gledhill & Hargrave, P.C., by Leigh A. Peek, for respondent appellee.

McCULLOUGH, Judge.

The Chapel Hill Day Care Center (CHDCC) was formed in 1967 as a joint project between the Chapel Hill Service League and the United Church of Christ in Chapel Hill, North Carolina. Since its inception, it has operated as a nonprofit day care and preschool facility. CHDCC was initially located in the United Church of Christ's educational building. CHDCC paid the cost of utilities, and received $3,360.00 per year from the Church for tuition assistance purposes.

CHDCC is accredited by the National Association for the Education of Young Children (NAEYC), whose stated purpose is "to improve the quality of care and education provided for young children in group programs in the United States." To receive accreditation, CHDCC developed written lesson plans and structured activities for the children. CHDCC presently provides day care for eighty-eight children who range in age from three weeks to five years. It operates from 7:30 a.m. to 5:45 p.m., Monday through Friday. Tuition ranges from $630.00 to $900.00 based on the child's age; several of the children receive a tuition subsidy to defray expenses.

From 1967 to 1995, CHDCC's Board of Directors was partially made up of members of the United Church of Christ. In 1995, CHDCC moved out of the church building and into the old Chapel Hill town library building, where it remained for approximately one year. All ties between the Church and CHDCC were dissolved at that time. During the 1996 tax year, CHDCC voluntarily listed its personal property and paid taxes on both real and personal property. In 1997, when CHDCC relocated to its current location in the Southern Village neighborhood, it again listed its personal property and paid real and personal property taxes.

The Orange County Assessor is required to perform a yearly audit of nonprofit day care centers located in churches in Orange County and determine whether any of the facilities qualify for tax exemptions. In 1997, Orange County Assessor John Smith visited several nonprofit day care centers located in churches and reported that the main purpose of each center's operation was part of the religious mis-

sion of the church in which it was housed, thereby entitling it to a tax exemption as a religious organization. Mr. Smith also visited CHDCC to assess its tax status. After examining the facility, Mr. Smith opined that CHDCC was primarily custodial in nature and did not operate as a formal educational center. Based on his analysis, he found that CHDCC was not entitled to a tax exemption under N.C. Gen. Stat. § 105-278.4 (1999), because it was "not wholly and exclusively educational." Past records revealed that CHDCC had never received an exemption from tax payments under any provisions of the North Carolina General Statutes.

CHDCC applied for an exemption from property taxation under N.C. Gen. Stat. § 105-278.4 for the 1997 tax year, maintaining that its primary function was educational, not custodial. The Orange County Board of Equalization and Review denied CHDCC's application on 30 June 1997. CHDCC then requested a hearing before the North Carolina Property Tax Commission ("Tax Commission") on 13 August 1998. Mr. Smith, the Orange County Assessor, was among those called to testify before the Tax Commission at the 24 February 2000 hearing. When asked about his impressions following his audit of CHDCC, Mr. Smith stated that

> . . . I do believe that it's true that children learn at an incredible rate, they are constantly learning, that they are like sponges; however, I don't believe that that is something that can be used by day care centers to qualify them as being wholly and exclusively educational.
>
> I did observe. I think they are very loving. They provide a great deal of love and care. I think they are primarily custodial and that they do provide custodial child care. Education is incidental to what they do, to their purpose.
>
> I did not observe, related particularly to the children under one year old—one year of age, anything that I would consider to be formal education. So, I cannot say that I observed anything related to the younger children that appeared to be educational.

The Tax Commission determined that CHDCC did not meet N.C. Gen. Stat. § 105-278.4(a)(4)'s "[w]holly and exclusively" educational standard, and concluded that the Center had to pay taxes as a regular taxpayer. An order formally denying CHDCC's application for tax exemption was entered on 13 April 2000. CHDCC appealed.

CHDCC argues that the Tax Commission erred in concluding (I) that the educational activities the Center provides are merely incidental to its custodial services; (II) that the educational services the Center provides are not sufficient to meet the "[w]holly and exclusively" educational standard described in N.C. Gen. Stat. § 105-278.4(a)(4); and (III) that CHDCC is not entitled to exemption from *ad valorem* taxation while independent, nonprofit day care centers located in church buildings are entitled to such an exemption. For the reasons set forth, we disagree with CHDCC and affirm the decision of the North Carolina Property Tax Commission.

Educational v. Custodial Purpose

We first note that

> [t]he standard of review of decisions of the Property Tax Commission is as follows: the appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the decision of the Commission is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the Commission; made upon unlawful proceedings; affected by other errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; or arbitrary and capricious. The court shall review the whole record.

In Re Appeal of Valley Proteins, Inc., 128 N.C. App. 151, 153, 494 S.E.2d 111, 112 (1997).

N.C. Gen. Stat. § 105-278.4 sets out the requirements an establishment must meet to qualify for educational tax exempt status. Subsection (a) states

> (a) Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:
>
> 1. Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);
>
> 2. The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;

3. Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

4. Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

Application of the statutory tax exemption turns on whether CHDCC is "[w]holly and exclusively" educational in nature. When presented with the question, the Tax Commission determined that CHDCC "is not a qualifying owner within the meaning of the provisions of G.S. § 105-278.4 since [CHDCC] provides primarily custodial care services to the young children enrolled at its day care facility[,]" and denied CHDCC's request for an educational facility tax exemption.

[1] CHDCC contends that it is primarily educational in nature and urges this Court to consider its custodial services as merely incidental to its educational purpose. Ms. Pam Anderson, CHDCC's Director, testified at the Tax Commission hearing and described the daily activities engaged in by each child, such as discovery learning, group time, outdoor play, mealtime, rest time, and so forth. She maintained that these activities, taken in the aggregate, were educational in nature. Ms. Anderson admitted, however, that the Center did not keep traditional school hours, did not assign homework or require make-up work if a child was absent for any period of time, and did not issue report cards of any type.

Ms. Anderson further testified that CHDCC has always developed age-appropriate lesson plans for each child; the lessons are specific to each child's social, emotional, gross motor, fine motor, and cognitive development. Each child's progress is chronicled in a developmental profile, which is reviewed by CHDCC's staff and the child's parents on a regular basis. Ms. Anderson also described the credentials of the twenty teachers at CHDCC. She stated that

> [b]ecause we recognize that the quality of education that we're able to provide for the children is largely related to the educational background of the teachers, we have 20 teachers. Of those 20, we have one with a master's of education, we have four with a bachelor's degree in child development—child develop-

ment or education. We have teachers that have bachelor's degrees in other areas such as social sciences.

We have a program coordinator with a four-year degree in child development, an assistant director with an associate degree in early childhood education, two teachers with associate's degrees in early childhood education, and the remainder of the staff either have the North Carolina child care credential or are working toward their associate degrees or four-year degrees.

CHDCC also tendered Dr. Richard Clifford as an expert in early childhood education. Dr. Clifford is the Co-Director of the National Center for Early Development and Learning at the Frank Porter Graham Child Development Center in Chapel Hill, North Carolina, and has specialized in early childhood development and learning for over thirty years. Dr. Clifford testified that children are constantly learning, and that the activities they engaged in while at CHDCC were educational pursuits. Dr. Clifford opined that CHDCC "absolutely" met the definition of "educational purposes" in N.C. Gen. Stat. § 105-278.4(a)(4). He also stated that the accreditation process separates those centers that educate children from those centers which are less education-oriented, so that CHDCC's accreditation by the NAEYC was further proof of its educational focus. Finally, Dr. Clifford stated that the varied programs for different age groups within CHDCC indicated that the Center was educational, as different ages are taught different things in different ways.

From a legal standpoint, CHDCC argues that we should follow the reasoning of *Janesville Community Day Care Center, Inc. v. Spoden*, 126 Wis. 2d 231, 376 N.W.2d 78 (1985). In *Janesville*, a licensed child day care facility requested tax exemption status by claiming that it was an educational association under Wisconsin Stat. § 70.11(4) (1984). *Janesville*, 126 Wis. 2d at 232, 376 N.W.2d at 79-80. The City of Janesville and the City Tax Assessor argued that the day care was primarily custodial, and that "the educational part of [the day care] program [was] too small a fraction of its activities to be a primary function." *Id.* at 235, 376 N.W.2d at 80.

Although the Wisconsin Legislature had not carved out a tax exemption for day care facilities, the *Janesville* court found that the day care had a structured instructional curriculum and specific programs. *Id.* at 237, 376 N.W.2d at 82. The *Janesville* court then agreed with the trial court that the day care "provid[ed] education within the traditional understanding of the term[,]" and granted the day care a

tax exemption because it qualified as an educational association. *Id.* at 241-42, 376 N.W.2d at 83.

While *Janesville* is factually similar to CHDCC's case, we note that its reasoning is not binding on this Court. Moreover, the relevant statutory provisions are clearly distinguishable. The *Janesville* court explained that "[t]o qualify its property as exempt under sec. 70.11(4), Stats., respondent must show that it is a nonprofit organization substantially and primarily devoted to educational purposes." *Id.* at 235, 376 N.W.2d at 81. *See also* Wisconsin Stat. § 70.11(4); and *International Foundation v. City of Brookfield*, 95 Wis. 2d 444, 290 N.W.2d 720 (1980), *aff'd*, 100 Wis. 2d 66, 301 N.W.2d 175 (1981). N.C. Gen. Stat. § 105-278.4(a)(4) is more restrictive; entities must be "[w]holly and exclusively used for educational purposes" to qualify for a tax exemption. Based on these obviously different statutory standards and the fact that Wisconsin law is not binding upon this Court, we find that *Janesville* is not dispositive of CHDCC's case.

The County correctly states that N.C. Gen. Stat. § 105-278.4 does not specifically mention an exemption for custodial institutions such as day care facilities. The County therefore urges this Court to find that CHDCC does not qualify as any of the educational entities mentioned in N.C. Gen. Stat. § 105-278.4(a)(1). We agree, and note that CHDCC did not assign error to the Tax Commission's finding that it was not a "qualified owner" under the statute. We are also persuaded by the County's argument that CHDCC's accreditation by the NAEYC is further evidence that CHDCC is custodial in nature, as the NAEYC does not accredit educational facilities.

N.C. Gen. Stat. § 105-278.4(a)(4) requires an institution to have a "[w]holly and exclusively" educational purpose in order to trigger a tax exemption. While we agree that some of CHDCC's activities serve to educate the children enrolled there, this is not enough to trigger tax exempt status under N.C. Gen. Stat. § 105-278.4. The Commission's findings of fact and conclusions of law are supported by competent evidence and are neither arbitrary nor capricious. CHDCC's first assignment of error is overruled.

N.C. Gen. Stat. § 105-278.4(a)(4)'s "[w]holly and exclusively" educational standard

We initially note that statutory interpretation of the phrase "[w]holly and exclusively used for educational purposes" is a question of law reserved for this Court's determination. *See Valley*

Proteins, 128 N.C. App. at 153, 494 S.E.2d at 112. CHDCC argues that the activities it provides for the children meet the "[w]holly and exclusively" educational standard set forth in N.C. Gen. Stat. § 105-278.4(a)(4), because the daily custodial care provided by the staff at CHDCC is merely incidental to the Center's overall educational purpose. In support of its argument, CHDCC again references portions of Dr. Clifford's testimony.

During the Tax Commission hearing, Dr. Clifford engaged in a discussion with members of the Tax Commission, who asked him which entities should qualify as educational facilities. Dr. Clifford made the following comments:

> [DR. CLIFFORD:] I see no difference in [CHDCC] than an elementary school. The largest provider of child care in North Carolina is the public schools. So, is a public school—if you use the definition of exclusive to say they can't do anything else, then no school would qualify under this definition in North Carolina.
>
> MS. SITTON: Or only the good ones would qualify.
>
> [DR. CLIFFORD:] No, no school. Every school provides child care for their—the children.
>
> . . . .
>
> MS. SITTON: So, every child care facility should qualify for this exemption?
>
> [DR. CLIFFORD:] That's my opinion.

To bolster Dr. Clifford's testimony, CHDCC also notes that "[w]hile our courts have consistently held that tax exemption statutes must be strictly construed against exemption, they have also held that such statutes should not be given a narrow or stingy construction." *In Re Wake Forest University*, 51 N.C. App. 516, 521, 277 S.E.2d 91, 94, *disc. review denied*, 303 N.C. 544, 281 S.E.2d 391 (1981) (citations omitted). CHDCC argues that following the strict letter of the law in this instance would directly contravene the Legislature's manifest purpose, which is to grant tax exemptions to facilities such as CHDCC. *See Valley Proteins*, 128 N.C. App. at 155, 494 S.E.2d at 114. CHDCC points to the individualized developmental profiles for each child, lesson plans, educational activities, teacher qualifications, and continuing education services the Center provides as proof that an educational purpose eclipses any incidental custodial role the Center plays, thus entitling it to tax exemption.

The County, on the other hand, maintains there is competent, material and substantial evidence that CHDCC is primarily custodial in nature. The County initially notes that the Wisconsin statute is less restrictive than the relevant North Carolina statute, N.C. Gen. Stat. § 105-278.4. The County also notes that the *Janesville* court made different findings of fact than the trial court did in this case. The Wisconsin trial court held that

> 11. Plaintiff provides education within the traditional understanding of the term and the property is owned exclusively for the purpose of its educational functions.
>
> 12. Plaintiff has an education purpose and function and although custodial services are provided, such services are incidental to the primary purpose of education.

Conversely, in the present case, the Tax Commission found that

> 5. *Taxpayer [CHDCC] provides custodial care and services for the 88 children enrolled at its day care facility* from the age of 3 weeks until they begin kindergarten, from the hours of 7:30 a.m. until 5:45 p.m. Tuition ranges from $900.00 per month for an infant to $630.00 per month for a 4-5 year old. Twelve children, currently enrolled at the day care, receive some type of tuition subsidy.
>
> . . . .
>
> *11. The care provided at Taxpayer's [CHDCC's] day care is for custodial care of the young children enrolled there and the day care is not wholly and exclusively educational.*
>
> 12. Taxpayer [CHDCC] has never received an exemption from paying personal property or real property taxes from the Orange County Assessor under any provision of the North Carolina General Statutes.

(Emphasis added.) The Tax Commission then concluded, as a matter of law, that

> 1. G.S. § 105-278.4 governs tax exemptions for real and personal property used for educational purposes. . . .
>
> . . . .
>
> 2. Taxpayer is [] not a qualifying owner within the meaning of the provisions of G.S. § 105-278.4 since Taxpayer provides pri-

marily custodial care services to the young children enrolled at its day care facility.

3. The educational activities provided for the children at Taxpayer's day care are incidental to the custodial care services provided which are the primary purpose of this day care facility.

4. The educational activities provided for 3-week-old infants to 4-5 year old preschoolers do not constitute the level required by G.S. § 105-278.4, which requires that real and personal property used for educational purposes may be exempted if it is "wholly and exclusively used for educational purposes."

5. Taxpayer failed to establish by competent, material and substantial evidence that the subject day care facility is a qualifying institution as described in G.S. § 105-278.4.

There is ample evidence in the record from which the Tax Commission could conclude that CHDCC is not a traditional school and is not "[w]holly and exclusively used for educational purposes." The Center does not maintain regular school hours, does not assign homework or make-up work, and does not issue report cards. CHDCC's own witnesses repeatedly referred to the Center in terms of a custodial day care center: CHDCC's director, Ms. Anderson, referred to the Center's teachers as "child care providers" and Dr. Clifford referred to CHDCC as a "child care" center. Bearing in mind that our review is limited to deciding all relevant questions of law and determining whether the findings of fact and conclusions of law are supported by competent, material and substantial evidence, we cannot say that the Tax Commission's decision is arbitrary and capricious. Appellant's second assignment of error is overruled.

Constitutional Considerations

[2] Lastly, CHDCC argues the Tax Commission's conclusion that it is not entitled to exemption from *ad valorem* taxation violates its rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Section 1 of the Fourteenth Amendment states that

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 19 of the North Carolina Constitution provides that

> [n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

CHDCC did not begin paying taxes until its affiliation with the United Church of Christ ended in 1995. CHDCC argues that the process engaged in by Orange County Assessor John Smith gave preferential tax treatment to church-affiliated day care centers while non-affiliated day care centers were denied favorable tax exemptions. At the Tax Commission hearing, Mr. Smith described the process he engaged in to determine an entity's tax status:

> [MR. SMITH:] Now, it's our opinion that in almost every case, the day care that's located in the church is a part of the church, is a part of the church mission. And all the day cares that are similarly located, that I have spoken with, tell me very strongly that they are a part of the church. Therefore, they are exempted as part of the church under the church application.
>
> . . . .
>
> [ORANGE COUNTY ATTORNEY:] When you denied the exemption for the Chapel Hill Day Care Center, did you treat the day care center any differently from any other similarly situated Orange County taxpayer?
>
> [MR. SMITH:] No.
>
> . . . .
>
> [CHDCC'S ATTORNEY:] Mr. Smith, let's assume—I think I understood you to say, and please correct me if I'm wrong, that if a day care center is in a church and is part of the mission of the church, then it is exempt from taxation.

[MR. SMITH:] Yes, that's my belief, that it is exempt and that it is a part of the church, it is a part of the church that goes about being the ambassador that the Bible says that it should be.

. . . .

If the day care is not part of the church mission, then it is not exempt.

CHDCC maintains that exemption from taxation is a form of preferential treatment that should not be granted based on religious affiliation, and points out that the Supreme Court invalidated N.C. Gen. Stat. § 105-275(32) (1997), because it gave preferential tax treatment to religious homes for the sick, aged and infirm. *See In re Springmoor, Inc.*, 348 N.C. 1, 498 S.E.2d 177 (1998). While this is true, we agree with the County's position that *Springmoor* severed N.C. Gen. Stat. § 105-275(32) from the rest of the statute and kept the remainder of the statute constitutionally intact.

Moreover, we find that N.C. Gen. Stat. § 105-278.3 (authorizing tax exemptions for real and personal property used for religious purposes) and N.C. Gen. Stat. § 105-278.4 (authorizing tax exemptions for real and personal property used for educational purposes) are constitutionally distinguishable from N.C. Gen. Stat. § 105-275(32). "Indeed, all of the fifty states have similar tax exemptions for property used for religious purposes. Such tax exemptions constitute an acceptable accommodation of religion, which has been called 'benevolent neutrality.' " *Springmoor*, 348 N.C. at 7, 498 S.E.2d at 181 (citations omitted). *See also Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 25 L. Ed. 2d 697 (1970).

The County presented evidence that CHDCC was not treated any differently than other similarly situated Orange County taxpayers. The procedures and guidelines in N.C. Gen. Stat. § 105-278.3 and N.C. Gen. Stat. § 105-278.4 were followed; thus, there were no constitutional violations. CHDCC's final assignment of error is overruled.

The North Carolina Property Tax Commission's order denying CHDCC's application for tax exemption is hereby

Affirmed.

Judges WALKER and THOMAS concur.

ANN ANDERSON, EMPLOYEE, PLAINTIFF v. GULISTAN CARPET, INC., EMPLOYER; SELF-INSURED/HEWITT, COLEMAN & ASSOCIATES, INC., SERVICING AGENT; DEFENDANT

No. COA00-1043

(Filed 17 July 2001)

1. **Workers' Compensation— occupational disease—not augmented by subsequent employment**

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff's employment at two hotels did not augment the carpel tunnel syndrome which first developed when she worked for defendant where medical records indicated that plaintiff's condition worsened in the interval between her work with defendant and the beginning of her work with the hotels, one doctor testified that plaintiff's work with the hotels did not cause her occupational disease, two other doctors who treated plaintiff did not offer an opinion as to whether plaintiff's condition was augmented by her employment at the hotels, and there was evidence that scar tissue worsened plaintiff's condition. The findings of the full Commission are binding if supported by competent evidence, despite evidence to support contrary findings.

2. **Workers' Compensation— disability—Form 21 presumption—subsequent work—not suitable**

The Industrial Commission did not err in a workers' compensation action by finding that defendant failed to rebut plaintiff's Form 21 presumption of total disability due to carpel tunnel syndrome and ulnar palsy where defendant pointed to plaintiff's subsequent jobs as a hotel desk clerk, but there was evidence that plaintiff's duties at the hotels involved repetitive motion (including computer use), that she had difficulty performing these duties, that her work should be sedentary and light, and that she should refrain from repetitive activity.

3. **Workers' Compensation— disability—findings—maximum medical improvement**

A workers' compensation disability award for carpel tunnel syndrome was remanded for further findings where the Commission awarded temporary total disability without determining that plaintiff had not reached maximum medical improvement and where there was a conflict in the evidence on that

point. Plaintiff is entitled to temporary total disability if she has not reached maximum medical improvement or permanent disability if she has.

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 25 April 2000. Heard in the Court of Appeals 5 June 2001.

Pressly, Thomas & Conley, P.A., by Edwin A. Pressly, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by H. Bernard Tisdale, III, for defendant-appellant.

GREENE, Judge.

Gulistan Carpet, Inc. (Defendant) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Full Commission) filed 25 April 2000 awarding Ann Anderson (Plaintiff) temporary total disability benefits.

The record shows that Plaintiff started working for Defendant on 21 November 1991 as a winder tender. Plaintiff's duties primarily "involved running end machines and lifting and moving bobbins on and off the machines repetitively." As a result of Plaintiff's job duties with Defendant, she developed bilateral carpal tunnel syndrome and bilateral tardy ulnar palsy in November 1994. The parties entered into a Form 21 Agreement which was approved by the Industrial Commission on 9 February 1995.

Dr. Robert Saltzman (Dr. Saltzman) performed bilateral carpal tunnel release procedures on Plaintiff in early 1995 and bilateral ulnar nerve release surgeries in the summer and fall of 1995. The last surgery Dr. Saltzman performed on Plaintiff occurred on 17 October 1995. After Plaintiff's surgery on 17 October 1995, she did not return to work for Defendant. On 1 April 1996, Dr. Saltzman noted Plaintiff had full range of motion to her upper extremities, although the scars from the surgery had thickened slightly. Plaintiff still complained of "pain down the flexor carpi ulnari bilaterally from the elbow to the wrist increasing with increased activities," in addition to "some residual numbness in the fifth and fourth fingers of the left hand." Dr. Saltzman determined Plaintiff had reached maximum medical

improvement; however, Plaintiff had a "total of 10% disabilities of the arm and 10% disabilities of the hand." Dr. Saltzman recommended Plaintiff be retrained "into something less physically demanding that [would] require use of cerebral abilities more so than her muscle."

Plaintiff returned to see Dr. Saltzman on 20 May 1996, complaining of "increasing burning, tingling, [and] numbness into the fifth and fourth fingers of her left hand, especially across dorsum of the fourth and fifth metacarpals." Dr. Saltzman noted there was still scar tissue and discussed with Plaintiff the need to manipulate the scar tissue as to avoid any further problems. Dr. Saltzman recommended a nerve conduction study of Plaintiff's ulnar nerve at the elbow and wrist be completed. Plaintiff underwent ulnar nerve conduction studies on 3 June 1996, the results of which were normal. Dr. Saltzman again opined Plaintiff had reached maximum medical improvement as of April 1996 and still had "a total of 10% disability of both arms and 10% disability of both hands."

On 12 November 1996, Plaintiff was seen by Dr. Stephen J. Naso, Jr., M.D. (Dr. Naso). Plaintiff complained that following her 1995 surgeries,

> she had an increase in the tingling and numbness in the left upper extremity and . . . that the right upper extremity [was] . . . getting worse and in fact it [was] worse than it was . . . before the surgery. Aside from the tingling and numbness in both upper extremities[,] she complain[ed] of pain in the metacarpal phalangeal area of the index finger, long finger, ring finger[,] and small fingers. This pain [was] present in both hands. [Plaintiff] state[d] her hands constantly tingle and in fact the forearms constantly tingle from the elbow all the way down. . . . Aside from the pain mentioned above, [Plaintiff] also complain[ed] of pain that [was] constant in both thenar eminences.

Following an examination, Dr. Naso determined there was no atrophy, no swelling, no loss of motion, no loss of sensation, and no dystrophic changes.

On 10 February 1997, Plaintiff began working at the Comfort Inn in Statesville, North Carolina, as a front desk clerk. Plaintiff's duties at the Comfort Inn included checking guests in and out of the hotel, inserting reservations into the computer, providing rooms and keys to guests, and operating the cash register or computer as needed to log in guests. Plaintiff stated she had trouble performing the duties of

her job at the Comfort Inn, specifically when she used the computer. Plaintiff also testified she could not think of any duties "that did not require computer entry at the Comfort Inn." Before Plaintiff began working at the Comfort Inn, she had pain in her fingers, her fingers would tingle, and she would have pain under her arm and through her shoulder blade. After Plaintiff started working at the Comfort Inn, her pain "got worse" and she started developing spasms in her hands. Plaintiff was fired from the Comfort Inn on 26 June 1997 for breaking the "chain of command."

On 3 July 1997, Plaintiff was seen by Dr. Gary Poehling (Dr. Poehling). At the time Dr. Poehling observed Plaintiff, she had "complaints of spasms, burning, and tingling sensations throughout bilateral upper extremities, greater on the right." Plaintiff had difficulty performing "simple tasks such as writing or typing." Dr. Poehling diagnosed Plaintiff with complex regional pain syndrome in the bilateral upper extremities. Dr. Poehling opined Plaintiff would benefit from proper desensitization treatment and based on Plaintiff's presentation, "her true disability would be much greater than 10% to each arm."

Plaintiff started working at the Best Stay Inn on 25 July 1997 as a front desk clerk and was terminated on 3 September 1997 for charging unauthorized rates to customers. During Plaintiff's employment at the Best Stay Inn, the pain in her hands and arms never went away; moreover, it intensified when she used her hands. Plaintiff testified there was no job she could do in her physical condition. Plaintiff testified that her condition was "getting worse and worse. . . . [She] couldn't move [her] neck either way, and [the pain was] in her shoulders . . . [and] under [her] armpits. [She was] having chest pains."

Dr. Saltzman examined Plaintiff again on 26 November 1997 and noted Plaintiff complained of "[l]eft arm and hand pain on the ulnar aspect of the left forearm, hand, and finger with tingling." Plaintiff also complained of "radiai pain over the thenar eminence, palm, and on the extensor surface of the MP joints of the index and middle fingers." Plaintiff's greatest complaint was "the 6 month spasming that she [was] having 8 or 10 times a day to the left thumb region." Plaintiff saw Dr. Saltzman again on 16 January 1998, after a Functional Capacity Evaluation and nerve conduction studies were performed. Dr. Saltzman rated Plaintiff as 30% total upper extremity disability, "listing 10% of each hand and 5% of each arm for a total of 15% for each upper extremity." Dr. Saltzman recommended Plaintiff

"return to work at a sedentary light level with the exception of overhead lifting."

On 5 March 1998, Plaintiff had a visit with Dr. Poehling. Dr. Poehling opined Plaintiff had "significant global tenderness along [her] bilateral levator scapulae," as well as "a mildly positive Tinel's at the wrist [and] . . . the Phalen's bilaterally." Dr. Poehling agreed with Dr. Saltzman's 15% permanent partial disability rating. Dr. Poehling stated Plaintiff should refrain from repetitive activity. In a deposition taken 2 October 1998, Dr. Poehling stated that in his opinion, Plaintiff's employment with the Comfort Inn or the Best Stay Inn did not increase the extent of any permanent disability and did not cause Plaintiff's problem. In his opinion, Plaintiff's problem was caused by the surgeries performed on her in 1995. Dr. Poehling opined it was reasonable Plaintiff was unable to complete the duties of a front desk clerk. Dr. Poehling further opined Plaintiff would need future treatment and medication.

In an opinion and award filed on 25 April 2000, the Full Commission made findings of fact consistent with the above-stated facts, including the following pertinent findings of fact:

> 4. . . . [P]laintiff's condition worsened due to scar tissue even though she had not returned to work. . . .
>
> 5. . . . [P]laintiff continued to experience problems and developed constant pain over her fingers and pain in her arms, shoulder blades[,] and hands. Her pain developed even though she did not work during 1996 and part of 1997.
>
> 6. Dr. Stephen Naso of the Carolina Hand Center saw [P]laintiff for a second opinion at the request of [D]efendant on December 28, 1994 and on November 12, 1996. He felt that [P]laintiff's condition had worsened since her surgeries. She had developed diffuse pain and tingling in her arms but there was no evidence of dystrophic changes. He felt she should be restricted to sedentary work with no pushing or pulling.
>
> 7. Plaintiff's vocational rehabilitation caseworker . . . was not able to locate suitable employment within [P]laintiff's geographic location. However, [P]laintiff located employment on her own at the Comfort Inn where she worked from February 10, 1997 through June 26, 1997. She worked for a short period as both a desk clerk and a guest service manager. . . . [H]er duties were to answer the telephone and take phone messages. She used the

computer frequently between 7:00 a.m. and 11:00 a.m. to check guests out. Furthermore, [P]laintiff used her right arm to swipe credit cards and to make electronic room keys. She also used the computer to make notes for housekeeping and to make room changes. Plaintiff often had other employees assist with the entries due to her hand problems. . . . Plaintiff had difficulty performing her duties and was eventually terminated on June 26, 1997.

. . . .

9. Thereafter, Best Stay Inn hired [P]laintiff on July 25, 1997 and she performed essentially the same duties as those she had performed at Comfort Inn. The same company owned both hotels. At Best Stay Inn, [P]laintiff worked the second shift, which required her to make greater use of the computer to check guests in, enter the method of payment, and make keys. Plaintiff was eventually terminated from Best Stay Inn on September 3, 1997. Plaintiff has not sought employment since this time.

10. Although [P]laintiff worked at the Comfort Inn and the Best Stay Inn, [D]efendant did not prove by the greater weight that either job constituted suitable employment or was indicative of [P]laintiff's wage earning capacity. While a general job description was provided to and approved by Dr. Saltzman's office, the job description was vague and insufficient. The job description provided to Dr. Saltzman was a general job description . . . which only referred to the duties of meeting guests, providing rooms and keys, and operating the cash register or computer to log in guests. It did not accurately describe the amount and frequency with which [P]laintiff would have to operate a keyboard and input computer information.

11. . . . [D]efendant did not prove by the greater weight that the two jobs were suitable . . . . Nevertheless, assuming arguendo that the jobs were suitable, [P]laintiff was unable to continue performing either job due to her upper-extremity condition and the resulting chronic regional pain syndrome and therefore failed at her attempts. In fact, Dr. Poehling felt that [P]laintiff would have had difficulty performing these jobs and that it was reasonable that she would not have been able to continue.

. . . .

15. Plaintiff is capable of performing sedentary level work with no repetitive hand motions, no overhead lifting[,] and slow manual dexterity as defined in her functional capacity evaluation of January 13, 1998. Since [P]laintiff has not sought work since leaving Best Stay Inn on September 3, 1997, she is in need of vocational assistance.

16. Although [P]laintiff's work with Comfort Inn and Best Stay Inn may have temporarily increased her symptoms, her work did not expose her to the hazards of her occupational disease or her resulting pain condition or aggravate or augment, however slight, her occupational disease. Plaintiff had developed regional pain syndrome and dystrophic changes in her arms and her permanent partial impairment ratings had increased before her work with Comfort Inn or Best Stay Inn. Furthermore, [P]laintiff's condition deteriorated as a natural consequence of her original occupational disease contracted while working with [D]efendant even though she experienced some temporary exacerbation while working for the two hotels.

17. Plaintiff was last injuriously exposed to hazards of her occupational disease and resulting pain condition while employed with [D]efendant and any exposure at Comfort Inn or Best Stay Inn did not augment her condition.

18. Since [D]efendant has failed to establish that [P]laintiff's attempted employment was suitable and has failed otherwise to rebut the Form 21 presumption of disability, [P]laintiff continues to be unable to earn wages in any employment. However, [D]efendant is entitled to a credit for money earned by [P]laintiff while working for Comfort Inn and Best Stay Inn.

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

1. The medical evidence of record fails to establish by the greater weight that [P]laintiff's employment with Comfort Inn or Best Stay Inn exposed her to the hazards of her occupational disease and resulting pain condition or that her employment with them augmented her disease, however slight. Therefore, [P]laintiff was not last injuriously exposed to the hazards of her occupational disease while employed with Best Stay Inn and Comfort Inn. N.C.G.S. § 97-57 and *Rutledge v. Tultex Corp.*, 308 N.C. 85 (1983).

2. Plaintiff is entitled to the Form 21 presumption of disability which has not been rebutted as [D]efendant failed to prove that the jobs attempted by [P]laintiff constituted suitable employment and failed to rebut the presumption of disability otherwise. Therefore, subject to [D]efendant's credit and an attorney's fee hereinafter approved, [P]laintiff is entitled to reinstatement of her benefits beginning February 10, 1997 and continuing until [P]laintiff returns to work at the same or greater wages or further order of the [Full] Commission. *Brown v. S & N Communication, Inc.*, 124 N.C. App. 320 (1996) and N.C.G.S. § 97-32.

The issues are whether: (I) the Full Commission's findings of fact that Plaintiff's occupational disease was not augmented by her employment with the Comfort Inn and Best Stay Inn are supported by competent evidence; (II) Defendant rebutted the presumption of Plaintiff's continuing disability; and (III) Plaintiff was entitled to temporary total disability compensation after 10 February 1997.

This Court's review of opinions and awards of the Full Commission is limited to whether the record contains competent evidence to support the Full Commission's findings of fact, and whether the findings of fact support the conclusions of law. *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 204, 472 S.E.2d 382, 385, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996).

I

[1] Defendant argues the Full Commission erred in finding Plaintiff's work with the Comfort Inn and Best Stay Inn did not augment her occupational disease. We disagree.

In a case where an employee suffers from a compensable occupational disease, "the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable." N.C.G.S. § 97-57 (1999). "It is not necessary that the exposure to the hazard either caused or significantly contributed to the development of the occupational disease; it is enough if the exposure augmented the disease process." *Harris v. North American Products*, 125 N.C. App. 349, 353, 481 S.E.2d 321, 323 (1997).

In this case, there is competent evidence to support the Full Commission's finding that Plaintiff's employment at the Comfort Inn

and the Best Stay Inn did not augment her occupational disease. Medical records indicate that during the period after Plaintiff no longer worked for Defendant and prior to working for the hotels, her condition worsened and she complained of "increasing burning, tingling, [and] numbness." Over the course of that period, Plaintiff's medical records show she developed pain over her fingers, arms, shoulder blades, and hands. Dr. Poehling testified Plaintiff's employment with the Comfort Inn and the Best Stay Inn did not cause her occupational disease. Neither Dr. Saltzman nor Dr. Naso offered an opinion as to whether Plaintiff's condition was augmented by her employment at the hotels. Further, there was evidence Plaintiff's condition worsened due to scar tissue and evidence in her medical records that Dr. Saltzman expressed the need to manipulate scar tissue to avoid any further problems. Accordingly, as there is competent evidence Plaintiff's employment at the Comfort Inn and the Best Stay Inn did not augment her occupational disease, the Full Commission did not err in so finding.[1]

II

[2] Defendant next argues that even if Plaintiff's employment with the hotels did not augment her condition, the Full Commission erred in finding Defendant failed to rebut the Form 21 presumption because the jobs at the hotels were suitable employment for Plaintiff. We disagree.

If a Form 21 agreement is executed by the employer and employee and approved by the Industrial Commission, "the employee receives the benefit of a presumption that she is totally disabled." *Franklin*, 123 N.C. App. at 205, 472 S.E.2d at 386. The employer, however, may rebut this presumption by producing evidence that suitable jobs are available for the employee, taking into account her physical and vocational limitations, and she is capable of obtaining a suitable job. *Id.* at 206, 472 S.E.2d at 386. "A job is 'suitable' if the employee is capable of performing the job, given her 'age, education, physical limitations, vocational skills, and experience.' " *Id.* (quoting *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)).

1. Defendant argues in its brief to this Court that there is overwhelming evidence Plaintiff's jobs with the hotels augmented her condition. The findings of the Full Commission, however, are binding on appeal if supported by competent evidence, despite plenary evidence to support contrary findings. *Locklear v. Stedman Corp.*, 131 N.C. App. 389, 393, 508 S.E.2d 795, 797 (1998).

In this case, there is competent evidence to support the Full Commission's finding of fact that Defendant failed to establish Plaintiff's attempted employment at the hotels was suitable. Plaintiff and Defendant entered into a Form 21 agreement, thus, Plaintiff was cloaked in the presumption of disability. Defendant, however, failed to rebut this presumption. There is evidence Plaintiff's duties at the hotels involved repetitive motion and Plaintiff often had difficulty performing her duties at the hotels. Moreover, Dr. Saltzman recommended Plaintiff's work should be at a sedentary light level and Dr. Poehling opined Plaintiff should refrain from repetitive activity. Accordingly, the Full Commission did not err in finding Defendant failed to establish the hotel jobs were suitable employment.

III

[3] Defendant next argues that even if it did not rebut the Form 21 presumption, the Full Commission erred in awarding Plaintiff temporary total disability compensation after 10 February 1997 because Plaintiff's healing period had ended.[2]

Temporary disability shall be paid only during "the healing period," N.C.G.S. § 97-31 (1999), thus, when the healing period ends, a plaintiff's right to temporary disability also terminates. "The 'healing period' ends when an employee reaches 'maximum medical improvement.' " *Franklin*, 123 N.C. App. at 204-05, 472 S.E.2d at 385.[3] "Maximum medical improvement" occurs when the employee has either completely recovered from her injuries or her injuries have stabilized. *Crawley*, 31 N.C. App. at 289, 229 S.E.2d at 328-29. Once an employee has reached "maximum medical improvement," she must establish permanent incapacity and prove the extent of her disability. *Franklin*, 123 N.C. App. at 205, 472 S.E.2d at 385-86.

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2. The amount and extent of disability compensation, i.e., temporary or permanent, is not reached by the Commission until the issue of disability is determined.

3. We note there is language in *Crawley v. Southern Devices, Inc.* suggesting the "healing period" of an injury encompasses more than medical improvement, but also encompasses "the time when the [plaintiff] is unable to work because of [her] injury, is submitting to treatment, which may include an operation or operations, or is convalescing." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229 S.E.2d 325, 328 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977). *Crawley*, however, holds compensation under section 97-31 "is made without regard to the loss of wage-earning power," and terminates when a plaintiff has reached "maximum improvement." *Id.* at 290, 229 S.E.2d at 329; *see Neal v. Carolina Mgmt.*, 130 N.C. App. 228, 235, 502 S.E.2d 424, 429 (1998) (Timmons-Goodson, J. dissenting) ("maximum medical improvement, by definition, means that the employee's healing period has ended"), *reversed*, 350 N.C. 63, 510 S.E.2d 375 (1999) (per curiam adopting the dissent); *see also Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322, 328, 533 S.E.2d 284, 288 (2000).

In this case, the Full Commission awarded Plaintiff temporary total disability, however, it failed to determine Plaintiff had not reached "maximum medical improvement," a prerequisite to concluding a plaintiff is entitled to temporary total disability. Although Dr. Saltzman determined Plaintiff had reached "maximum medical improvement" as of April 1996, Plaintiff's disability rating increased between April 1996 and the time of the hearing. Additionally, Dr. Poehling opined Plaintiff would need further treatment and medications. Because there is a conflict in the evidence as to whether Plaintiff had reached "maximum medical improvement," this case must be remanded to the Full Commission to enter findings of fact determining whether or not Plaintiff has reached "maximum medical improvement." On remand, if the Full Commission determines Plaintiff has not reached "maximum medical improvement," Plaintiff is entitled to temporary total disability.[4] If, however, the Full Commission determines Plaintiff has reached "maximum medical improvement," the Commission must address Plaintiff's entitlement to permanent disability compensation.

Affirmed in part, reversed and remanded in part.[5]

Judge BRYANT concurs.

Judge TIMMONS-GOODSON concurs in part and dissents in part with a separate opinion.

TIMMONS-GOODSON, J., concurring in part, dissenting in part.

I agree with the majority that the Commission was correct in finding that the nature of plaintiff's work did not augment her occupational disease and that defendant failed to rebut the Form 21 presumption. I disagree, however, with that portion of the opinion remanding the present case to the Commission for a finding as to whether plaintiff reached her "maximum medical improvement." Contrary to the majority's holding, I believe that the Commission's conclusion that plaintiff was entitled to temporary total disability is supported by the evidence. Therefore, I respectfully dissent.

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4. Defendant does not dispute whether or not Plaintiff is entitled to total disability.

5. We do not address Defendant's remaining assignments of error as Defendant has not presented any argument in its brief to this Court relating to those assignments of error. *See* N.C.R. App. P. 28(b)(5).

Plaintiff is only entitled to temporary disability if she has not reached "maximum medical improvement," meaning that she has completely recovered or her injuries have stabilized. *See Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229 S.E.2d 325, 328-29 (1976). I believe there was competent evidence in the record indicating that plaintiff's condition had not stabilized. In April 1996, Dr. Saltzman determined that plaintiff reached her "maximum medical improvement." Nonetheless, her disability rating increased between the date of Dr. Saltzman's opinion and the time of the Commission's hearing. Furthermore, Dr. Poehling never opined that plaintiff had recovered or that her condition had stabilized. To the contrary, his records demonstrated that in July 1997, plaintiff could benefit from and needed further treatment. In fact, Dr. Poehling would later indicate, as late as March 1998, that any improvements in plaintiff's condition "will be gradual over a period of time." As the aforementioned evidence demonstrates the instability of plaintiff's condition, the Commission did not err in failing to find that she had not reached her "maximum medical improvement."

For the forgoing reasons, I would affirm the Commission's order and award in its entirety.

LARRY EDMOND STAMM, PLAINTIFF v. TRACEY SALOMON, LISA SALOMON, SALOMON OF IREDELL COUNTY, INC., DEFENDANTS

No. COA00-839

(Filed 17 July 2001)

1. Judges— ex parte contact by trial judge with bankruptcy judge—due process

In an action arising from representations allegedly made in forming a business, the trial court did not deprive defendants of their due process rights by contacting a bankruptcy judge ex parte where defendants announced their bankruptcy filing in open court and requested a stay; the trial judge contacted the bankruptcy judge to ask whether the proceedings must be stayed; the bankruptcy judge indicated that he planned to lift the stay and allow the trial to proceed and then reinstate the stay at the conclusion of the trial to prevent execution of any judgment; the

bankruptcy court issued an order to that effect which also included an opportunity for defendants to be heard; and the trial court complied with the order and allowed the jury trial to be completed. Even if the trial court erred in communicating with the bankruptcy judge ex parte, there was no prejudice.

2. Fraud— false representation—sufficiency of evidence

The trial court did not err in an action arising from the formation of a business by denying defendant Lisa Salomon's motions for a directed verdict and j.n.o.v. on the issue of fraud where defendant contended that plaintiff failed to establish a false representation, but there was evidence that defendant did not disclose the true ownership of land during several weeks of conversations with plaintiff about the business and construction of a building for the business. A plaintiff may prove fraud by alleging facts which establish a concealment of a material fact; there is a duty to disclose all material facts where a relationship of trust and confidence exists between the parties.

3. Attorneys— discharged—authority to act for client

Attorneys were without authority to make a motion for a directed verdict in an action arising from representations allegedly made during the formation of a business where defendants Tracey and Lisa Salomon were represented by the same attorneys, defendants filed for bankruptcy during the trial and defendant Tracey Salomon discharged his counsel, Tracey's former attorneys continued to represent Lisa Salomon, and defense counsel moved for a directed verdict and judgment notwithstanding the verdict on Tracey's behalf. Nothing in the record suggests that Tracey gave his former attorneys permission to further represent him following their dismissal; an attorney or law firm may not represent a client without the client's permission.

4. Fraud— detrimental reliance—sufficiency of evidence

The trial court did not err by refusing to direct a verdict for defendant Tracey Salomon on its own motion on a fraud claim arising from the formation of a business where defendant raised the issue of detrimental reliance, but plaintiff testified that he relied on defendants' assertions regarding ownership of the land on which a building was being built and expended significant sums on preparing the business.

5. Appeal and Error; Corporations— argument not supported by authority—imputed knowledge from corporate president

The trial court did not err by denying a corporation's motions for summary judgment, directed verdict, and j.n.o.v. in an action arising from the formation of another business where the argument was not supported by authority and did not have merit. The knowledge of a corporation's president is imputed to the corporation itself.

6. Damages and Remedies— punitive damages—underlying fraud claim established

The trial court did not err by awarding punitive damages where the court had correctly refused to dismiss plaintiff's claims for fraud.

7. Costs— attorney fees—no authority for award specified

The trial court erred by awarding attorney fees to plaintiff in a fraud action without specifying the statutory authority under which it made the award.

Appeal by defendants from judgment entered 26 January 2000 by Judge Mark Klass in Iredell County Superior Court. Heard in the Court of Appeals 21 May 2001.

Homesley, Jones, Gaines, Homesley & Dudley, by Clifton W. Homesley and Kevin C. Donaldson, for plaintiff-appellee.

Robert K. Trobich, for defendants-appellants.

TYSON, Judge.

Tracey Salomon ("Tracey"), Lisa Salomon ("Lisa"), and their wholly owned corporation, Salomon of Iredell ("the corporation") (collectively "defendants") appeal the entry of judgment for Larry Edmond Stamm ("plaintiff") upon a jury verdict in favor of plaintiff.

Facts

The evidence presented at trial tended to establish that in the late summer of 1998, plaintiff and Tracey began discussing the possibility of starting a business together. The parties discussed opening a business specializing in race car painting and "blasting." Plaintiff testified that Tracey and Lisa represented to plaintiff that Tracey owned land near Mooresville, North Carolina in close proximity to many race teams that would provide business to the new company.

The parties agreed that Tracey would provide the land for the business, that plaintiff would provide capital for construction of the building on the property, and that Tracey and plaintiff would be equal partners in the business. Plaintiff testified that Tracey said "I've got the land, you've got the money, we'll be 50/50. 50/50 on the business, 50/50 on the building and 50/50 on the property." Plaintiff testified that he "trusted that this was truly [Tracey's] land." In furtherance of their agreement, plaintiff and Tracey filed articles of incorporation for LK Norm S&S, Inc., d/b/a Race City USA Paint and Blast.

Plaintiff testified that in reliance on Tracey's statements regarding the land and the business, he "moved forward" with a "tremendous amount of work" to procure the necessary building permits and begin construction on a building for their business. Construction on the building began in September 1998. Plaintiff testified that he "immediately" began putting money behind the business, including paying for all necessary permits, paying an architectural firm, procuring insurance, and paying several deposits for building services such as grading and plumbing. Plaintiff introduced into evidence an itemized list of his expenditures for the building, totaling approximately $44,400.00. Plaintiff further testified that he spent hours performing strenuous manual labor in the actual construction of the building. He stated that he "worked every day, seven days a week, at least 15 hours a day" on getting the building and the business ready for operation.

Plaintiff testified that as construction on the building progressed and he continued to invest money, Lisa "became every more [sic] present in our conversations and Tracey . . . eventually became nonexistent." He testified that Lisa "became increasingly visible and increasingly involved in the process." Plaintiff further testified that throughout the time that he was investing in construction of the building, Tracey and Lisa represented to him that the land on which they were building was owned by Tracey. He stated that "[t]hey told me I'd be 50/50 on the land when it was supposed to be Tracey's land" and that they represented this "for quite some time."

In September 1998, Lisa told plaintiff that the land was in fact owned by the corporation, Salomon of Iredell, and not by her or Tracey. Plaintiff testified that at the time he discovered Tracey did not own the land, he "had already spent in excess of $31,000.00." Plaintiff testified that Tracey "didn't have a whole lot to say about it," but stated "you've got to ask [Lisa]." Plaintiff spoke to Lisa, stating,

"something's got to be put in place . . . showing that I'm 50 percent owner on this property." Lisa responded that they would see an attorney to help them with the appropriate procedure. Plaintiff stated that he "in good faith . . . believed that [Tracey and Lisa] were going to hold up to their end of the bargain." Lisa also discussed with plaintiff the possibility of him entering into a lease with the corporation with an option to buy. Plaintiff believed that Lisa had authority to act on behalf of the corporation because she had told him she was its president. Plaintiff testified, "they continued to lead me down the path and said you will have an interest in this property."

Plaintiff moved forward with the business in reliance on the assurances of Lisa that his ownership interest in the business would be protected. The business began operating on 15 November 1995. Plaintiff testified that on 16 November 1995, he was discussing bills with Lisa when she stated that Tracey had "relinquished all rights to this business" to her, and that she was the one that was going to make the decisions. Plaintiff testified that the following day, Lisa "charged towards [him]" while he was at work and began yelling "I run this business."

On 18 November 1995, the two exchanged words again, and Lisa "spit directly in [plaintiff's] face." Plaintiff testified that Lisa yelled "I ought to . . . kill you. I ought to turn you upside down and bash your head into the ground." Plaintiff returned to work the following day and "pretended that nothing had really happened." Plaintiff stated that shortly thereafter, a locksmith arrived at the building and began to change the locks to the business. Plaintiff telephoned his wife who advised him to leave, since Lisa "had already threatened to kill [him]."

Plaintiff attempted to gather some personal belongings from the business, including his computer monitor. Plaintiff testified that Lisa "grabbed the monitor off of the desk and put it on her lap," stating "if you take this monitor, if you take this computer, I'll get you." Plaintiff left the business. Plaintiff never returned to the premises because he "was told [he] would be killed."

Plaintiff incurred additional expenses following his removal from the business. Defendants refused to pay all of the contractors who had performed work on the building. Plaintiff paid approximately $4,100.00, subsequent to his removal from the building and the business.

On 28 January 1999, plaintiff filed a complaint against defendants for actual damages, fraud and misrepresentation, unfair and deceptive trade practices, and assault and battery by Lisa. Defendants answered on 29 March 1999, asserting counterclaims for breach of contract, fraud and misrepresentation, unfair and deceptive trade practices, and assault and battery by plaintiff upon Lisa. Defendant corporation filed a motion for summary judgment on 7 October 1999, which motion was denied. Defendants filed a motion for a continuance on 30 December 1999 and again on 12 January 2000, both of which were denied.

The matter was tried to a jury at the 17 January 2000 civil session of Iredell County Superior Court. Defendants moved for a directed verdict. The trial court granted defendants' motion on plaintiff's claim for unfair and deceptive trade practices.

On 21 January 2000, during trial, Tracey discharged his attorneys. On 24 January 2000, at approximately 10:30 p.m., defendants corporately and individually filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Western District of North Carolina. Tracey failed to appear in court for trial on 25 and 26 January 2000.

The jury returned a verdict in favor of plaintiff on 26 January 2000. The jury awarded plaintiff $56,909.12 for all three defendants' fraud, $125,000.00 in punitive damages, and $5,000.00 for an assault and battery perpetrated by Lisa. Defendants moved for judgment notwithstanding the verdict or a new trial. The motions were denied, and the trial court entered judgment on the jury's verdict, in addition to awarding plaintiff $24,900.00 in attorney's fees. Defendants appeal.

Defendants argue that the trial court erred in the following: (1) contacting the United States Bankruptcy Court following defendants' filing of Chapter 7 Bankruptcy during the pendency of the trial; (2) denying defendants' motions for directed verdict and judgment notwithstanding the verdict on plaintiff's claim for fraud; (3) denying the corporations' motion for summary judgment and motions for directed verdict and judgment notwithstanding the verdict; (4) awarding punitive damages where the evidence failed to establish a cause of action for fraud; and (5) awarding attorney's fees. We hold that the trial court did not err with respect to issues (1) through (4). We reverse the trial court's award of attorney's fees.

I. Contact with Bankruptcy Court

[1] Defendants argue that the trial court deprived defendants of their due process rights by engaging in "*sua sponte* and *ex parte* contact" with the United States Bankruptcy Court judge following defendants' filing for bankruptcy. Defendants contend that the contact between the trial judge and the bankruptcy judge "evidenced bias and a lack of neutrality" by the trial court, requiring a new trial. We disagree.

The record reflects that towards the end of the trial, defendants' attorney announced in open court that defendants had filed for Chapter 7 bankruptcy at 10:29 p.m. on 24 January 2000 in the United States Bankruptcy Court for the Western District of North Carolina. Defendants requested that the trial court stay the proceedings based upon the filing of bankruptcy.

Following defendants' request, the trial court contacted the bankruptcy court to inquire whether the proceedings must be stayed. The bankruptcy judge expressed to the trial judge that he planned to lift the stay and allow the trial to proceed, but that the stay would remain in effect at the conclusion of the trial and would prevent execution on any judgment rendered against defendants. The bankruptcy court issued an order to that effect on 25 January 2000. The order also scheduled a hearing for 8 February 2000 to allow defendants to be heard on the issuance of the order.

The propriety of the order issued by the bankruptcy court is not for our review, though we note that the lifting of an automatic stay is within the authority of that court. *See* 11 U.S.C. § 362. The bankruptcy court issued an order lifting the automatic stay such that the trial, which was nearing a close, could be completed. The trial court complied with the order of the bankruptcy court and allowed the trial to proceed. Even if the trial court erred in communicating with the bankruptcy judge *ex parte*, defendants have failed to show how they were prejudiced by such communication.

Although defendants intimate that the bankruptcy judge was improperly swayed by the trial judge in issuing the order lifting the stay, the issuance of the order is not for our consideration. Defendants have failed to show any prejudice that would require the granting of a new trial.

II. Fraud

Tracey and Lisa argue that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict on plaintiff's claim of fraud. Lisa alleges that plaintiff failed to forecast sufficient evidence that she made a false representation to plaintiff. Tracey argues that plaintiff failed to forecast sufficient evidence to show that plaintiff relied to his detriment on Tracey's misrepresentations about ownership of the land. We address the arguments of each defendant in turn.

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)). "If there is more than a scintilla of evidence supporting each element of the plaintiff's case, the directed verdict motion should be denied." *Little v. Matthewson*, 114 N.C. App. 562, 565, 442 S.E.2d 567, 569 (1994), *affirmed*, 340 N.C. 102, 455 S.E.2d 160 (1995) (citing *Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991)).

"To establish fraud, a plaintiff must show '(1) that defendant made a false representation or concealment of a material fact; (2) that the representation or concealment was reasonably calculated to deceive him; (3) that defendant intended to deceive him; (4) that plaintiff was deceived; and (5) that plaintiff suffered damage resulting from defendant's misrepresentation or concealment.' " *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 599, 534 S.E.2d 233, 236, *disc. review denied*, 353 N.C. 265, 546 S.E.2d 100 (2000) (quoting *Claggett v. Wake Forest University*, 126 N.C. App. 602, 610, 486 S.E.2d 443, 447 (1997)).

A. Fraud Claim against Lisa

[2] Lisa argues that plaintiff failed to establish the necessary element of a false representation to warrant issuance of the fraud claim to the jury. Plaintiff concedes that he does not allege that Lisa made the initial misrepresentation regarding ownership of the land. However, plaintiff contends that there was sufficient evidence to establish fraud against Lisa based on her continued failure to disclose the true

ownership of the property throughout the parties' business dealings, and her continued assertions that plaintiff's interest in the land and business would be protected following plaintiff's discovery that neither she nor Tracey owned the property. We agree with plaintiff.

Although Lisa argues that plaintiff failed to show evidence of a false representation, we note that a plaintiff may prove fraud by alleging facts which establish a false representation *or* concealment of a material fact. *See, e.g., Watts v. Cumberland County Hosp. System, Inc.*, 317 N.C. 110, 116-17, 343 S.E.2d 879, 884 (1986) (citations omitted); *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951) (quoting 37 C.J.S., Fraud, s 1, p. 204) ("in general terms fraud may be said to embrace 'all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another.' "). "Where a relation of trust and confidence exists between the parties, 'there is a duty to disclose all material facts, and failure to do so constitutes fraud.' " *Vail* at 114, 63 S.E.2d at 205-06 (quoting 37 C.J.S., Fraud, s 16, p. 247).

A fiduciary relationship exits " 'in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991) (quoting *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83, *disc. rev. denied*, 298 N.C. 572, 261 S.E.2d 128 (1979)). Generally, the existence of such a relationship is determined by specific facts and circumstances, and is thus a question of fact for the jury. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990) (citation omitted). Business partners, however, "are each others' fiduciaries as a matter of law." *HAJMM Co.* at 588, 403 S.E.2d at 489 (citing *Casey v. Grantham*, 239 N.C. 121, 79 S.E.2d 735 (1954)).

Plaintiff's complaint alleges fraud based on false representations and defendants' "fail[ure] to disclose" that they did not own the land. The trial court in this case correctly instructed the jury that in order to find Lisa guilty of fraud, the jury must find that she made a false representation *or* that she concealed a material fact. The trial court instructed the jury that a concealment occurs "when a person fails to disclose that which under the circumstances he should disclose. A person has a duty to disclose all facts material to a transaction or

event where he is a fiduciary, he has made a partial or incomplete representation, [or] he is specifically questioned about them."

We hold that plaintiff presented sufficient evidence to overcome Lisa's motion for directed verdict on the fraud claim. Plaintiff testified that "they [Lisa and Tracey] told me I'd be 50/50 on the land when it was supposed to be Tracey's land" and that they represented this "for quite some time," including during the period when plaintiff was expending significant sums of money for construction of the building. Plaintiff testified that as construction progressed, Tracey became "nonexistent" and Lisa was "increasingly visible and increasingly involved in the process." However, it was not until plaintiff "had already invested almost $32,000.00" of his own money and weeks of his own labor towards construction of the building that defendants disclosed that they did not own the land. Thus, during that several weeks that plaintiff and Lisa were conversing regularly about the business and construction on the building, Lisa failed to disclose to plaintiff the true ownership of the land.

Viewing this evidence in the light most favorable to plaintiff, we hold that the trial court did not err in allowing the jury to consider plaintiff's claim and in denying Lisa's motion for judgment notwithstanding the verdict.

B. Fraud Claim against Tracey

[3] Tracey argues that plaintiff failed to forecast sufficient evidence of his detrimental reliance on Tracey's misrepresentation about his ownership of the property to warrant submission of the fraud claim to the jury. Tracey argues that plaintiff was aware that the corporation owned the land prior to plaintiff's expending significant sums of money on construction of the building.

We first note that Tracey's motion for directed verdict was not properly made. On 21 January 2000, Tracey dismissed his attorneys. Defense counsel stated for the record,

> that we are completely relieved of our obligations to represent [Tracey] in this case, given that he has fired us as his counsel . . . . [a]nd that the court has acknowledged that, and that we, due to his discharge of our services, no longer have any responsibility to represent him throughout the lawsuit.

The trial court noted for the record that Tracey "has fired his attorneys." Tracey was not present in court on 25 and 26 January 2000,

because he felt "he was denied his constitutional right to representation" and therefore "construed [the trial] as a mistrial." Tracey's former defense counsel, who still represented Lisa, moved for directed verdict and judgment notwithstanding the verdict on his behalf.

An attorney or a law firm may not represent a client without the client's permission to do so. *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). " '[N]o person has the right to appear as another's attorney without the authority to do so, granted by the party for which he [or she] is appearing.' " *Id.* at 577, 515 S.E.2d at 444 (quoting *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532, 463 S.E.2d 397, 400 (1995), *disc. rev. allowed*, 342 N.C. 655, 467 S.E.2d 713, *disc. rev. withdrawn*, 343 N.C. 122, 471 S.E.2d 65 (1996)). Nothing in the record suggests that Tracey gave his former attorneys permission to further represent him following their dismissal on 21 January 2000; thus, his former counsel was without authority to make motions on his behalf.

[4] We have also held, however, that the trial court has authority to direct a verdict on its own motion. *See L. Harvey and Son Co. v. Jarman*, 76 N.C. App. 191, 199, 333 S.E.2d 47, 52 (1985) (where party fails to move for directed verdict, trial court has authority to direct verdict of own initiative; "[h]owever, mindful of the low evidentiary threshold necessary to take a case to the jury, and also of the detailed procedure outlined in Rule 50, which presumes the use of a motion before a verdict is directed, we do not encourage the frequent use of this practice, and caution trial judges to use it sparingly.").

We hold that the trial court did not err in failing to do so here. Plaintiff testified that "for quite some time," and throughout the time that he was investing in construction of the building, Tracey and Lisa continued to represent that the land on which they were building was owned by Tracey. Plaintiff testified that he "had already spent in excess of $31,000.00" at the time he discovered Tracey did not own the land. Moreover, plaintiff testified that after he discovered Tracey did not own the land, defendants continued to misrepresent that they would "work something out" regarding ownership of the land. Plaintiff testified that he continued to rely on defendants' assertions and expend significant sums of money on preparing the business.

Such evidence, viewed in the light most favorable to plaintiff, is sufficient evidence of detrimental reliance to allow the jury to consider plaintiff's fraud claim against Tracey. Nor did the trial court err

in failing to grant the motions for judgment notwithstanding the verdict. These assignments of error are overruled.

III. Claims against the Corporation

[5] Defendants argue that the trial court erred in denying the corporation's motion for summary judgment and motions for directed verdict and judgment notwithstanding the verdict. Defendants argue that plaintiff failed to bring forth any cause of action against the corporation.

Defendants' argument is not supported by any authority, *cf.* N.C. R. App. P. 28(b)(5) (assignments of error for which no authority is cited will be taken as abandoned), nor do we find that it has merit. The knowledge of a corporation's president, in this case Lisa, or its agent, is imputed to the corporation itself. *Jay Group, Ltd., supra*, 139 N.C. App. at 601, 534 S.E.2d at 237 (citations omitted). We reject this argument.

IV. Punitive Damages

[6] Defendants argue that the trial court erred in denying defendants' motions for judgment notwithstanding the verdict and new trial and in awarding punitive damages where the evidence failed to establish a cause of action for fraud. In light of our holding that the trial court did not err with respect to plaintiff's fraud claims, we find no error in the entry of an award for punitive damages thereon. *See* N.C. Gen. Stat. § 1D-15 (1999) (allowing imposition of punitive damages where defendant is liable in compensatory damages for fraud); *Mehovic v. Mehovic*, 133 N.C. App. 131, 136, 514 S.E.2d 730, 733 (1999) (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976)) ("fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded.").

V. Attorney's Fees

[7] Defendants also argue that the trial court erred in awarding plaintiff $24,900.00 in attorney's fees. "As a general rule, attorneys fees are not awarded to the prevailing party without statutory authority." *Brown v. Rhyne Floral Supply Mfg. Co., Inc.*, 89 N.C. App. 717, 717, 366 S.E.2d 894, 895, *cert. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *cert. denied*, 488 U.S. 1045, 102 L. Ed. 2d 997 (1989) (citing *Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E.2d 578 (1952)). The trial court in this case did not specify the statutory authority under which it awarded attorney's fees to plaintiff.

Our thorough review of defendants' remaining arguments that the trial court erred in failing to grant judgment notwithstanding the verdict or a new trial reveals no error. We find no error in the award of compensatory and punitive damages in favor of plaintiff. The entry of the award of attorney's fees in the amount of $24,900.00 for plaintiff is reversed.

No error in part; reversed in part.

Chief Judge EAGLES and Judge McGEE concur.

JOHN WILEY LASHLEE, III AND REBECCA C. CLARK-LASHLEE, PLAINTIFF-APPELLANTS v. WHITE CONSOLIDATED INDUSTRIES, INC. AND ELECTROLUX MOTOR AB, DEFENDANT-APPELLEES

No. COA00-490

(Filed 17 July 2001)

1. **Products Liability— contributory negligence—chainsaw kickback—alleged negligent design and manufacture—failure to tie into tree**

The trial court did not err by granting summary judgment for defendants based upon plaintiff's contributory negligence where plaintiff became a paraplegic after falling from a tree while using a chainsaw manufactured by defendants; plaintiff alleged that the original non-kickback chain had been replaced with a more dangerous chain; plaintiff had experienced kickback and was aware of the danger; he had tied himself into the tree earlier in the day because he had seen professionals do so and because it was common sense, but did not do so when he decided to cut the final limb; plaintiff had never seen anyone try to cut a tree while standing on a ladder, but stood near the top of the ladder, leaned his left side against the tree, and began to cut; plaintiff was knocked from the tree, unconscious and with a laceration along the center of his head; and plaintiff alleged that defendants were negligent in designing, manufacturing, and selling a chainsaw with inadequate safety devices. Plaintiff's experts in chainsaw design were not competent to render an opinion on the reasonable use of a chainsaw in a tree; plaintiff knew that kickback could knock him

off the ladder and out of the tree and his failure to secure himself to the tree constituted contributory negligence.

2. Damages and Remedies— punitive damages—chainsaw replacement chain

The trial court properly granted summary judgment for defendants on the issue of punitive damages in a negligence action arising from replacement of a low-kickback chainsaw chain with a non-approved chain. The characterization of defendants' actions as conscious and reckless by a witness who was not testifying as a legal expert did not create a genuine issue of material fact.

Appeal by plaintiffs from order and judgment dated 15 December 1999 by Judge B. Craig Ellis in Superior Court, Bladen County. Heard in the Court of Appeals 14 March 2001.

Jones Martin Parris & Tessener, PLLC, by John Alan Jones, for plaintiff-appellants.

Ward & Smith, P.A., by Gary J. Rickner, and Dennis R. Bailey for defendant-appellees.

McGEE, Judge.

Plaintiff John Wiley Lashlee, III (Lashlee) was rendered a paraplegic after falling from a tree while using a chainsaw manufactured by defendants. Plaintiffs sued defendants seeking recovery on multiple grounds, including negligence, and seeking punitive damages. Plaintiffs allege that Lashlee was hit in the head and knocked to the ground when the chainsaw he was using "kicked back" severely after the chainsaw's original low-kickback chain had been unintentionally replaced with a more dangerous chain. In their complaint, plaintiffs allege that defendants negligently designed, manufactured, and sold a chainsaw with inadequate safety devices, and they seek punitive damages on the grounds that defendants' negligence was wanton, gross, reckless, and in callous disregard for the rights and safety of others.

Defendants moved the trial court for summary judgment. During the summary judgment hearing, plaintiffs withdrew all claims except those for negligence and punitive damages. The trial court granted defendants' motion for summary judgment on the two remaining claims. Plaintiffs appeal.

Lashlee testified during his deposition that the chainsaw involved in the accident had actually belonged to his neighbor, Rex Tillotson, although Lashlee had been using the saw regularly for about three years prior to his injury. Lashlee estimated that he had used the saw some one hundred times a year during the two years preceding his injury, primarily cutting firewood for a wood stove he owned. Prior to his injury, Lashlee never received any formal training in chainsaw use and never read the operating manual or other written material concerning the use, operation and maintenance of the chainsaw. Instead, Lashlee learned how to use the chainsaw by watching professionals work, watching television, and talking with knowledgeable individuals like Isaac Simmons, Jr. (Simmons) and Layton Priest.

From watching professionals, Lashlee learned always to stay balanced with the chainsaw, not to cut above shoulder level, and to wear protective equipment such as plastic glasses, gloves, and boots. Lashlee had observed that professionals did not always wear hardhats, so Lashlee never acquired one for himself. Lashlee had observed professionals cutting in trees, both from an hydraulic bucket and by tying into the tree, although Lashlee had never seen anyone use a chainsaw from a ladder. Lashlee was familiar with kickback, having experienced it some four or five times prior to the time of his injury, but he had never observed anyone else experience kickback and was not clear on its mechanics other than that it happened when the tip of the chainsaw blade came in contact with some object. Lashlee had never cut in a tree before the day of his injury and never spoke with either Simmons or Layton Priest about cutting in a tree. Lashlee did talk with James Alton Boswell (Boswell), the town maintenance supervisor, about whether he should cut down the tree limb he was cutting when his injury occurred, but they did not talk about *how* to cut it.

Lashlee sought to bring down a tree that was close to his house on 28 October 1992. Lashlee began working about noon, and the day was warm and sunny. The tree, a thirty-foot bay tree, had a diameter of about a foot and a half and split into a "V" about ten feet above the ground. To control the tree's fall, Lashlee decided to remove several limbs from the house side of the tree. Because the limbs were about twenty feet above the ground, Lashlee used a neighbor's ten-foot ladder to climb into the "V," then tied himself into the tree for safety. Lashlee tied himself in because he had watched professionals do so, and because it was common sense to him to do it.

After cutting the limbs, Lashlee untied himself from the tree, climbed down, and returned the ladder to his neighbor. Using the rope with which he had tied himself into the tree, as well as the rope he had used to raise the chainsaw into the tree, Lashlee tied the tree to the back of his truck. Boswell arrived, and Lashlee cut a preparatory notch into the tree. Boswell started Lashlee's truck and stressed the rope attached to the tree as Lashlee began the final cut to bring down the tree. However, Lashlee became concerned that the remaining limb on the house side of the tree could cause the tree to twist as it fell, damaging the house. Lashlee and Boswell discussed the possibility of such twisting, and Lashlee decided to cut off the remaining limb.

Lashlee retrieved the ladder from his neighbor, an aluminum ladder that was the lower half of a twenty-foot extension ladder. The rungs were round, ridged, and about two inches in diameter. Lashlee asked Boswell to hold the ladder and then climbed the ladder carrying the chainsaw. The limb he sought to cut exited the tree about a foot below the "V" in the tree, so Lashlee positioned himself about three or four rungs from the top of the ladder. The limb was to his right, so Lashlee placed his left foot a rung higher on the ladder than his right foot and leaned the left side of his body against the tree. Lashlee had his left leg bent and the fatty part of his underarm against the tree, with his weight against the tree. Lashlee felt balanced and secure and did not have to reach to cut the limb, which was about at the height of his diaphragm. Lashlee testified that he remembered starting to cut the limb, and that the next thing he remembered was lying on the ground and asking someone to help him up. In addition to a neck injury, Lashlee received a laceration along the center of his head some two inches long, although the baseball-style cap he was wearing while cutting had only a scratch or a grease mark on it.

Boswell testified that, at the time of Lashlee's accident, Boswell was holding the ladder for Lashlee. Boswell was not watching Lashlee cut because sawdust was falling down. At some point, Boswell heard the chain on the chainsaw stop abruptly, a sound Boswell believed to be due to kickback. Boswell looked up and saw Lashlee falling straight back from the ladder, the chainsaw falling separately. Lashlee's eyes were wide open and he made no movement or sound as he fell, knocked out.

Boswell was maintenance superintendent for the town of Clarkton in 1992. The town maintenance staff used chainsaws when needed, though they would always hire contractors when a chainsaw

had to be used in a tree. Most contractors used bucket trucks, except one, an individual who would sometimes tie himself into a tree and sometimes would not. Boswell never spoke with that individual about when it was appropriate to tie into a tree.

Lashlee testified that, sometime before the accident, he had damaged the chain on the chainsaw and had brought the chainsaw to Simmons to have the chain replaced. Simmons, a professional tree cutter, owned and ran a chainsaw shop. Lashlee had never before had the chain replaced and did not ask Simmons to put any particular kind of chain on the chainsaw. Ten days before the accident, Lashlee took the chainsaw to a different chainsaw shop and had the chain sharpened. At the time of his injury, Lashlee did not know what a low-kickback chain was, would not have recognized one if he saw it, and had no idea whether the chain on the chainsaw was a low-kickback chain.

Simmons testified that he had been a professional tree cutter for more than thirty years at the time of Lashlee's injury. In addition, Simmons had opened a chainsaw and small engine store in the early 1980's and had become a dealer for defendants' chainsaws after calling defendant's office in Charlotte a few times and receiving a couple of visits from a salesman for defendants. Simmons did not recall having to sign an agreement or contract to become a dealer, and Simmons was not required to attend, nor did he attend, any of the various training programs that were offered by defendants. In 1987, Simmons sold Rex Tillotson the chainsaw that was ultimately involved in Lashlee's injury.

Simmons closed his shop sometime around 1990 for health reasons, although he continued to do some repair work out of his home. Simmons testified that he remembered Lashlee coming to his home for a new chain, but did not actually remember putting a chain on the chainsaw. Simmons identified the chain on the chainsaw during the deposition as a chisel chain, as opposed to one designed for softer woods, and testified that the saw would have been sold with such a chisel chain. Simmons had never heard of a low-kickback chain and did not recall ever being told by defendants to put only low-kickback chains on the chainsaw. Simmons did not consider the suggested chains listed on the label on the chainsaw to be the only ones he should install.

Simmons testified that he had experienced kickback thousands of times and had been bruised badly, but never cut. Simmons

explained that only a bar tip guard can prevent kickback, but he had never actually used one, and in fact most people just take it off at the time they buy a chainsaw. Thus, Simmons never ordered the bar tip guards for his shop, though defendants' salesman did teach him how to install them.

Charles Suggs (Suggs) testified that he had a Ph.D. in agricultural and biological engineering and that his research focused on man-machine systems. His publications include the development, testing and evaluation of a chainsaw kickback simulator. Suggs concluded that the chain on the chainsaw used by Lashlee was not a low-kickback chain, and that excessive kickback knocked Lashlee out of the tree on the day of the accident. Moreover, Suggs testified that he had visited nine chainsaw dealers with a chainsaw like the one involved in Lashlee's injury, and had asked to have a new chain installed. Of the nine, one dealer did not have a chain that would fit, three dealers installed low-kickback chains, one dealer installed a chain that may or may not have been a low-kickback chain, and four dealers installed chains not classified as low-kickback.

Suggs opined that defendants were negligent in not manufacturing a chainsaw bar that could only be fitted with a low-kickback chain, not color-coding low-kickback chains to make them easily identifiable, and not strengthening the warning language on the label that recommended which chains should be used with the chainsaw. Suggs acknowledged that most chainsaw manufacturers do not meet those standards but concluded therefore that those other manufacturers were negligent as well. Suggs had no reason to believe that the chain saws manufactured by defendants did not meet all voluntary safety standards adopted by the industry.

It was also Suggs' opinion that, although it would certainly be a good idea to tie oneself into a tree if there were any question about the stability of one's footing, given Lashlee's chainsaw experience, it was safe for Lashlee to use a chainsaw on a ladder as he did. However, Suggs acknowledged that he had no professional training in the use of chainsaws and had never tried to use a chainsaw in a tree.

William F. Kitzes (Kitzes) testified that he was a safety analyst and product safety manager, and that he had given two to three hundred depositions on product safety issues over the previous fifteen years. In his opinion, the warnings used by defendants informing users about the importance of low-kickback replacement chains, and defendants' training of dealers to insure that users were aware of the

importance of low-kickback replacement chains, were inadequate. Kitzes had no information about whether other chainsaw manufacturers required their dealers to attend training or what warning language other chainsaw manufacturers used, but considered that issue irrelevant. In his opinion, defendants had consciously and recklessly failed to provide consumers with the information they needed, although Kitzes did not allege that defendants had acted deliberately.

Kitzes testified that he had used a chainsaw no more than once or twice, and only in a laboratory setting. He acknowledged that, when cutting a tree, it would be prudent to tie in and he would recommend it, when it could be done. However, Kitzes believed that there might be situations in which tying into a tree might not be appropriate or feasible.

I.

[1] Plaintiffs first assign error to the trial court's grant of summary judgment in favor of defendants because of plaintiffs' alleged contributory negligence. Summary judgment is appropriate under N.C. Gen. Stat. § 1A-1, Rule 56

> 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 trial court held that the undisputed facts before it established Lashlee to be contributorily negligent as a matter of law, and accordingly granted summary judgment to defendants on the claim of negligence (R 80).

"Issues of contributory negligence, like those of ordinary negligence are rarely appropriate for summary judgment. Only where plaintiff's own negligence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997) (citations omitted).

> "Contributory negligence per se may arise where a plaintiff knowingly exposes himself to a known danger when he had a *reasonable* choice or option to avoid that danger, or when a plaintiff heedlessly or carelessly exposes himself to a danger or risk of which he knew or should have known."

Davies v. Lewis, 133 N.C. App. 167, 171, 514 S.E.2d 742, 744, *disc. review denied*, 350 N.C. 827, 537 S.E.2d 819 (1999) (quoting *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 122-23, 284 S.E.2d 702, 707 (1981), *disc. review denied*, 305 N.C. 300, 290 S.E.2d 702 (1982)) (emphasis in original). We therefore consider whether Lashlee was contributorily negligent as a matter of law.

In *Jenkins*, the plaintiff was partially paralyzed after making a shallow dive from his knees from the end of a lakeside sliding board. The plaintiff acknowledged that he and others had gone down the slide board on their knees many times before; that he knew the water under the board was shallow, although he did not know how shallow; and that he knew it would hurt if he hit his head on the bottom of the lake. This Court, in affirming the trial court's finding of contributory negligence as a matter of law, held that "plaintiff was aware of the potential danger and knew the risk of the activity in which he engaged. The danger of striking the bottom of the swimming area when diving head first into shallow water was obvious to plaintiff." *Jenkins*, 125 N.C. App. at 107-08, 479 S.E.2d at 263 (citation omitted).

In *Davies*, the plaintiff broke her neck after making a shallow dive off of a floating dock. The plaintiff had made dives off the dock before, but never in the direction of the dive that broke her neck. The water around the dock had a visibility of only one to two inches; the plaintiff had been taught not to dive into water of an unknown depth; and the plaintiff was aware that water depth changed with the tide, although she assumed that tidal conditions at the floating dock would remain constant. This Court affirmed the trial court's finding of contributory negligence as a matter of law, holding that the plaintiff

> failed to use ordinary care before diving into the water on the date in question. She knew from her experience as a trained diver that diving into water of an unknown depth was dangerous, but did so by her own choosing and at her own risk. There was a reasonable opportunity for her to avoid this danger by jumping instead of diving into the water, and her decision to dive without attempting to measure the water's depth constitutes contributory negligence.

Davies, 133 N.C. App. at 170-71, 514 S.E.2d at 744.

In the case before us, Lashlee had experienced kickback and was aware of the danger it posed. He had tied himself into the tree earlier

on the day of his injury to prevent himself from falling, both because he had seen professionals do so and because it was "common sense." Lashlee had never seen anyone try to cut a tree while standing on a ladder. Yet, when he decided to cut the final limb, Lashlee chose not to retrieve the rope he had previously used to tie himself in. Instead, Lashlee stood near the top of the ladder, leaned his left side against the tree, and began to cut. We conclude that Lashlee was aware of the danger that kickback could potentially knock him backward off the ladder and out of the tree, and that Lashlee's failure to secure himself to the tree constituted contributory negligence as a matter of law.

Plaintiffs contend that, under *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 488 S.E.2d 240 (1997), plaintiffs are entitled to have the issue of Lashlee's contributory negligence heard by a jury. In *Nicholson*, the plaintiff was an experienced electrical lineman working in an insulated hydraulic bucket beneath energized electrical lines. To protect himself, the plaintiff wore a helmet and insulated gloves. Twice prior to the accident, the plaintiff's helmet blew off and, each time, the plaintiff immediately lowered the bucket and retrieved the helmet. The third time his helmet blew off, however, the plaintiff was in the midst of tightening a bolt and chose to continue tightening. One of the overhead electrical lines then somehow came in contact with the plaintiff's head, and current ran through the plaintiff's body and out through his gloved hands, severely injuring the plaintiff.

The trial court in *Nicholson* held that the plaintiff was contributorily negligent as a matter of law. Our Supreme Court reversed, noting that one of the plaintiff's experts had stated by affidavit that the plaintiff, although failing to comply with safety standards, had acted as other similarly trained linemen would act in similar circumstances. The Court concluded that an issue of fact existed as to the reasonableness of the plaintiff's conduct under the circumstances, and therefore that summary judgment was improper.

In the case before us, plaintiffs' experts, Suggs and Kitzes, each suggested that Lashlee's failure to tie himself into the tree at the time of the accident may have been reasonable under the circumstances. However, Suggs acknowledged that he had no professional chainsaw training, and that he had never used a chainsaw in a tree. Kitzes acknowledged that he had hardly ever used a chainsaw at all, and never outside of a laboratory. Although Suggs and Kitzes may have

been qualified to testify about chainsaw design, neither was competent to render an expert opinion on the reasonable use of a chainsaw in a tree.

We conclude that, at the time defendants moved for summary judgment on the issue of defendants' negligence, no genuine issue of fact existed as to the negligence of Lashlee's conduct. The trial court did not err in finding Lashlee contributorily negligent as a matter of law.

II.

[2] Plaintiffs also assign error to the trial court's grant of summary judgment in favor of defendants on the issue of punitive damages.

> As a general rule, punitive damages may be recovered where tortious conduct is accompanied by an element of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or express malice, or in a manner evincing a wanton and reckless disregard of the plaintiffs' rights.

Connelly v. Family Inns of Am., Inc., 141 N.C. App. 583, 593, 540 S.E.2d 38, 44-45 (2000) (citation omitted). We note also that "contributory negligence will not bar recovery where the defendant is guilty of willful or wanton negligence." *Collins v. CSX Transportation*, 114 N.C. App. 14, 21, 441 S.E.2d 150, 154, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 388 (1994) (citation omitted).

Plaintiffs assert that defendants demonstrated willful or wanton negligence by making it possible for users of defendants' chainsaws to unknowingly replace a factory-approved low-kickback chain with a non-approved chain. Plaintiffs point to the limited warnings on the chainsaw itself, the fact that most chainsaw users cannot tell a low-kickback chain from other chains, and defendants' failure to require their dealers to attend safety training as evidence of defendants' negligence. Plaintiffs argue that, because it is foreseeable that a chainsaw user will need a replacement chain at some point, defendants' failure to take additional steps to assure that the replacement chain will be a low-kickback chain demonstrates a wanton and reckless disregard for the safety of the users of its chainsaws.

In order to warrant punitive damages, an act of negligence must be willful or wanton.

> A wanton act is an act done with a "wicked purpose or . . . done needlessly, manifesting a reckless indifference to the rights

> of others." An act is willful when there is a deliberate purpose not to discharge a duty, assumed by contract or imposed by law, necessary for the safety of the person or property of another.

Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 51, 524 S.E.2d 53, 60 (1999) (citations omitted). In *Benton*, our Court held that evidence of a restaurant's failure to provide adequate security for its diners, despite a duty to do so and its location in a high-crime area, was insufficient as a matter of law to justify a punitive damages verdict. *See id.* Similarly, we hold that plaintiffs in the present case have failed to present sufficient evidence to support a finding that defendants were willfully or wantonly negligent.

Plaintiffs contend that the expert opinion of Kitzes that defendants consciously and recklessly failed to provide consumers with needed information is sufficient to take the issue of punitive damages to a jury. Defendants counter that, because Kitzes was not testifying as a legal expert, his legal characterization of defendants' acts carries no independent weight. *See Howard v. Jackson*, 120 N.C. App. 243, 249, 461 S.E.2d 793, 798 (1995). We agree with defendants and hold that the mere characterization by Kitzes of defendants' negligence as conscious and reckless did not create a genuine issue of material fact.

We therefore affirm the trial court's grant of summary judgment in favor of defendants. Defendants have adequately demonstrated Lashlee's contributory negligence as a matter of law, and plaintiffs have failed to present competent evidence that defendants were willfully or wantonly negligent.

Affirmed.

Judges WYNN and THOMAS concur.

GERALDINE B. HOWELL, PLAINTIFF-APPELLEE v. THE CITY OF LUMBERTON, DEFENDANT-APPELLANT

No. COA00-310

(Filed 17 July 2001)

1. Cities and Towns— municipality's improper maintenance of storm drainage pipe—no preemption by inverse condemnation statute

The trial court did not err by failing to grant defendant municipality's motion for involuntary dismissal on plaintiff's negligence claim arising out of defendant's improper maintenance of a storm drainage pipe running under plaintiff's property even though defendant contends the claim is preempted by the inverse condemnation statute of N.C.G.S. § 40A-51, because: (1) the inverse condemnation statute under N.C.G.S. § 40A-51 specifically provides that it does not affect an owner's common law right to bring an action in tort for damage to an owner's property; and (2) North Carolina cases have only concluded there was no common law action in trespass or nuisance available to plaintiffs that could be preserved by N.C.G.S. § 40A-51.

2. Cities and Towns— municipality's improper maintenance of storm drainage pipe—not a continuing and permanent trespass and nuisance

The trial court did not err by failing to grant defendant municipality's motion for involuntary dismissal on plaintiff's negligence claim arising out of defendant's improper maintenance of a storm drainage pipe running under plaintiff's property even though defendant contends plaintiff's claim should be characterized as a continuing and permanent trespass and nuisance making it an inverse condemnation action under N.C.G.S. § 40A-51, because: (1) plaintiff is not seeking to recover for the general loss of value to her property due to the continual and ongoing effects of the location of the pipe, but instead seeks to recover for the specific damage to her house caused by the large sinkhole in September 1994; (2) plaintiff may bring an action in negligence even if the damage to her house occurred over the course of the sinkhole activity; and (3) defendant's contention that it should not be liable for any damages based on the fact the sinkholes occurred within defendant's easement is incorrect when plaintiff alleges damage to her house, most of which extends far beyond the easement.

3. Cities and Towns— municipality's improper maintenance of storm drainage pipe—duty of reasonable care

Although defendant municipality contends that plaintiff failed to meet her burden of proof in a negligence action to show that defendant municipality willfully or wantonly injured plaintiff based on the fact that the addition to plaintiff's house is built over the storm drainage pipe, thereby encroaching on defendant's easement and making plaintiff a trespasser, defendant owed plaintiff the standard duty of reasonable care because defendant's issuance to plaintiff of a building permit to construct the addition where it now stands transforms plaintiff, at the very least, into a licensee.

4. Cities and Towns— municipality's improper maintenance of storm drainage pipe—foreseeability—breach of duty

The trial court did not err in a negligence action by concluding that defendant municipality's improper maintenance of a storm drainage pipe running under plaintiff's property made it foreseeable that a sinkhole would damage plaintiff's house and that defendant breached its duty to maintain the storm pipe, because: (1) the 1992 report from defendant's director of its Public Works Department to defendant's city manager indicates that defendant did foresee this damage; (2) even though advance notice has not been required to find negligence in the maintenance of storm drain systems, defendant had actual notice of the defective pipe beginning with the first sinkhole in 1981; and (3) defendant could have prevented the damage to plaintiff's house by removing and relocating the pipe, and the mere fact that such a solution might be difficult or expensive does not relieve defendant of its duty of due care.

5. Statute of Limitations— negligence—municipality's improper maintenance of a storm drainage pipe

A plaintiff's negligence claim based on defendant municipality's improper maintenance of a storm drainage pipe running under plaintiff's property is not barred by the three-year statute of limitations under N.C.G.S. § 1-52 even though the first sinkhole occurred in 1981, plaintiff discovered the damage to her house in September 1994, and plaintiff filed her complaint in February 1997, because: (1) the statute of limitations began to run when plaintiff discovered the damage to her house since plaintiff is seeking to recover for damage to her house and not for damage

to her property in general; and (2) defendants make no allegation that the damage to plaintiff's house ought reasonably to have been apparent at the time the first sinkhole occurred in 1981 or at any other time before the damage was in fact discovered.

Appeal by defendant from judgment entered 21 December 1998 by Judge Carl L. Tilghman in Robeson County Superior Court. Heard in the Court of Appeals 24 January 2001.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for plaintiff-appellee.

Faison & Gillespie, by Reginald B. Gillespie, Jr., for defendant-appellant.

McGEE, Judge.

Plaintiff filed this action in February 1997, seeking recovery for damages to her house allegedly due to defendant's negligence in maintaining a storm drainage pipe running under plaintiff's property. The case was heard before the trial court without a jury. During trial, defendant moved for involuntary dismissal, and the trial court denied the motion. The trial court granted judgment in favor of plaintiff on 21 December 1998. Defendant appeals. Because defendant does not challenge the trial court's findings of fact on appeal, we must presume the findings of fact to be correct. *See Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998).

Between 1948 and 1954, a thirty-six inch storm drain pipe was installed in what was originally an open drainage ditch on the property later owned by plaintiff. The pipe is located approximately ten feet from the west property line and runs across the property parallel to the property line. As part of defendant's storm water drainage system, defendant owns the pipe and the easement in which the pipe is located. However, defendant acquired no written easement for the installation of the pipe, and no written easement appears of record in the Office of the Robeson County Register of Deeds showing the location, nature, or extent of defendant's easement in which the pipe is located.

The storm drain pipe joints were sealed with oakum, a flexible material consisting of hemp saturated with concrete. At the time the pipe was installed, and until the early 1970's, oakum was widely used and was considered state-of-the-art for sealing such pipe joints. In the

1970's, however, defendant and others learned that oakum can deteriorate over time, allowing water to access the pipe, which can result in a sinkhole. Oakum deterioration is a natural process which cannot be prevented, and no test, process or machine can predict when failure will occur. By the mid-1970's, defendant had begun using a petroleum-based sealant known as Ramneck in the installation and repair of storm drain pipe joints.

A house was built on the property in 1961 and was bought by Jimmy D. Howell. The west wall of the house was situated approximately fifteen feet east of the pipe. The pipe was buried three to six feet under the surface and was not visible, though catch basins were located in the streets in front of and behind the house. Jimmy Howell was informed of and shown the location of the pipe at the time of purchase.

Plaintiff married Jimmy Howell in 1967 and plaintiff and Jimmy Howell obtained a building permit from defendant's inspection department in 1977 to build a fifteen foot by twenty-two foot room onto the west side of the house. The chimney and west wall of the addition were built above the pipe. When plaintiff and Jimmy Howell divorced in 1989, plaintiff became the sole owner of the property. At the time she became owner, plaintiff was not aware that the pipe was located on her property.

In 1981, while getting wood from a woodpile in the backyard, Jimmy Howell fell into a sinkhole when the ground beneath him collapsed some fifteen feet behind the house. Plaintiff notified defendant of the problem, and defendant sent a crew which dug up the ground and exposed the pipe under the sinkhole. The crew applied concrete to the seal of the joint and replaced soil that had been washed away though the sinkhole. No further sinkholes appeared at that location.

Plaintiff notified defendant of another sinkhole on her property in 1988. Defendant's practice at that time, upon being notified of a sinkhole in or near one of its storm drain lines, was to expose the pipe and repair any observed or suspected pipe failure. Defendant's work crew put dirt in the hole but did not expose the pipe to determine whether another oakum seal had deteriorated. No further sinkholes appeared at that location.

Plaintiff reported another sinkhole in 1989 on the right-of-way of the street in front of plaintiff's property. Defendant's crew filled the

sinkhole with sand and concrete. No further sinkholes appeared at that location.

The director of defendant's Public Works Department reported to defendant's city manager in 1992 that, based on the history of occurrences of sinkholes on plaintiff's property, funds should be appropriated to move the storm drain pipe since it ran under plaintiff's property at or near the west wall of her residence. However, no funds were appropriated by defendant to move the pipe.

Plaintiff notified defendant of another sinkhole on her property in 1993. Defendant's crew filled the hole with sand but did not expose the pipe. No further sinkholes appeared at that location.

Plaintiff discovered a severe sinkhole on her property in September 1994, measuring some thirty-six inches in diameter and four to five feet deep. Plaintiff also discovered signs that her house was suffering damage from settlement. The 1977 addition had begun to pull away from the remainder of the house, cracks appeared in the brick veneer, and the floors became unlevel, making it difficult to open and close doors.

Defendant's representative from its Public Works Department indicated to plaintiff that the sinkhole was too close to plaintiff's house to safely dig around the pipe at the location of the sinkhole. Instead, defendant offered in June 1995 to remove the portions of the storm drain pipe not under plaintiff's addition and to fill and seal the remaining portions with concrete. Defendant also offered to make cosmetic repairs to plaintiff's house, in return for an easement to reroute the pipe and a release from liability. Plaintiff considered the offer inadequate and refused to sign the release.

I.

[1] Defendant first assigns error to the trial court's failure to grant defendant's motion for involuntary dismissal during the trial. Defendant asserts that plaintiff's purported negligence claim is preempted by N.C. Gen. Stat. § 40A-51, North Carolina's inverse condemnation statute.

Although N.C.G.S. § 40A-51(c) (1999) specifically provides that "[n]othing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property[,]" defendant contends that the language is sharply limited by *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986), *McAdoo v.*

City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988), and *Ashley Park Charlotte Assoc. v. Charlotte, N.C.*, 827 F.Supp. 1223 (W.D.N.C. 1993). In *Smith*, this Court acknowledged that the plaintiffs had no "private common law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation" under N.C.G.S. § 40A-51. *Smith* at 521, 339 S.E.2d at 847 (citation omitted). In *McAdoo*, this Court affirmed summary judgment for the defendant municipality on the plaintiff's claim of trespass. The Court held that because the defendant had the power of eminent domain it was immune from common-law claims for trespass and thus N.C.G.S. § 40A-51(c) did not apply. *See McAdoo* at 573, 372 S.E.2d at 744.

In *Ashley*, the plaintiff sought to recover from the defendant municipality when the plaintiff discovered that its property had been contaminated by an adjoining landfill. The U.S. District Court for the Western District of North Carolina, citing *Smith* and *McAdoo*, granted summary judgment under N.C.G.S. § 40A-51 on the plaintiff's common-law claims for nuisance, trespass and negligence. *Ashley*, 827 F.Supp. at 1226. Defendants argue that, under *Ashley's* interpretation of *Smith* and *McAdoo*, N.C.G.S. § 40A-51(c) does not allow plaintiff to bring a common-law negligence claim in the present case.

However, neither *Smith* nor *McAdoo* addressed a claim of negligence. Moreover, neither recognized any limitation to N.C.G.S. § 40A-51(c). Instead, *Smith* and *McAdoo* concluded that there was no common-law action in trespass or nuisance available to the plaintiffs that could be preserved by N.C.G.S. § 40A-51(c). We therefore hold that, if a common-law action for negligence by defendant would otherwise be available to plaintiff, it is preserved under N.C.G.S. § 40A-51(c) and not preempted by the inverse condemnation statute. Insofar as *Ashley* implies otherwise, *Ashley* has incorrectly interpreted North Carolina law.

[2] Defendant next contends that plaintiff's claim should be characterized not as negligence but as a continuing and permanent trespass and nuisance, and therefore as an inverse condemnation action within N.C.G.S. § 40A-51. Defendant distinguishes *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), (property damage due to storm water overflow), *Tent Co. v. Winston-Salem*, 271 N.C. 715, 157 S.E.2d 577 (1967) (property damage due to storm water overflow), and *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567 (1991) (property damage due to sewage overflow) as each involving a single incident of harm, while describing plaintiff's claim as "based

on the continual and ongoing effects of the location and use of the [p]ipe—a permanent physical structure under the [a]ddition." Defendant further distinguishes these cases, as well as *Hooper v. City of Wilmington*, 42 N.C. App. 548, 257 S.E.2d 142, *disc. review denied*, 298 N.C. 568, 261 S.E.2d 122 (1979) (loss of property through erosion by storm water), as involving damage to real property occurring *outside* the defendant municipality's easement.

Plaintiff, however, is not seeking to recover for the general loss of value to her property due to the "continual and ongoing effects of the location of the pipe." Instead, plaintiff seeks to recover for the specific damage to her house caused by, or at least discovered in conjunction with, the large sinkhole of September 1994. In *Hotels*, the defendant municipality used a stream running through the plaintiff's property for storm drainage. On several occasions prior to 29 July 1965, rain caused the stream to overflow onto the plaintiff's land. Upon notification by the plaintiff, the defendant would work to remove obstructions from the stream. On 29 July 1965, however, the stream overflowed enough to enter the plaintiff's motel and damage the plaintiff's property. Our Supreme Court held that the defendant could be held liable for negligent breach of its duty to keep its sewers and drains free of obstructions which might cause such flooding. *Hotels*, 268 N.C. at 537, 151 S.E.2d at 37. Similarly, although plaintiff reported numerous sinkholes before September 1994, it was not until the sinkhole of September 1994 that plaintiff discovered the damage to her home.

Moreover, plaintiff may bring an action in negligence even if the damage to her house occurred over the course of the sinkhole activity. In *Hooper*, the plaintiffs sued the defendant municipality for damage to their property due to erosion of the drainage ditch running alongside their property. The plaintiffs asserted that the erosion was due to the amount and velocity of water running through the ditch from the defendant's drainage system. This Court affirmed the trial court's award of damages for the erosion occurring over the previous three years. It follows that, even if plaintiff's damage has been caused by the continual and ongoing occurrence of sinkholes, plaintiff may still recover under negligence for all of her damages within the appropriate statute of limitations.

We dismiss defendant's assertion that, because the sinkholes occurred within defendant's easement, defendant cannot be liable for any damage caused by them. Putting aside the question of whether defendant could be liable for damage occurring within its own ease-

ment, we note that plaintiff alleges damage to her house, most of which extends far beyond the easement. We see little distinction between damage due to flood waters rising out of a defendant's easement and damage due to earth sinking within a defendant's easement.

We therefore find no error in the trial court's denial of defendant's motion for involuntary dismissal. We hold that plaintiff has legitimately characterized her claim as an action in negligence, and that N.C.G.S. § 40A-51 does not preempt that negligence action.

II.

[3] Defendant next asserts that plaintiff failed to meet her burden of proof that defendant willfully or wantonly injured plaintiff. Defendant argues that because defendant owns the pipe and the easement in which it is located and because the addition to plaintiff's house is built over the pipe thereby encroaching on defendant's easement, plaintiff should be considered and treated as a trespasser on defendant's easement. Defendant would owe a trespasser only a duty not to willfully or wantonly injure the trespasser. *See Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998).

The extent of defendant's easement, however, is unknown. Although plaintiff and defendant stipulated before trial that defendant "owns the [p]ipe and the easement in which the [p]ipe is located[,]" no written record of the easement exists. The trial court found that the west wall of plaintiff's addition was located over the pipe, but it did not actually find that plaintiff had encroached upon defendant's easement.

Nonetheless, we need not determine whether plaintiff's addition was built within defendant's easement. We hold that defendant's issuance to plaintiff of a building permit to construct the addition where it now stands transforms plaintiff, at the very least, into a licensee. It follows that, regardless of the relation between plaintiff's addition and defendant's easement, defendant owes plaintiff the standard duty of reasonable care. *See Nelson* at 632, 507 S.E.2d at 892.

III.

[4] Defendant further argues that plaintiff has failed to demonstrate negligence on the part of defendant. Defendant asserts that, because oakum deterioration is a natural and unpredictable process which

cannot be prevented, defendant could not have foreseen the sinkhole which damaged plaintiff's house and could not have done anything to prevent it anyway.

To demonstrate negligence, plaintiff must show the trial court that defendant owed plaintiff a duty of care; that defendant breached its duty; that the breach was the actual and proximate cause of plaintiff's injury; and that plaintiff suffered damage due to the injury. *See Pulliam*, *supra*, at 754, 407 S.E.2d at 570.

> "The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof."

Hotels, *supra*, at 536, 151 S.E.2d at 37 (citation omitted). In the present case, plaintiff and defendant agree that the storm drain pipe is a part of defendant's drainage system.

Defendant contends that, insofar as it had a duty to maintain the storm drain pipe beneath plaintiff's property, it did not breach its duty. Defendant first asserts that the September 1994 sinkhole that damaged plaintiff's house was unforeseeable, and therefore that defendant cannot be held liable for the damage. Plaintiff counters that, even if the occurrence of the September 1994 sinkhole itself could not be predicted, by September 1994 defendant could foresee further sinkholes appearing on plaintiff's property which might cause damage to plaintiff's house. In fact, the 1992 report from defendant's director of its Public Works Department to defendant's city manager indicates that defendant did foresee just such damage.

Defendant argues that under *Mosseller v. Asheville*, 267 N.C. 104, 147 S.E.2d 558 (1966), defendant cannot be held liable for damages due to the pipe defect causing the September 1994 sinkhole if it had notice only of other, prior defects or only of conditions likely to produce the September 1994 defect. *See id.* at 111, 147 S.E.2d at 563. *Mosseller*, however, addresses injuries due to street or sidewalk defects, for which the municipality may be held liable only after having actual or constructive notice of the defect. *See id.* at 108, 147 S.E.2d at 561. *Mosseller* explicitly did not involve damage to another's property, *see id.*, and advance notice has not been required to find negligence in the maintenance of storm drain systems. *See*, *e.g.*,

Hotels (no allegation that defendant municipality had notice of specific obstructions prior to flooding). Moreover, insofar as the defect in the present case was the failure of oakum seals throughout the storm drain pipe under plaintiff's property, defendant *had* actual notice of the defective pipe beginning with the first sinkhole in 1981.

Defendant next asserts that it did not breach its duty to maintain the storm drain pipe because it had no way to prevent the oakum seals from failing and no way to access the pipe beneath the addition once the September 1994 sinkhole appeared. However, while it may have been impossible to prevent individual seals from failing, defendant could have prevented the damage to plaintiff's house by removing and relocating the pipe. Defendant's director of its Public Works Department recommended the allocation of funds for such a relocation in 1992, and in June 1995 defendant actually offered to perform such a relocation. The mere fact that such a solution might be difficult or expensive does not relieve defendant of its duty of due care in maintaining its storm drain pipe in such a way as to prevent injury to plaintiff. *See, e.g., Hooper, supra* (the defendant municipality's rejection of various methods to prevent erosion did not eliminate the municipality's liability for erosion).

Defendant does not challenge the trial court's conclusion that the failure of the oakum seals and their associated sinkholes caused plaintiff's damage, nor does defendant challenge the trial court's damage award to plaintiff. We hold that plaintiff has adequately demonstrated that defendant owed plaintiff a duty, and that defendant breached that duty. We therefore find no error in the trial court's holding that defendant was negligent.

IV.

[5] Finally, defendant asserts that plaintiff's negligence claim is barred by the three-year statute of limitations in N.C. Gen. Stat. § 1-52. In particular, defendant cites N.C.G.S. § 1-52(3) (1999), which provides a statute of limitations of three years "[f]or trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter." *See also*, N.C.G.S. § 1-52(5) (applying the three-year statute of limitations to other tort actions). Defendant argues that, because the first sinkhole appeared in 1981, the statute of limitations on plaintiff's claim began running then.

Defendant cites *Robertson v. City of High Point*, 129 N.C. App. 88, 497 S.E.2d 300, *disc. review denied*, 348 N.C. 500, 510 S.E.2d 654 (1998) in support of its contention that the statute of limitations on plaintiff's claim has expired. In *Robertson*, the plaintiffs brought suit against the defendant municipality for its creation and use of a nearby landfill for more than three years. The plaintiffs' complaint included claims of trespass, nuisance, and negligence. This Court affirmed the trial court's dismissal of those claims, holding that the plaintiffs' cause of action had accrued at the creation of the landfill more than three years before the plaintiffs filed their complaint.

Plaintiff counters that her action for recovery of damage to her house did not accrue until the damage was discovered. N.C.G.S. § 1-52(16) (1999) provides a three-year statute of limitations for "physical damage to claimant's property, the cause of action . . . shall not accrue until . . . physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant[.]" Plaintiff discovered the damage to her house in September 1994, and filed her complaint in February 1997, less than three years later.

We hold that, because plaintiff is seeking to recover for damage to her house and not for damage to her property in general, the statute of limitations on her action began with her discovery of the damage to her house. Unlike *Robertson*, plaintiff in the present case filed her complaint within three years of discovering the damage alleged. Defendants make no allegation that the damage to plaintiff's home, discovered in September 1994, ought reasonably to have been apparent at the time the first sinkhole occurred in 1981, or at any other time before the damage was in fact discovered.

Plaintiff filed her action within the appropriate statute of limitations, plaintiff adequately demonstrated defendant's negligence to the trial court, and plaintiff's negligence claim is not preempted by N.C.G.S. § 40A-51. We therefore affirm the trial court's judgment in favor of plaintiff.

Affirmed.

Judges WYNN and JOHN concur.

IN THE MATTER OF: APPEAL OF WINSTON-SALEM JOINT VENTURE FROM THE DECISION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY TAXATION FOR TAX YEAR 1997

No. COA00-912

(Filed 17 July 2001)

1. Taxation— ad valorem—shopping mall—valuation method—income approach

The Property Tax Commission appropriately used the income approach rather than the cost approach in valuing Hanes Mall for ad valorem taxes. Although the taxpayer cites In re Appeal of Belk-Broome Co., 119 N.C. App. 470 and argues that the outcome of the assessment should be limited by the cost method, that case states that the cost approach may not effectively reflect market conditions and leaves room for the fair market value to differ from the cost approach value. To hold otherwise would place improper restrictions on determining the fair market value.

2. Taxation— ad valorem—shopping mall—valuation method—equal protection

There was no equal protection violation in an ad valorem tax assessor's use of the income approach when appraising Hanes Mall even though all other commercial properties were appraised under the cost approach because there was evidence that Hanes Mall was the only super regional mall in the county and that it was unlike any other property in the county. The taxpayer did not show that it was discriminated against by being excluded from the same class as strip malls and the like because it did not show that it was entitled to be considered in that class.

Appeal by taxpayer from a final decision entered 20 March 2000 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 30 May 2001.

Maupin Taylor & Ellis, P.A., by Charles B. Neely, Jr. and Nancy S. Rendleman; Fisk, Kart & Katz, by James P. Regan, for taxpayer-appellant.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Jr., Stephen M. Russell and Kevin G. Williams, for appellee-Forsyth County.

HUNTER, Judge.

Taxpayer-appellant Winston-Salem Joint Venture (herein "Taxpayer") appeals the final decision of the North Carolina Property Tax Commission ("the Commission") modifying the Forsyth County Board of Equalization and Review's ("the Board") decision as to the value of Taxpayer's commercial property (referred to herein as "Hanes Mall"), and finding its appraised value to be $140,000,000. Taxpayer argues the Commission erred: (1) by failing to apply or properly consider the cost approach method in appraising Hanes Mall, and; (2) by adopting the County's expert appraiser's assessment of the property's value. Upon careful review of the record before us, we affirm the Commission's decision.

Finding no discrepancy in the parties' recitation of the facts, we take our account of the facts directly from Taxpayer's brief to this Court. Effective 1 January 1997, the Forsyth County Tax Assessor ("the Assessor") "appraised the real property associated with Hanes Mall in Winston-Salem at a total value of $162,725,000." Taxpayer appealed the assessment to the Board in a timely manner. Subsequently, the Board heard Taxpayer's appeal and "on December 4, 1997 . . . affirmed the decision of the Assessor." Then on 2 January 1998, Taxpayer appealed the Board's decision to the Commission. After a hearing which lasted several days, the Commission found, in pertinent part:

> 12. . . . [The] County [Assessor] used the direct capitalization method to arrive at a total value of $162,725,000 for the subject property. This method is used to convert an estimate of one year's income expectancy, or an annual average of several years' income expectancy into an indication of value in one direct step. . . . In general, the direct capitalization approach requires the use of comparable sales and the income derived therefrom to arrive at an appropriate capitalization rate. When using this approach to value the subject property, [the Assessor] did not apply or rely upon its 1997 schedule of values, rules and standards to arrive at the capitalization rate of 7.75%. Instead, the [Assessor] used data developed for a prior appraisal assignment that did not correlate with the rate information used to develop the 1997 schedule of values, standards and rules. Hence, the [Assessor] arrived at a capitalization rate of 7.75% and when that rate was applied to the applicable schedule of values, rules and standards it resulted in an improper classification of the subject property as an A plus mall.

13. . . . In Mr. Nafe's opinion [Taxpayer's expert witness], the value of the subject property is composed of three components: (1) real estate, (2) Hanes Mall's internal profit centers, and (3) the intangible personal property associated with Hanes Mall's business. . . .

14. In Mr. Nafe's opinion, in order to determine fair market value, the appraiser must identify and segregate the non-realty elements of the subject property so that his appraisal of the subject property would be limited to the fee simple in the property's real estate value. . . . In applying the cost approach, Mr. Nafe . . . estimated the value of the subject property to be $84,000,000. Under the income approach, Mr. Nafe arrived at total value $80,000,000 for the subject property when applying both the direct capitalization analysis and the discounted cash flow analysis. Mr. Nafe's going-concern value of the subject property as of January 1, 1997 was $130,000,000, denoted as follows:

Fee simply [sic] real estate only:	$ 80,000,000
Non-realty value:	$ 50,000,000
Total Going Concern value:	$130,000,000

. . .

16. . . . In summary, Mr. Nafe concluded that the value of the subject real property . . . was $80,000,000 . . . . *He reached this valuation by applying the income approach, which is typically given greatest weight in the analysis of income-producing property.*

. . .

20. Investors in regional malls do not use the cost approach to determine market value because of the assumptions and wide variety of estimates that are placed upon such items as entrepreneurial profit, subsidies, and influences by anchor department stores. . . .

21. To arrive at an opinion of value for the subject property, Mr. . . . Korpacz, the [Assessor]'s expert witness, utilized the direct capitalization and yield capitalization approaches as recognized under the income method of valuation. While Mr. Korpacz utilized the sales comparison approach to value, he rejected the cost approach based upon his experience that investors in regional malls give little value to this approach to at arrive [sic] market value.

22. Mr. Korpacz considered business enterprise value in his value analysis of the subject property, but he rejected this concept because, based upon his experience, regional mall investors do not recognize or reflect this concept when investing in this particular market. . . .

23. Mr. Korpacz's fee simple opinion of value for the subject property . . . was $140,000,000. He reached this value when applying the income approach; analyzing market rents and determining that the appropriate capitalization rate was 8.55%. Mr. Korpacz's appraisal correlates with the County[Assessor]'s 1997 schedule of values, rules and standards in that his appraisal analysis yields a proper classification of the subject property as a B plus mall.

24. Of the three traditional appraisal methods considered by the Commission, the cost approach, the comparable sales approach, and the income approach, the income approach is the most reliable method in reaching market value for the subject property.

25. Even though the Commission considered the comparable sales and cost approaches to value, the Commission determined that those approaches would not yield fair market value of the subject property and should not be relied upon as the primary approaches to determine value.

(Emphasis added.) Thus, the Commission concluded as a matter of law:

2. In North Carolina, property must be valued for *ad valorem* tax assessment purposes at its "true value in money," which is statutorily defined as "market value[,]" [pursuant to N.C. Gen. Stat. § 105-283.]

. . .

3. *Ad valorem* assessments are presumed to be correct. In order for the Taxpayer to rebut the presumption of correctness, the Taxpayer must prove that the County [Assessor] employed an arbitrary or illegal method of valuation and that the assessment of the subject property substantially exceeded the true value in money of the subject property.

. . .

> 6. In reaching a total assessed value for the subject property . . . of $162,725,000, the County [Assessor] failed to properly apply its schedule of values, rules and standards, as required and directed by G.S. 105-317 of the North Carolina Machinery Act. The income capitalization rate developed by the County [Assessor] does not correlate with an appropriate classification of the subject property under the County[Assessor]'s schedule of values, rules and standards. . . .
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> . . .
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> 10. The income approach is the most probative means to establish the fair market value of the subject property and even though it is the preferred method, a combination of the three methods may be used as long as the income approach is given the greatest weight. . . .
>
> 11. The value of the subject property, relying primary [sic] on the income approach . . . was $140,000,000.

(Emphasis added.) Taxpayer appeals the Commission's decision.

[1] Taxpayer first assigns error to the Commission's "failing to apply or properly consider the cost approach in appraising Hanes Mall." Although Taxpayer admits "this Court [has] held that . . . exclusive reliance on the cost approach [i]s an error of law and that the income approach should be the primary method used," relying on *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 473, 458 S.E.2d 921, 923-24 (1995), *aff'd*, 342 N.C. 890, 467 S.E.2d 242 (1996), Taxpayer argues "this Court did not conclude that the cost approach should *not* be used." (Emphasis omitted and added.) As such, Taxpayer contends that "a combination of cost and income methods *could be* used so long as the income approach is given greatest weight" (emphasis added), and thus the cost approach *should have* been used in the present case because that method's "primary use is to establish a ceiling on valuation . . . ." *Belk*, 119 N.C. App. at 474, 458 S.E.2d at 924. We are unpersuaded.

N.C. Gen. Stat. § 105-345.2(b) (1999) governs the standard of appellate review as to property valuations, stating that the appellate Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b). Further, the statute gives this Court the authority to

reverse, remand, modify, or declare void any decision which prejudices a plaintiff, where said decision is:

(1) In violation of constitutional provisions; or

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

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b). Moreover, our state's case law has plainly set out that "*ad valorem* tax assessments are presumed to be correct." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975) (emphasis added). However, in dealing with this very matter, this Court clearly held that

> the presumption is one of fact and is therefore rebuttable[; but t]o rebut the presumption, [Taxpayer-]Belk must produce " 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property." [*Amp, Inc.*, 287 N.C.] at 563, 215 S.E.2d at 762. . . .

Belk, 119 N.C. App. at 473, 458 S.E.2d at 923 (emphasis in original) (citation omitted). Additionally, the Court went on to opine:

> It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property[. . . and,] the cost approach's *primary* use is to establish a ceiling on valuation, rather than actual market value. . . . [However, t]he modern appraisal practice is to use cost approach as a secondary approach "because cost may not effectively reflect market conditions." *[Coastal Eagle Point] Oil Co. [v. West Deptfort Township]*, 13 N.J. Tax 242, 288 [(1993)] . . . .

Id. at 474, 458 S.E.2d at 924 (emphasis added).

We recognize that the Court's holding of what a taxpayer is required to prove is absolute. However, we deem the *Belk* Court's

statement, that "the cost approach's primary use is to establish a ceiling on valuation," (upon which the present Taxpayer relies), to be at most *dicta*. *Id.* This is because, even in its own assessment of which approach is most proper, the *Belk* Court plainly settled and stated that the goal of any valuation is to reach fair market value for the subject property—fair market value which accurately ". . . 'reflect[s] market conditions.' " *Id.* (quoting *Oil Co.*, 13 N.J. Tax 242, 288). The Court further stated:

> *The County [Assessor] is required to value all property for ad valorem tax purposes at its true value in money, which is its "market value."* North Carolina General Statutes § 105-283 (1992). Market value is defined in the statute as
>
> "the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used."
>
> *Id. An important factor in determining the property's market value is its highest and best use.* The Belk property must be valued at its highest and best use, which the parties agree is its present use . . . . *Therefore, the County, and the Commission [Assessors], are required to use a valuation methodology that reflects what willing buyers in the market for anchor department stores will pay for the subject property.* In doing so, the county must "consider at least [the property's] . . . past income; probable future income; and any other factors that may affect its value." North Carolina General Statutes § 105-317(a)(2) (1992).

Id. at 473-74, 458 S.E.2d at 923-24 (emphasis added) (citations omitted).

We note that in the *Belk* case, the cost approach for the subject property yielded a much higher value assessment than what was shown to be the property's "fair market value"—that is, what a willing buyer would pay a willing seller under the terms outlined above. As such, the cost approach's "ceiling on valuation" was therefore an irrelevant factor, and the Court refused to accept the cost approach value as fair market value. However, that is not so in the case at bar.

In applying *Belk* to the present case, we find Taxpayer's argument to be without merit. Taxpayer's business (though more than just an

anchor store) is of the exact type as that of Belk. Taxpayer does not argue that the income approach used by the Assessor was incorrect or unlawful, only that the outcome of the Assessor's assessment should have been limited by the Assessor's use of the cost method. However, the very case law upon which Taxpayer relies clearly states that the cost approach ". . . 'may not effectively reflect market conditions.' " *Id.* at 474, 458 S.E.2d at 924 (quoting *Oil Co.*, 13 N.J. Tax 242, 288). We recognize that it is Taxpayer's hope that this Court finds—since in the present instance the cost approach results in a much lower assessment—that the cost approach assessment should yield the maximum value of Hanes Mall.

However, we refuse to ignore the plain language used by the *Belk* Court. Instead, we hold that although the cost approach may often times result in the upper limit of fair market value, it does not necessarily need to be so. Therefore, we believe the precedent set forth in *Belk* leaves room for the fair market value to differ from the cost approach value. To hold otherwise would place improper restrictions on determining the fair market value of realty as required by statute, and render consideration of competent evidence reflecting fair market values above the cost approach assessment to be unacceptable. Further, we agree with the Commission that the cost approach "would not yield fair market value of the [mall] and should not be relied upon as the primary approach[] to determine value." Therefore, we hold that the Commission's use of the income approach—pursuant to *Belk*—was the appropriate valuation method in the case at bar.

[2] Taxpayer's second and final assignment of error is that "[t]he Commission's adoption of Mr. Korpacz's appraisal as its assessment of Hanes Mall resulted in a denial of Taxpayer's constitutional and statutory rights to equal protection and uniform taxation." In its brief to this Court, Taxpayer goes to great lengths in discussing cases which purport that "the use of one assessment methodology to assess the property of one group of taxpayers and another assessment methodology to assess the property of another group of taxpayers *in the same class* resulted in significant differences in assessed values of comparable properties and a denial of uniformity." (Emphasis added.) Thus, Taxpayer argues, because the Assessor treated Hanes Mall differently from "any other property in Forsyth County," Taxpayer has been discriminated against. We disagree.

Taxpayer is correct when it states that "[t]he U.S. Supreme Court has held that application of two distinct valuation methodologies to

properties in the same class which results in systematic discrimination against one group of property owners is a clear violation of uniformity." Citing *Allegheny Pitts. v. Webster County*, 488 U.S. 336, 345, 102 L. Ed. 2d 688, 698 (1989). Additionally, per the parties' stipulations, the Assessor admits that:

> 16. In performing its 1997 revaluation, the assessments made by the Forsyth County Assessor's Office of hotels and motels, investment grade apartment complexes, the Hanes Mall and the five anchor stores adjacent to the Hanes Mall were based upon the income approach to value, although the County may have considered other approaches to value. The assessments of *all other commercial and industrial properties* in Forsyth County including, but not limited to, strip centers and other shopping centers, retail stores, restaurants, nursing homes, bowling alleys, office buildings, theaters, and industrial enterprises were based upon the cost approach to value, although the County may have considered other approaches to value.

(Emphasis added.) However, Taxpayer offers no evidence that the Assessor utilized the cost approach to value another "super regional mall" and yet used the income approach *solely* to value Hanes Mall. Contrarily, the Assessor presented evidence that Hanes Mall is the only super regional mall in Forsyth County and that it is "unlike any other property in the county, which creates an inherent weakness for using the cost approach to determine a fair [market] value." Therefore, without a showing that Taxpayer's property was entitled to be considered in the same class as strip malls and the like, Taxpayer has failed to show it was discriminated against by being excluded from that class. In failing to fall within the same class, the assessment cannot violate the equal protection clauses of the United States and North Carolina Constitutions. *See Tax Appeal of County of Maui v. KM Hawaii, Inc.*, 81 Hawaii 248, 256, 915 P.2d 1349, 1357 (1996).

Additionally, we note Taxpayer failed to object or assign error to the Commission's findings that the Assessor's expert witness, Mr. Korpacz:

> 21. . . . rejected the cost approach based upon his experience that investors in regional malls give little value to this approach to at arrive [sic] market value.
>
> . . .

> 24. Of the three traditional appraisal methods considered by the Commission, . . . the income approach is the most reliable method in reaching market value for the subject property.

As such, Taxpayer has lost its right to argue those findings were not supported by substantial evidence of record.

The law has long been that:

> The Commission has the authority and responsibility "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *[In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 164, 484 S.E.2d 450, 451 (1997)] (quoting *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981)). . . .

In re Appeal of Phillip Morris, 130 N.C. App. 529, 532, 503 S.E.2d 679, 681, *review denied*, 349 N.C. 359, 525 S.E.2d 456 (1998). Further, "[t]he weight to be accorded relevant evidence is a matter for the factfinder, which is the Commission." *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. 710, 712, 379 S.E.2d 37, 38 (1989). Additionally:

> Our Supreme Court has said valuations fixed by the Commission shall be final and conclusive where no error of law or abuse of discretion is alleged. *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943). . . . [T]he Commission "has full authority, notwithstanding irregularities at the county level, to determine the valuation and enter it accordingly. Such valuation so fixed is final and conclusive unless error of law or abuse of discretion is shown." *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 579, 160 S.E.2d 728, 733 (1968).

In re Appeal of Boos, 95 N.C. App. 386, 388, 382 S.E.2d 769, 770 (1989). Moreover, "[i]f the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *Phillip Morris*, 130 N.C. App. at 533, 503 S.E.2d at 682.

Having failed to show that the decision of the Commission was either: in violation of constitutional provisions, in excess of statutory authority, made upon unlawful proceedings, affected by other errors of law, unsupported by competent evidence, or arbitrary or capri-

cious, we hold Taxpayer has failed to prove it was discriminated against. N.C. Gen. Stat. § 105-345.2(b). Additionally, without a showing that "the assessment *substantially* exceeded the true value in money of the property," *Amp*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (emphasis in original), Taxpayer has failed to rebut the presumption that its "*ad valorem* tax assessments are . . . correct." *Id.* at 562, 215 S.E.2d at 761 (emphasis added). Therefore, because we find the findings of fact and conclusions of the Commission are based upon and supported by competent, material and substantial evidence in the record, the Commission's final decision is

Affirmed.

Judges MARTIN and HUDSON concur.

TERRY WAYNE DAWSON, D.D.S., PLAINTIFF v. ATLANTA DESIGN ASSOCIATES, INC., AND ATLANTA DESIGN ASSOCIATES—N.C., INC., DEFENDANTS

No. COA00-1031

(Filed 17 July 2001)

Parties— real party in interest—breach of contract—professional negligence—special duty—construction of dental facility

The trial court erred in a professional negligence and breach of contract action concerning the construction and design of a dental facility by requiring plaintiff dentist to substitute his limited liability company as the party plaintiff in this action based on the company's ownership of the property upon which the dental facility was designated to be constructed, because: (1) the general rule that a shareholder or member cannot pursue an individual cause of action against a third party for wrongs or injuries to the corporation or company is not applicable to plaintiff's claims since the claims do not allege, and the record does not reveal, an injury to the limited liability company; (2) plaintiff is a real party in interest under N.C.G.S. § 1A-1, Rule 17; and (3) plaintiff's individual contract with defendants creates a special duty running from defendants to plaintiff.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiff from order filed 26 April 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 5 June 2001.

Wyatt Early Harris & Wheeler, L.L.P., by Lee M. Cecil, for plaintiff-appellant.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine; and Hotz & Associates, PC, by Walter H. Hotz, for defendant-appellees.

GREENE, Judge.

Terry Wayne Dawson, D.D.S. (Plaintiff) appeals an order filed 26 April 2000 requiring him to substitute Boykin-Dawson, L.L.C. as the party plaintiff in his action against Atlanta Design Associates, Inc. and Atlanta Design Associates—N.C., Inc. (Atlanta Design) (collectively, Defendants).

The record shows that on 16 May 1994, Plaintiff and Craig E. Boykin (Boykin) entered into a contract with Defendants pursuant to which Defendants were to design a dental facility in High Point. Boykin-Dawson, L.L.C., a limited liability company owned by Plaintiff, Plaintiff's spouse, Boykin, and Boykin's spouse, owned the property upon which the dental facility was designated to be constructed. Construction of the facility was completed in July 1996 and, subsequent to taking possession of the facility, Plaintiff "found numerous and significant deficiencies in both construction and design." On 28 December 1998, Plaintiff filed a complaint against Defendants alleging claims for breach of contract and professional negligence. Plaintiff's breach of contract claim alleged he suffered damages as a result of "numerous breaches" by Defendants of their 16 May 1994 contract with Plaintiff. Additionally, Plaintiff's professional negligence claim alleged numerous "unreasonable and negligent acts" by Defendants in their performance of the 16 May 1994 contract. Plaintiff alleged the "unreasonable and negligent acts . . . were the direct and proximate cause of damage to . . . Plaintiff."

In an order filed 23 July 1999, the trial court, upon Atlanta Design's motion, joined Boykin as a proper party pursuant to Rule 20 of the North Carolina Rules of Civil Procedure. Atlanta Design then filed a counterclaim against Boykin; however, Atlanta Design dismissed its counterclaim against Boykin on 28 January 2000.

In a motion dated 7 April 2000, Defendants moved to dismiss Plaintiff's claims against them pursuant to the following North

Carolina Rules of Civil Procedure: 12(b)(6) (failure to state a claim upon which relief can be granted); 12(b)(7) (failure to join a necessary party); 17 (failure to join a real party in interest); and 19 (failure to join those united in interest as plaintiffs or defendants). In support of the motion to dismiss, Defendants alleged the following:

> 2. Plaintiff is a member of Boykin-Dawson[, L.L.C.], a limited liability [company] which owns the land and building for which the design services of which [P]laintiff[] complains were provided.
>
> 3. As a member of Boykin-Dawson, [L.L.C.], the owner of the land and building, [P]laintiff lacks standing to maintain this action, individually, and [P]laintiff's actions should therefore be dismissed[.]

A hearing was held on Defendants' motion to dismiss on or about 24 April 2000. Subsequent to the hearing, the trial court found "that the damages alleged by [P]laintiff, if any, were suffered by Boykin-Dawson, L.L.C., rather than [P]laintiff, individually." The trial court, therefore, ordered "that Boykin-Dawson, L.L.C., as the real party in interest, shall be substituted as the plaintiff . . . within ten (10) days of the date of this Order." Additionally, the trial court ordered "that [D]efendants' Motion to Dismiss is denied, without prejudice, and may be renewed if Boykin-Dawson, L.L.C., is not substituted as the party plaintiff as required by this Order."

The dispositive issue is whether Plaintiff alleged in his complaint injuries to Boykin-Dawson, L.L.C. and/or whether the record contains evidence Boykin-Dawson, L.L.C. suffered injuries as a result of the wrongs alleged in Plaintiff's complaint.

Initially, we note the trial court's 26 April 2000 order does not dispose of this case but requires further action by the trial court; therefore, the 26 April 2000 order is interlocutory. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Thus, because Plaintiff's appeal is from an interlocutory order that does not affect a substantial right, the appeal is subject to dismissal. N.C.G.S. § 1-277 (1999). Nevertheless, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we treat Plaintiff's appeal as a petition for writ certiorari and grant the petition. *See Kimzay Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 79, 404 S.E.2d 176, 177, *disc. review denied*, 329 N.C. 497, 407 S.E.2d 534 (1991).

Rule 17 of the North Carolina Rules of Civil Procedure provides that "[e]very claim shall be prosecuted in the name of the real party in interest." N.C.G.S. § 1A-1, Rule 17 (1999). "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Reliance Insurance Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977).

Generally, shareholders of a corporation or members of a company " 'cannot pursue individual causes of action against third parties for wrongs or injuries to the [corporation or company] that result in the diminution or destruction of the value of their stock [or membership interest].' " *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 335, 525 S.E.2d 441, 444 (2000) (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997)).[1] "The only two exceptions to this rule are: (1) a plaintiff alleges an injury 'separate and distinct' to himself, or (2) the injuries arise out of a 'special duty' running from the alleged wrongdoer to the plaintiff." *Id.* A "special duty" exists when the alleged wrongdoer owed a duty "directly to the shareholder [or member] as an individual." *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. A "special duty" may "arise from contract." *Id.*

In this case, Plaintiff alleged claims against Defendants for breach of contract and professional negligence arising out of Plaintiff's 16 May 1994 contract with Defendants. Plaintiff's claims do not allege injuries to Boykin-Dawson, L.L.C., and the record does not contain any evidence that Boykin-Dawson, L.L.C. was injured as a result of the alleged breach of contract and/or negligence of Defendants. Thus, the general rule that a shareholder or member cannot pursue an individual cause of action against a third party for *wrongs or injuries to the corporation or company* is not applicable to Plaintiff's claims. Plaintiff, therefore, is a real party in interest under Rule 17 and is not precluded from bringing his claims against Defendants. Additionally, even assuming Boykin-Dawson, L.L.C. suffered injuries as a result of the wrongs alleged in Plaintiff's complaint, Plaintiff's individual contract with Defendants creates a "special duty" running from Defendants to Plaintiff. Plaintiff, therefore, has a legal right to bring the claims in question and is a real party in

1. We acknowledge that the business entity at issue in *Energy Investors* was a partnership, while the business entity at issue in the case *sub judice* is a limited liability company. Neither party argues in its brief to this Court, and we see no reason why, the teaching of *Energy Investors* should not apply to limited liability companies.

interest. The trial court, therefore, erred by ordering Plaintiff to substitute Boykin-Dawson, L.L.C. as the real party in interest.[2] Accordingly, the trial court's 26 April 2000 order is reversed and this case is remanded.

Reversed and remanded.

Judge BRYANT concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

I disagree with the majority that this interlocutory appeal which affects no substantial right should be heard pursuant to the Court's discretion under Rule 2 of the North Carolina Rules of Appellate Procedure. I, therefore, respectfully dissent.

The order is interlocutory because it is not a final determination of all of the claims. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980). Interlocutory orders are appealable only as allowed by North Carolina Rule of Civil Procedure 54(b) or North Carolina General Statutes sections 1-277 and 7A-27(d). *See* N.C. Gen. Stat. § § 1A-1, Rule 54(b); 1-277; and 7A-27(d) (1999). Because the trial court's order does not contain a Rule 54(b) certification that there is no just reason for delay, plaintiff's right to an immediate appeal, if one exists, depends on whether the order affects a substantial right. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999). No substantial right has been identified by the majority. In fact, the majority concedes that "Plaintiff's appeal is from an interlocutory order that does not affect a substantial right." "If an appealing party has no right of appeal, an appellate court . . . should dismiss the appeal." *Waters v. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978) (citations omitted).

Rule 2 of the North Carolina Rules of Appellate Procedure provides for the suspension of rules by an appellate court.

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend

2. The parties do not raise the issue of whether Boykin is a necessary party pursuant to Rule 19 of the North Carolina Rules of Civil Procedure. We, therefore, do not address this issue.

> or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. The majority has pointed towards no manifest injustice that is prevented by hearing this appeal. The North Carolina Supreme Court has recently spoken to the limited nature of Rule 2 as follows:

> While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.

Steingress v. Steingress, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). I do not believe such public interest or manifest injustice is implicated in this case. Rather, the Court's ruling encourages the very kind of "fragmentary, premature, and unnecessary appeals" that the rules prohibiting the appeal of interlocutory orders are intended to prevent. *Waters*, 294 N.C. at 207, 240 S.E.2d at 343. Consequently, I would dismiss the appeal as interlocutory.

Based on the foregoing, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 JULY 2001

ASHTON v. CITY OF CONCORD No. 00-921	Cabarrus (00CVS130)	Affirmed
BOND v. HENDERSON No. 00-858	Cumberland (99CVS1111)	Affirmed
FOWLER v. CITY OF RALEIGH No. 00-1258	Ind. Comm. (921537)	Dismissed
HOBBS v. N.C. DEP'T OF HUMAN RES. No. 00-1010	Wake (96CVS11136)	Appeal dismissed
HOLLOWAY v. HENDERSON No. 00-782	Guilford (94CVD6243)	Reversed
HOLLOWAY v. HENDERSON No. 00-1127	Guilford (94CVD6243)	Reversed
IN RE HENDERSON No. 00-884	McDowell (97J56)	Affirmed
IN RE MOORE No. 00-1102	Halifax (99J91) (99J92) (99J93)	Affirmed
JONES v. N.C. DEP'T OF TRANSP. No. 00-239	Wake (98CVS5512)	Appeal dismissed
KENAN v. BASS No. 00-708	Sampson (96CVS1134)	Affirmed
McMILLAN v. N.C. DEP'T OF CORR. No. 00-1017	Moore (99CVS1379)	Affirmed
MOOREHEAD v. MOOREHEAD No. 00-1047	Cabarrus (98CVD1992)	Appeal dismissed
MORRIS COMMUNICATIONS CORP. v. ASHEVILLE ZONING BD. OF ADJUST. No. 00-1050	Buncombe (99CVS3870)	Dismissed
OUTDOOR COMMUNICATIONS, INC. v. ASHEVILLE ZONING BD. OF ADJUST. No. 00-1049	Buncombe (99CVS03831)	Dismissed
PAGE v. MOSES H. CONE MEM'L HOSP. No. 00-534	Ind. Comm. (048818)	Affirmed

STATE v. BRYNE No. 00-1038	Cabarrus (99CRS017073)	No error
STATE v. BRYSON No. 00-1232	Gaston (99CRS36485) (99CRS36486) (99CRS36488) (99CRS36491) (99CRS36492) (99CRS36493) (99CRS36494) (99CRS36496) (99CRS36795) (99CRS36796) (99CRS36797) (99CRS36798) (99CRS36799) (99CRS36800) (99CRS40253) (99CRS40254) (99CRS40255) (99CRS40256) (99CRS40257) (99CRS40291) (99CRS40292) (99CRS40293)	No error
STATE v. FOWLER No. 00-1020	Iredell (98CRS15206) (98CRS15207) (98CRS15208)	No error
STATE v. HENDERSON No. 00-1004	Franklin (98CRS2421) (98CRS2424)	No error
STATE v. McMOORE No. 00-797	Forsyth (98CRS53065)	No error
STATE v. RUDD No. 00-978	Craven (96CRS10754)	Affirmed
STATE v. STAMPER No. 00-936	Gaston (99CRS31293)	No error
STATE v. STEVENSON No. 00-946	Mecklenburg (97CRS29118) (97CRS31774)	Affirmed
STATE v. THOMPSON No. 00-1019	Davie (00CRS1215) (00CRS1803)	No error

STATE v. WARD No. 00-604	Caswell (98CRS562)	New trial
STATE v. WEAVER No. 00-915	Wake (98CRS65645) (98CRS108920) (99CRS04025) (99CRS20047)	No error
STATE v. WILKINS No. 00-1131	Beufort (99CRS6099)	No error
VELEZ v. DICK KEFFER PONTIAC-GMC TRUCK, INC. No. 00-242	Iredell (99CVS911)	Dismissed

AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

AMENDMENTS TO THE SETTLEMENT PROCEDURES IN DISTRICT COURT ACTIONS INVOLVING FAMILY FINANCIAL ISSUES

In the Supreme Court of North Carolina

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rules 3, 4, 7, 9, 15, 26, 27, 28, 31, 33, 40, and 42 are hereby amended as described below:

Rule 3(c) is amended to read as follows:

"(c) *Time for Taking Appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

"(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

"(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

"(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

"In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C. R. App. P. 27(b) and N.C. R. Civ. P. 6(e) shall not apply.

"If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party."

Rule 4(a)(2) is amended by striking all references to the number "10" and replacing them with the number "14."

Rule 4(d) is amended by striking the words "life imprisonment or."

Rule 7(b)(1) para 4, is amended by replacing the words "Appendix G" in the fourth paragraph with the words "Appendix B."

Rule 9(d)(2) is amended by adding the word "nondocumentary" in the beginning of the second sentence after the words "When an original."

Rule 15(d) is amended by adding the following sentence at the end:

"A motion for extension of time is not permitted."

Rule 26(g), para.1, is amended in the second sentence by replacing the numeral "11" to "12" before the words "point type."

Rule 27(c) is amended by adding the words "or the responses thereto" after the word "rehearing," and prior to the words "prescribed by these rules or by law" in the last sentence of the first paragraph.

Rule 28(b)(1) is amended is amended by replacing the phrase "table of contents" with the phrase "subject index."

Rule 28(b)(4) through (9) are renumbered (5) through (10), respectively.

Rule 28 is further amended by adding a new subsection (b)(4) as follows:

"(4) A statement of the grounds for appellate review. Such statement shall include citation of the statue or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."

Rule 28(c), para 1, first sentence is amended by replacing the phrase "table of contents" with the phrase "subject index."

Rule 28(c), para 1, second sentence is amended by inserting the phrase "statement of the grounds for appellate review," after the phrase "history of the case."

Rule 28(j), first sentence is amended by replacing the words "table and contents" with the phrase "subject index."

Rule 31(b) is amended by deleting the following sentence as follows:

"~~Two copies thereof shall be filed with the clerk.~~"

Rule 33(a) is amended in the fifth sentence, beginning "Only those counsel," by deleting the next to the last word so that it reads "heard in argument."

Rule 33 is amended by adding a new subsection (b) as follows and by renumbering the existing subsection (b) to (c):

"(b) Signatures on electronically filed documents. If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document from his or her computer to (1) list his or her name first on the document, and (2) place on the document under his or her signature line the following statement: 'I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.' "

Rule 40 is amended by changing "App. R." to "N.C. R. App. P."

Rule 42 is amended by changing "App. R. . . ." to "N.C. R. App. P. . . ."

Minor typographical and grammatical corrections have been made throughout the Rules, and they are highlighted in the redline version of the Rules released with this order.

The Appendixes to the North Carolina Rules of Appellate Procedure are amended as follows:

Appendix A is amended to read as follows:

APPENDIX A
TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	~~final agency determination~~ receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	~~10~~14	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil, agency)	~~10~~14	filing notice of appeal	7(a)(1) 18(b)(3)

Ordering Transcript (criminal indigent)	~~10~~14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript		~~receipt~~ service of order for transcript	7(b)(1)
(civil, non-capital criminal)	60		
(capital criminal)	120		
Serving proposed record on appeal		notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
(civil, non-capital criminal)	35		
(agency)	35		18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal		service of proposed record	11(c)
(civil, non-capital criminal)	21		
(capital criminal)	35		
(agency)	30	service of proposed record	18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE ~~APPELLATE RULES~~ RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)

Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
~~Filing appellant's brief (or mailing brief under Rule 26(a))~~	~~30~~	~~Clerk's mailing of printed record or from docketing record in civil appeals1 in forma pauperis~~	~~14(d) 15(g)~~
Filing appellant's brief (or mailing brief under Rule 26(a))		Filing notice of appeal Certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellee's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 ~~has been amended and now~~ grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." ~~(~~Rule 21(c).~~)~~

Appendix B is amended to read as follows:

APPENDIX B
FORMAT AND STYLE

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, ~~white~~ plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will

be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least ~~10~~ 12-point type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS.

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****
(TITLE OF DOCUMENT)
****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner

is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the court of appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled ~~to a~~ NEW BRIEF.

INDEXES

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a five-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page #), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation. (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double-spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R. pp. 38-40) References to the transcript, if used, should be made in similar manner. (T. p. 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example

below. The name, address, ~~and~~ telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained)

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Appendix C is amended by rewriting item 23 in Tables 1 and 3 and item 13 in Table 2 to read as follows:

"23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal."

Appendix C is amended by changing all occurrences of "Record, p." to "R. p." and all occurrences of "Transcript," to "T."

Appendix D(1)(a) is amended by deleting the words "or of imprisonment for life" after the word "death."

Appendix D(1)(b) is amended by deleting the words "Life Imprisonment or" after the words "Sentence of" and before the word "Death" and by deleting the words "(imprisonment for life)" before the words "Respectfully submitted."

Appendix D is amended by striking all dates ending with "19__" and replacing them with "2___."

Appendix E is amended by adding the following section after the section entitled "Statement of the Case":

"STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

"Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review."

Appendix F is amended by changing the last paragraph as follows:

"Photocopying charges are $.20 per page. The ~~electronic~~ facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter. " ~~The electronic transmission fee for documents received by the clerk's office for filing pursuant to Rule 26(a)(2) is $10.00 per document~~ ~~filed~~."

These amendments to the North Carolina Rules of Appellate Procedure and the Appendixes thereto shall be effective 31 October 2001.

Adopted by the Court in conference the 18th day of October 2001. The Appellate Division Reporter shall publish the Rules in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals, at the earliest practicable date. The Rules in their entirety shall also be placed on the Judicial Branch web page at www.aoc.state.nc.us.

Edmunds, J.
For the Court

Witness my hand and the Seal of the Supreme Court of North Carolina, this the 18th day of October, 2001.

Christie Speir Cameron
Clerk of the Supreme Court

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 13 June 1975, with amendments received through 18 October 2001.

These rules were promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They are effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N.C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N.C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N.C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

An Appendix of Tables and Forms prepared by the Drafting Committee, as revised, is published with the rules for its possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, it is not an authoritative source on parity with the rules.

Article I
Applicability of Rules

Article II
Appeals from Judgments and Orders of Superior Courts and District Courts

Article III
Review by Supreme Court of Appeals
Originally Docketed in Court of Appeals:
Appeals of Right; Discretionary Review

Article VI
General Provisions

Appendixes

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I
APPLICABILITY OF RULES

RULE 1
SCOPE OF RULES: TRIAL TRIBUNAL DEFINED

(a) *Scope of Rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) *Rules Do Not Affect Jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) *Definition of Trial Tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—1(a), (c)—effective 1 February 1985.

RULE 2
SUSPENSION OF RULES

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

ARTICLE II
APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

RULE 3
APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

(1) Termination of parental rights, G.S. 7A-289.34.

(2) Juvenile matters, G.S. 7A-666.

(c) *Time for Taking Appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C. R. App. P. 27(b) and N.C. R. Civ. P. 6(e) shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

ADMINISTRATIVE HISTORY

Adopted 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a), (b), (c), (d)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—3(b)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
28 July 1994—3(c)—1 October 1994;
6 March 1997—(c)—effective upon adoption 6 March 1997;
18 October 2001—3(c)—effective 31 October 2001.

RULE 4
APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) *Manner and Time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order.

(b) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or

order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 4 October 1978—4(a)(2)—effective 1 January 1979;
13 July 1982—4(d);
3 September 1987—4(d)—effective for all judgments of the superior court entered on or after 24 July 1987;
8 December 1988—4(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—4(a) 8 December 1988 amendment rescinded prior to effective date;
18 October 2001—4(a)(2), (d) (subsection (d) amended to conform with G.S. § 7A-27) effective 31 October 2001.

RULE 5
JOINDER OF PARTIES ON APPEAL

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after Joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 6
SECURITY FOR COSTS ON APPEAL

(a) *In Regular Course.* Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) *In Forma Pauperis Appeals.* An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) *Filed with Record on Appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) *Dismissal for Failure to File or Defect in Security.* For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) *No Security for Costs in Criminal Appeals.* Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—6(e)—effective 1 February 1985;
6 July 1990—6(c)—effective 1 October 1990.

RULE 7
PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) *Civil Cases.* Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within 14 days after the service of the written documentation of the appellant, shall arrange for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

(2) *Criminal Cases.* In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall arrange for the transcription of the proceedings as in civil cases.

Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries spec-

ify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) *Production and Delivery of Transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date the clerk of the trial court serves the order upon the person designated to prepare the transcript, that person shall have 60 days to procure and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these Rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for addi-

tional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
REPEALED: 1 July 1978.
(See note following Rule 17.)
Re-adopted: 8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.
Amended: 8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—7(a)(1), (a)(2), and (b)(1)—effective 1 October 1990;
21 November 1997—effective 1 February 1998;
8 April 1999—7(b)(1), para. 5;
18 October 2001— 7(b)(1), para. 4—effective 31 October 2001.

RULE 8
STAY PENDING APPEAL

(a) *Stay in Civil Cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the Writ of Supersedeas may be made to the appellate court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in Criminal Cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—8(b)—effective 1 February 1985;
6 March 1997—8(a)—effective 1 July 1997.

RULE 9
THE RECORD ON APPEAL

(a) *Function; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) *Composition of the Record in Civil Actions and Special Proceedings.* The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. assignments of error set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceeding was made with an electronic recording device.

(2) *Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.* The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) *Composition of the Record in Criminal Actions.* The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. assignments of error set out in the manner provided in Rule 10; and

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(b) *Form of Record; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of Arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of Unnecessary Matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing Dates and Signatures on Papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel Identified.* The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R. p. ____)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T. p. _____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) *Additions and Amendments to Record on Appeal.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate

court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) *When Testimonial Evidence Narrated—How Set Out in Record.* Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) *Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.* Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis

for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) *Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.* Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) *Presentation of Discovery Materials.* Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like,

pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) *Electronic Recordings.* When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) *Models, Diagrams, and Exhibits of Material.*

(1) *Exhibits.* Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) *Transmitting Exhibits.* Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court. When an original nondocumentary exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) *Removal of Exhibits from Appellate Court.* All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by with-

drawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—9(a)(3)(h), 9(d)(2)—effective 1 October 1990;
6 March 1997—9(b)(5)—effective upon adoption 6 March 1997;
21 November 1997—9(a)(1)(j)-(l), 9(a)(3)(i)-(k), 9(c)(5)—effective 1 February 1998;
18 October 2001—9(d)(2)—effective 31 October 2001.

RULE 10
ASSIGNING ERROR ON APPEAL

(a) *Function in Limiting Scope of Review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving Questions for Appellate Review.*

(1) *General.* In order to preserve a question for appellate review, a party must have presented to the trial court a

timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) *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.

(3) *Sufficiency of the Evidence.* A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of Error.*

(1) *Form; Record References.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) *Jury Instructions.* Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) *Sufficiency of Evidence.* In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) *Assigning Plain Error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-Assignments of Error by Appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

RULE 11
SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in

accordance with the provisions of Rule 9. Within 21 days (35 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appear in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Judicial Order or Appellant's Failure to Request Judicial Settlement.* Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have served, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so served, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settle-

ment process with the order settling the record on appeal. Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) [Reserved.]

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

8 December 1988—11(a), (b), (c), (e), (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

26 July 1990—11(b), (c), (d)—effective 1 October 1990;

6 March 1997—11(c)—effective upon adoption 6 March 1997;

21 November 1997—11(a)—effective 1 February 1998.

RULE 12
FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—12(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
6 March 1997—12(c)—effective upon adoption 6 March 1997.

RULE 13
FILING AND SERVICE OF BRIEFS

(a) *Time for Filing and Service of Briefs.*

(1) *Cases Other Than Death Penalty Cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of dock-

eting the record on appeal in the appellate court. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(2) *Death Penalty Cases.* Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant in a criminal appeal which includes a sentence of death shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 21 days after service of the brief of the State-appellee.

(b) *Copies Reproduced by Clerk.* A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) *Consequence of Failure to File and Serve Briefs.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 October 1980—13(a)—effective 1 January 1981;
27 November 1984—13(a), (b)—effective 1 February 1985;
30 June 1988—13(a)—effective 1 September 1988;
8 June 1989—13(a)—effective 1 September 1989.

ARTICLE III
REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

RULE 14
APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) *Notice of Appeal; Filing and Service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chairman of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) *Content of Notice of Appeal.*

(1) *Appeal Based Upon Dissent in Court of Appeals.* In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from

which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) *Briefs.*

(1) *Filing and Service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall

file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) *Failure to File or Serve.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;
27 November 1984—14(a), (b), (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
30 June 1988—14(b)(2), (d)(1)—effective 1 September 1988;
8 June 1989—14(d)(1)—effective 1 September 1989;
6 March 1997—14(a)—effective 1 July 1997.

RULE 15
DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(a) *Petition of Party.* Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap.

(b) *Same; Filing and Service.* A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) *Same; Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by

that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response. A motion for extension of time is not permitted.

(e) *Certification by Supreme Court; How Determined and Ordered.*

(1) *On Petition of a Party.* The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) *On Initiative of the Court.* The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) *Orders; Filing and Service.* Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Filing; Copies.* When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the

Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) *Filing and Service of Briefs.*

(1) *Cases Certified Before Determination by Court of Appeals.* When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) *Cases Certified for Review of Court of Appeals Determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(3) *Copies.* A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of

Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) *Failure to File or Serve.* If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) *Discretionary Review of Interlocutory Orders.* An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) *Appellant, Appellee Defined.* As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 7 October 1980—15(g)(2)—effective 1 January 1981;
18 November 1981—15(a).
30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988;
8 December 1988—15(i)(2)—effective 1 January 1989;
8 June 1989—15(g)(2)—effective 1 September 1989;
6 March 1997—15(b)—effective 1 July 1997;
18 October 2001—15(d)—effective 31 October 2001.

RULE 16
SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) *Scope of Review in Appeal Based Solely Upon Dissent.* Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) *Appellant, Appellee Defined.* As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 November 1983—16(a), (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984.
30 June 1988—16(a), (b)—effective 1 September 1988;
26 July 1990—16(a)—effective 1 October 1990.

RULE 17
APPEAL BOND IN APPEALS UNDER G.S. §§ 7A-30, 7A-31

(a) *Appeal of Right.* In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) *Discretionary Review of Court of Appeals Determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary Review by Supreme Court Before Court of Appeals Determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in Forma Pauperis.* No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 19 June 1978—effective 1 July 1978;
26 July 1990—17(a)—effective 1 October 1990.

Note to 1 July 1978 Amendment:

Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

ARTICLE IV
DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

RULE 18
TAKING APPEAL; RECORD ON APPEAL—COMPOSITION AND SETTLEMENT

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) *Time and Method for Taking Appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of

a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as he deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) *Composition of Record on Appeal.* The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order or opinion appeal is taken, the session at which the judgment, order or opinion was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency, including a Form 44 for all cases which originate from the Industrial Commission, to be filed with the agency to present and define the matter for determination;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that

the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) assignments of error to the actions of the agency, set out as provided in Rule 10; and

(11) a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) *By Agreement.* Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule

18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By Conference or Agency Order; Failure to Request Settlement.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20

days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further Procedures.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) *Extensions of Time.* The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985;
26 July 1990—18(b)(3), (d)(1), (d)(2)—effective 1 October 1990;
6 March 1997—18(c)(2), (c)(4)—effective 1 July 1997;
21 November 1997—18(c)(11)—effective 1 February 1998.

RULE 19
[RESERVED]

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977—19(d).
REPEALED: 27 February 1985—effective 15 March 1985.

RULE 20
MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 February 1985—effective 15 March 1985.

ARTICLE V
EXTRAORDINARY WRITS

RULE 21
CERTIORARI

(a) *Scope of the Writ.*

(1) *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the Judgments and Orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) *Petition for Writ; to Which Appellate Court Addressed.* Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which

appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) *Response; Determination by Court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

(f) *Petition for Writ in Post Conviction Matters—Death Penalty Cases.* A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 November 1981—21(a), (e);
27 November 1984—21(a)—effective 1 February 1985;
3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987;
8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989;
6 March 1997—21(c), (f)—effective 1 July 1997.

RULE 22
MANDAMUS AND PROHIBITION

(a) *Petition for Writ; to Which Appellate Court Addressed.* Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) *Response; Determination by Court.* Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 23
SUPERSEDEAS

(a) *Pending Review of Trial Tribunal Judgments and Orders.*

(1) *Application—When Appropriate.* Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) *Same—How and to Which Appellate Court Made.* Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) *Pending Review by Supreme Court of Court of Appeals Decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) *Petition: Filing and Service; Content.* The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other

parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) *Response; Determination by Court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Temporary Stay.* Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 2 December 1980—23(b)—effective 1 January 1981;
6 March 1997—23(e)—effective 1 July 1997.

RULE 24
FORM OF PAPERS: COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

ARTICLE VI
GENERAL PROVISIONS

RULE 25
PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply with Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to

comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989;
6 March 1997—25(a)—effective upon adoption 6 March 1997.

RULE 26
FILING AND SERVICE

(a) *Filing.* Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this Rule.

(1) **Filing by Mail:** Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(2) **Filing by Electronic Means:** Filing in the appellate courts may be accomplished by electronic means by use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court.

In all cases where a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the elec-

tronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have their account drafted electronically by following the procedures described at the electronic filing site, or they must forward the applicable filing fee for their document by first class mail, contemporaneously with the transmission.

(b) *Service of All Papers Required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) *Manner of Service.* Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel(s)'s correct and current electronic mail address(es) or service may be accomplished in the manner described previously in this subsection.

(d) *Proof of Service.* Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) *Joint Appellants and Appellees.* Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) *Numerous Parties to Appeal Proceeding Separately.* When there are unusually large numbers of appellees or appellants pro-

ceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) *Form of Papers; Copies.* Papers presented to either appellate court for filing shall be letter size (8 1/2 x 11") with the exception of wills and exhibits. All printed matter must appear in at least 12-point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a), (g)—effective 1 September 1988;
26 July 1990—26(a)—effective 1 October 1990;
6 March 1997—26(b), (g)—effective 1 July 1997;

4 November 1999—effective 15 November 1999;
18 October 2001—26(g), para. 1—effective 31 October 2001.

RULE 27
COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) *Motions for Extension of Time in the Trial Division.* The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) *Motions for Extension of Time in the Appellate Division.* All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

(d) *Motions for Extension of Time; How Determined.* Motions for extension of time made in any court may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a), (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—27(c), (d)—effective 1 October 1990;
18 October 2001—27(c)—effective 31 October 2001.

RULE 28
BRIEFS: FUNCTION AND CONTENT

(a) *Function.* The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) *Content of Appellant's Brief.* An appellant's brief in any appeal shall contain, under appropriate headings, and in the form pre-

scribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statue or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a nonargumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. 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. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument,

with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, office address and telephone number.

(9) The proof of service required by Rule 26(d).

(10) The appendix required by Rule 28(d).

(c) *Content of Appellee's Brief; Presentation of Additional Questions.* An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) *Appendixes to Briefs.* Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) *When Appendixes to Appellant's Brief Are Required.* Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) *When Appendixes to Appellant's Brief Are Not Required.* Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) *When Appendixes to Appellee's Brief Are Required.* Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) *Format of Appendixes.* The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) *References in Briefs to the Record.* References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) *Joinder of Multiple Parties in Briefs.* Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) *Additional Authorities.* Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) *Reply Briefs.* Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided:

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record

and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

(j) *Page Limitations Applicable to Briefs Filed in the Court of Appeals.* Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or amicus curiae, formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of subject index, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b), (c)—effective 1 October 1981;
12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), (i)—effective 1 September 1988;
8 June 1989—28(h), (j)—effective 1 September 1989;
26 July 1990—28(h)(2)—effective 1 October 1990;
18 October 2001—28(b)(4)-(10), (c), (j)—effective 31 October 2001.

RULE 29
SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) *Sessions of Court:*

(1) *Supreme Court.* The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) *Court of Appeals.* Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) *Calendaring of Cases for Hearing.* Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel

of record of the setting of an appeal for hearing by mailing a copy of the calendar.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1);
26 July 1990—29(b)—effective 1 October 1990.

RULE 30
ORAL ARGUMENT

(a) *Order and Content of Argument.* The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) *Time Allowed for Argument.*

(1) *In General.* Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) *Numerous Counsel.* Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-Appearance of Parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on Written Briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) *Decision of Appeal Without Publication of an Opinion.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) *Pre-Argument Review; Decision of Appeal Without Oral Argument.*

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 December 1975—30(e);
3 May 1976—30(f);
5 February 1979—30(e);
10 June 1981—30(f)—to become effective 1 July 1981.

RULE 31
PETITION FOR REHEARING

(a) *Time for Filing; Content.* A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) *How Addressed; Filed.* A petition for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered.

(c) *How Determined.* Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) *Procedure When Granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 30 days after the case is certified for rehearing, and the opposing party's brief,

within 30 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) *Stay of Execution.* When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) *Waiver by Appeal from Court of Appeals.* The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) *No Petition in Criminal Cases.* The courts will not entertain petitions for rehearing in criminal actions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d);
8 December 1988—31(b), (d)—effective 1 January 1989;
18 October 2001—31(b)—effective 31 October 2001.

RULE 32
MANDATES OF THE COURTS

(a) *In General.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of Issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—32(b)—effective 1 February 1985.

RULE 33
ATTORNEYS

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Signatures on electronically filed documents.* If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document from his or her computer to (1) list his or her name first on the document, and (2) place on the document under his or her signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it."

(c) *Agreements.* Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 October 2001—33(a)-(c)—effective 31 October 2001.

RULE 33A
SECURE LEAVE PERIODS FOR ATTORNEYS

(a) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Appellate Division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(b) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attor-

ney's secure leave periods pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(c) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the Appellate Division during that secure leave period.

(d) *Content of Designation.* The designation shall contain the following information: (1) the attorney's name, address, telephone number and state bar number, (2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end, (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts, (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the Appellate Division in which the attorney has entered an appearance.

(e) *Where to File Designation.* The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the Clerk of the Supreme Court; (2) if the attorney has entered an appearance in the Court of Appeals, in the office of the Clerk of Court of Appeals.

(f) *When to File Designation.* To be effective, the designation shall be filed: (1) no later than ninety (90) days before the beginning of the secure leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period.

ADMINISTRATIVE HISTORY

Adopted: 6 May 1999—effective 1 January 2000 for all actions and proceedings pending in the appellate division on and after that date.

RULE 34
FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989;
8 April 1999—34(d).

RULE 35
COSTS

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to Costs in Mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) *Costs of Appeal Taxable in Trial Tribunals.* Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) *Execution to Collect Costs in Appellate Courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 36
TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) *When Particular Judge Not Specified by Rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have

such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) *Upon Death, Incapacity, or Absence of Particular Judge Authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

ADMINISTRATIVE HISTORY

Adopted: 3 June 1975.

RULE 37
MOTIONS IN APPELLATE COURTS

(a) *Time; Content of Motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the

motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 38
SUBSTITUTION OF PARTIES

(a) *Death of a Party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for Other Causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) *Public Officers; Death or Separation from Office.* When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 39
DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to Be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court, on paper, microform, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—39(b)—effective 1 January 1989.

RULE 40
CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by N.C. R. App. P. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 October 2001—effective 31 October 2001.

RULE 41
APPEAL INFORMATION STATEMENT

(a) The Court of Appeals has adopted an APPEAL INFORMATION STATEMENT which will be revised from time to time. The purpose of the APPEAL INFORMATION STATEMENT is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file and serve the APPEAL INFORMATION STATEMENT as set out in this Rule.

(1) The Clerk of the Court of Appeals shall furnish an APPEAL INFORMATION STATEMENT form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

(3) If any party to the appeal concludes that the APPEAL INFORMATION STATEMENT is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within 7 days of the service of the APPEAL INFORMATION STATEMENT and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

ADMINISTRATIVE HISTORY

Adopted: March 1994—effective 15 March 1994.

RULE 42
TITLE

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "N.C. R. App. P. . . .," is also appropriate.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Renumbered: Effective 15 March 1994.
Amended: 18 October 2001—effective 31 October 2001.

APPENDIXES TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 1 July 1989
Including Amendments through 18 October 2001

Appendix A: Timetables for Appeals

Appendix B: Format and Style

Appendix C: Arrangement of Record on Appeal

Appendix D: Forms

Appendix E: Content of Briefs

Appendix F: Fees and Costs

APPENDIX A
TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	14	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil, agency)	14	filing notice of appeal	7(a)(1)18(b)(3)
Ordering Transcript (criminal indigent)	14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript		service of order for transcript	7(b)(1)
(civil, non-capital criminal)	60		
(capital criminal)	120		
Serving proposed record on appeal		notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
(civil, non-capital criminal)	35		
(agency)	35		18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal		service of proposed record	11(c)
(civil, non-capital criminal)	21		
(capital criminal)	35		
(agency)	30	service of proposed record	18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)

Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))		Filing notice of appeal Certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellee's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." Rule 21(c).

Appendix A amended effective 1 October 1990; 6 March 1997; 31 October 2001.

APPENDIX B

FORMAT AND STYLE

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12-point type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS.

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the court of appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a five-inch line. The form of the index for a record on

appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one

copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation. (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double- spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R. pp. 38-40) References to the transcript, if used, should be made in similar manner. (T. p. 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) ATTORNEY, COUNSELOR, LAWYER & HOWE

By: _____
John Q. Howe

By: _____
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Appendix B amended effective 31 October 2001.

APPENDIX C
ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b.
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c.
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order
*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court

16. Court's instructions to jury, per Rule 9(a)(1)f.
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items required by Rule 9(a)(1)i.
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a.
3. Statement of organization of superior court, per Rule 9(a)(2)b.
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c.
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)g.
11. Entries showing settlement of record on appeal, extension of time, etc
12. Assignments of error, per Rule 9(a)(2)h.
13. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b.
4. Warrant

5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors
*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f., 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extension of time, etc
22. Assignments of error, per Rule 9(a)(3)j.
23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal

Table 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C. R. Civ. P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

   R. p. 4.

2. The court's denial of defendant's motion under N.C. R. Civ. P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the com-

plaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

R. p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C. R. Civ. P. 35, on the ground that on the record before the court, good cause for the examination was shown.

T. vol. 1, p. 137, lines 17-20.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

R. p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

T. vol. 1, p. 295, line 5, through p. 297, line 12.
T. vol. 1, p. 299, lines 1-8.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

R. p. 45.

3. The court's instructions to the jury, R. pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

4. The court's instructions to the jury, R. pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

R. p. 80; T. vol. 3, p. 764, lines 8 - 23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   R. p. 20.

2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.

   R. p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   R. p. 27.

Appendix C amended effective 1 October 1990; 31 October 2001.

APPENDIX D
FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. NOTICES OF APPEAL

a. to Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant)(Name of Party) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in the (District)(Superior) Court of (name) County, (describing it).

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for (Plaintiff)(Defendant)
(Address and Telephone)

b. to Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

c. to the Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant)(Name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . .

(Constitutional question—G.S. 7A-30(1)) . . . directly involves substantial questions arising under the Constitution(s)(of the United States)(and)(or)(of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of United States and under

Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search warrant, thereby depriving defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp. 7 through 10). This constitutional issue was determined erroneously by the Court of Appeals."

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—G.S. 7A-30(2))... was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues which are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues as with the constitutional question appeal, above. Any additional issues desired to be raised in the Supreme Court where the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for (Plaintiff)(Defendant)-Appellant
(Address and Telephone)

2. APPEAL ENTRIES

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(a) showing appeal duly taken by oral notice under App. Rule 3(b) or 4(a), and

2) the entry required by App. Rule 9(a) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals)(Supreme Court). (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed 15 days thereafter within which to serve objections or a proposed alternative record on appeal.

This the ___ day of _____, 2__.

s/_____
Judge Presiding

3. PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31.

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant),(Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which pro-

vide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis, of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for (Plaintiff)(Defendant) Appellant
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in case.

4. PETITION FOR WRIT OF CERTIORARI

To seek review (1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; (2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (name) County Superior (District) Court][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g. failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [Superior Court of (name) County] [North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon errors [(to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure][stated as follows: (here list the errors, as issues, in the manner provided for the petition for discretionary review)]; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g. fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court of _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. Section _____ inadequate; or that trial judge has refused to stay exe-

cution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court of _____ County)][North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment) (order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the(Appeal)(discretionary review) (review by extraordinary writ)(now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judg-

ment)(order)(decree) which is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court of _____ County, sentenced the defendant to death, execution being set for (date of execution)

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

Appendix D amended effective 6 March 1997; 31 October 2001.

APPENDIX E
CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the Index. Page reference should be made to the first citation of the authority in each question to which it pertains.

TABLE OF CASES AND AUTHORITIES

* * * * *

QUESTIONS PRESENTED

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1988, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1988, the transcript was ordered on October 15, 1988, and was delivered to parties on December 10, 1988.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 12, 1989. The record was filed and docketed in the Supreme Court on February 25, 1989.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial

right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

> I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.
>
> ASSIGNMENT OF ERROR NO. 2
> (T. p. 45, lines 20-23)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the center of the page.

The Certificate of Service is then shown with centered, upper case heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should not compile the entire transcript into an appendix to support issues involving directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The Appendix should include a table of contents, showing the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix. For example:

CONTENTS OF APPENDIX

* * * * *

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

Appendix E amended effective 31 October 2001.

APPENDIX F
FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rule 6 and 17. The bond should be filed contemporaneously with the

record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $1.75 per printed page. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter.

Appendix F amended effective 31 October 2001.

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the Settlement Procedures in District Court Actions Involving Family Financial Issues

WHEREAS, section 7A-38.4A of the North Carolina General Statutes established pretrial settlement procedures in district court actions, and

WHEREAS, N.C.G.S. § 7A-38.4A (k) and (o) enables this Court to implement section 7A-38.4A by adopting rules and by adopting standards for certification of mediators and procedures for the enforcement of those standards,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), the Settlement Procedures in District Court Actions Involving Family Financial Issues are adopted to read as attached hereto.

These Rules shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. They shall be effective on the 16th day of October, 2001.

Adopted by the Court in Conference this 16th day of October, 2001.

s/Butterfield, J.
Butterfield, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) **Equitable Distribution Scheduling Conference.** At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties:

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a medi-

ated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discus-

sion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable

to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at first session.

B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL. The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms.

Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order,

the mediator may schedule another session if the mediator determines that it would assist the parties.

C. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court upon the recommendation of the Dispute Resolution Commission, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j).

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Conference. The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the completion of the conference, whether or not an agreement was reached by the parties.

If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case, the person who informed the mediator that settlement had been reached, and the person who will present final documents to the court.

If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. The mediator shall distribute to the parties and their attorneys at the conference an evaluation form prepared by the Dispute Resolution Commission. All participants are encouraged to fill out and return the forms to the mediator to further the mediator's professional development.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.

C. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B.andC. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

E. POSTPONEMENT FEES. As used herein, the term "postponement" shall mean rescheduling or not proceeding with a settlement conference once a date for the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not postpone the conference without good cause. A con-

ference may be postponed only after notice to all parties of the reason for the postponement, payment to the mediator of a postponement fee as provided below or as agreed when the mediator is selected, and consent of the mediator and the opposing attorney.

In cases in which the court appoints the mediator, if a settlement conference is postponed without good cause within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed without good cause within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless agreed to by the parties. Postponement fees are in addition to the one-time, per case administrative fee provided for in Rule 7.B.

F. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) shall subject that party to the contempt power of the court.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution; or

2. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as an attorney and/or judge of the General Court of Justice for at least four years who is either:

   (a.) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code.

The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b.) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission.

C. Be a member in good standing of the State Bar of one of the United States or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed with the permission of the parties five mediated settlement conferences as a neutral observer:

(1) three of which shall be settlement conferences involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

(2) two of which may be mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Agree to be placed on at least one district's mediator appointment list and accept appointments, unless the mediator has a conflict of interest which would justify disqualification as mediator.

K. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.)

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or

has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8.

The Dispute Resolution Commission may certify applicants who satisfy the requirements of Rule 8.B. and 8.D. within six (6) months of the adoption of these Rules if they have satisfied, on the date of the adoption of these Rules, all other requirements of Rule 8 as it existed immediately prior to the adoption of these Rules.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to these rules shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections.

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Knowledge of communication and information gathering skills.

(4) Standards of conduct for mediators.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8) either in the ACR approved training or in some other acceptable course.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the

parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all

parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding conducted under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No settlement agreement reached at a settlement proceeding conducted pursuant to these Rules shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any of these agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants;

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) **Reporting Results of the Proceeding.** The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11, 12 and 13 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. **NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. **PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder

shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case.

Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) **Report of Evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

H. **EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS.** If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. **Settlement Judge.** A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. **Conducting the Conference.** The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. **Confidential Nature of the Conference.** Judicial settlement conferences shall be conducted in private. No steno-

graphic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

(C) The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d),52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

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Municipality's improper maintenance of storm drainage pipe—duty of reasonable care—Although defendant municipality contends that plaintiff failed to meet her burden of proof in a negligence action to show that defendant municipality willfully or wantonly injured plaintiff based on the fact that the addition to plaintiff's house is built over the storm drainage pipe thereby encroaching on defendant's easement and making plaintiff a trespasser, defendant owed plaintiff the standard duty of reasonable care. **Howell v. City of Lumberton, 695.**

Municipality's improper maintenance of storm drainage pipe—foreseeability—breach of duty—The trial court did not err in a negligence action by concluding that defendant municipality's improper maintenance of a storm drainage pipe running under plaintiff's property made it foreseeable that a sinkhole would damage plaintiff's house and that defendant breached its duty to maintain the storm pipe. **Howell v. City of Lumberton, 695.**

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Municipality's improper maintenance of storm drainage pipe—not a continuing and permanent trespass and nuisance—The trial court did not err by failing to grant defendant municipality's motion for involuntary dismissal on plaintiff's negligence claim arising out of defendant's improper maintenance of a storm drainage pipe running under plaintiff's property even though defendant contends plaintiff's claim should be characterized as a continuing and permanent trespass and nuisance making it an inverse condemnation action under N.C.G.S. § 40A-51. **Howell v. City of Lumberton, 695.**

Negligence—contact with electrical wire—no notice to defendant of break in insulation—The trial court did not err by granting summary judgment for defendant city in a negligence action by a Cablevision installer who was injured in a fall after coming into contact with an electrical wire owned by defendant. Although plaintiff alleged that a tree branch had grown around the wire, breaking its insulation, plaintiff did not set forth facts establishing that

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quacy as a class representative is a criminal record that includes worthless check charges, but that record does not render her inadequate to represent the interests of the proposed class when weighed against all other factors. **Pitts v. American Sec. Ins. Co., 1.**

Certification of class—dispositive motions—Dispositive motions such as summary judgment are not properly considered until after a ruling on a motion for class certification. **Pitts v. American Sec. Ins. Co., 1.**

Certification of class—numerosity requirement—A class action plaintiff's allegations of the existence of a class "reasonably believed to be in excess of 1,000 persons" and that the identity of the proposed class members could be determined from defendants' records was sufficient to satisfy the numerosity requirement for certification in an action arising from a collateral protection insurance program. **Pitts v. American Sec. Ins. Co., 1.**

Certification of class—superior method of determining claim—The trial court erred when it concluded that a class action was not the superior method to determine claims arising from a a collateral protection insurance program based on findings that this was a case of de minimus damages, that many of the causes of action required individualized proof, that damages would be based upon individual situations, and that the expansive nature of the proposed class would result in excessive transaction costs and difficulties. The record did not contain any evidence of the amount of damages the class members would recover nor any evidence to support the finding of excessive transaction costs and difficulties, while the findings regrading individualized issues of proof are collateral matters that do not outweigh the useful purposes of bringing a class action. **Pitts v. American Sec. Ins. Co., 1.**

Existence of class—individual defenses—actions for fraud—common issues of law and fact—The trial court erred when it found that a class did not exist in an action arising from a collateral protection insurance program where the court considered possible defenses and found that a class necessarily does not exist in actions for fraud. The relevant inquiry is whether the common issues of law and fact predominate over the individual merits and damages. The potential individual issues here are outweighed by the common issues of law and fact. **Pitts v. America Sec. Ins. Co., 1.**

Motion for certification—prerequisites—When considering a motion for class certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, the trial court must first determine whether the party seeking certification has met its burden of showing that the three prerequisites to certification have been met: the first is the existence of a class; the second is that the named class representative will fairly and adequately represent the interests of all class members; and the third is that the proposed class members are so numerous that it is impractical to bring them all before the court. If all the prerequisites are established, the court must determine whether a class action is superior to other available methods for the adjudication of the controversy. **Pitts v. America Sec. Ins. Co., 1.**

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Dismissal for lack of subject matter jurisdiction—not a judgment on the merits—The trial court did not err by not dismissing a petition for enforcement

CONSTITUTIONAL LAW—Continued

allowed defendant's N.C.G.S. § 15A-1227 motion to dismiss based on insufficiency of the evidence and defendant's N.C.G.S. § 15A-1414 motion for appropriate relief is not barred by the double jeopardy clause because: (1) a dismissal during a pretrial stage of the proceedings does not prohibit further prosecution of defendant under the double jeopardy clause; (2) the § 15A-1227 motion to dismiss was not timely because it was not made before the end of the session; (3) the § 15A-1414 motion for appropriate relief was not proper because it was not made after a verdict; and (4) defendant's motions thus must be treated as "pretrial" motions, and jeopardy had not attached at the time of the court's order. Furthermore, the trial court was without authority to rule on defendant's motions because they were improper under §§ 15A-1227 and 15A-1414. **State v. Allen, 386.**

Double jeopardy—possession with intent to sell or deliver cocaine—drug taxation—The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine when it required defendant to pay taxes on the drugs seized from him. **State v. Crenshaw, 574.**

Due process—domestic contempt action—not advised of right to counsel—not indigent—A defendant in a domestic action which included a motion for contempt for failure to pay child support was not denied due process because she was not advised of her right to counsel where the record contained sufficient facts from which it could be concluded that she was not indigent. She was not entitled to appointed counsel and her due process rights were not violated by allowing her to proceed pro se. **King v. King, 391.**

Due process—no knowing use of false testimony—The State did not knowingly use false testimony in violation of defendant's trial for murder, kidnapping and armed robbery by its use of a codefendant's testimony that three shots were fired at the victim rather than four as shown by the autopsy, although the State had argued in a second codefendant's trial that the codefendant-witness had not testified truthfully in that trial, since the exact number of shots fired and the identity of the person firing a fourth shot was immaterial and the inconsistencies were for the jury to resolve. **In re Appeal of Owens, 349.**

Due process—property tax valuation—notice of valuation method—There was no due process violation in a property tax valuation review where the taxpayers contended that the county used a valuation method not disclosed to them until the hearing, but the matter was heard on remand, both parties were aware of the valuation methods being advocated by the other, and both were allowed an opportunity to persuade the Property Tax Commission of the proper method. **In re Appeal of Owens, 349.**

Habitual offender—prior felony conviction—invalid waiver of counsel—An habitual felon defendant carried his burden of showing by a preponderance of the evidence that he had not waived his right to counsel for a prior felony conviction used to support the habitual felony indictment where he had said he "didn't need no lawyer" when asked by a judge in a prior felony proceeding if he wanted a lawyer, but the trial judge did not make findings showing consideration of defendant's age at the time he signed the waiver, his ninth-grade education, or his time in jail prior to the waiver. **State v. Fulp, 428.**

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$1,930. Although the court did not make any findings regarding the timing of the settlement offer or the exercise of superior bargaining power, the date was shown by the undisputed evidence and the court made adequate findings on the whole record to support an award of attorney fees. Additionally, it was noted that there is nothing in N.C.G.S. § 6-21.1 that limits the trial court's consideration of unwarranted refusals to settle by individual defendants. **Olson v. McMillian, 615.**

Attorney fees—offer of judgment—judgment finally obtained—The trial court did not err in a negligence action arising out of an automobile accident by awarding plaintiff costs and attorney fees under N.C.G.S. § 6-21.1 and N.C.G.S. § 1A-1, Rule 68 based on the conclusion that the judgment finally obtained exceeded the offer of judgment of $4,801.00 where plaintiff was awarded $1,134.30 in costs plus $4,880.00 in attorney fees in addition to the $4,500.00 awarded by the jury verdict. **Thorpe v. Perry-Riddick, 567.**

Attorney fees—reasonable value of services—The trial court did not abuse its discretion in a negligence action arising out of an automobile accident by awarding attorney fees to plaintiff under N.C.G.S. § 6-21.1 where the court's findings supported its conclusion that the reasonable value of services rendered by plaintiff's attorney was $4,880.00. **Thorpe v. Perry-Riddick, 567.**

CRIMINAL LAW

Aiding and abetting—advising jury of maximum sentence—Although the trial court erred in an aiding and abetting case involving robbery and murder by disallowing defense counsel to advise the jury of the maximum sentence defendant could receive if found guilty, there was no prejudicial error. **State v. Belfield, 320.**

Continuance denied—prior victim's testimony—notice—The trial court did not abuse its discretion in a prosecution for first-degree rape and first-degree kidnapping by denying defendant's motion for a continuance where defendant argued that he was not given notice prior to trial that the State would offer a prior victim's testimony, but the State notified defendant of hearsay statements made by defendant which would be offered by someone other than a law enforcement officer. Pursuant to N.C.G.S. § 15A-903(a), the State is not required to disclose the name of the witness testifying to the statements or the circumstances surrounding the statements. **State v. Barkley, 514.**

Denial of recess at close of State's evidence—no prejudice—The trial court did not abuse its discretion in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by denying defendant a recess at the close of the State's evidence until the next day to confer with counsel regarding his decision to testify and present witnesses on his behalf. **State v. Haywood, 223.**

Hung jury—insufficient time for deliberation—mistrial denied—The trial court did not abuse its discretion by denying defendant's motions for a mistrial when informed that the jury could not reach a unanimous verdict where the court correctly found that there had not been sufficient deliberation by the jury in the first instance and that there was insufficient evidence that the jury was hung in the second. **State v. Pallas, 277.**

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Jury instruction—duress—necessity—The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by denying defendant's request for a jury instruction on the defense of duress. **State v. Haywood, 223.**

Mistrial denied—Fifth Amendment privilege asserted—The trial court did not err in a prosecution for first-degree murder and armed robbery by not granting a mistrial where a witness was allowed to assert a blanket Fifth Amendment privilege to all questions asked by defense counsel. **State v. Nolen, 172.**

Prosecutor's argument—curative instruction—The trial court did not err in an armed robbery prosecution by not granting a mistrial where defendant objected to the prosecutor's argument concerning defendant's failure to present evidence to rebut the State's case, the court sustained the objection, and the court directed the jury "not to consider that." Any error was sufficiently cured by the court's instructions. **State v. Mason, 20.**

Prosecutor's argument—explanation for incident—The trial court did not commit plain error by allowing the prosecution to make a statement in its opening argument allegedly drawing attention to the likelihood that defendant would not testify and that allegedly attempted to shift the burden of proof to defendant. **State v. Ackerman, 452.**

DAMAGES AND REMEDIES

Punitive damages—chainsaw replacement chain—The trial court properly granted summary judgment for defendants on the issue of punitive damages in a negligence action arising from replacement of a low-kickback chainsaw chain with a non-approved chain. The characterization of defendants' actions as conscious and reckless by a witness who was not testifying as a legal expert did not create a genuine issue of material fact. **Lashlee v. White Consol. Indus., Inc., 684.**

Punitive damages—sufficiency of evidence—negligence action—directed verdict denied—The trial court did not err in a personal injury action arising from an electrical shock suffered by plaintiff during an expansion of an industrial plant by denying defendant's motion for a direct verdict, j.n.o.v., or a new trial on punitive damages where the evidence was sufficient to go to the jury on the question of whether the employee's behavior demonstrated a reckless indifference to the rights of others. **Whaley v. White Consol. Indus., Inc., 88.**

Punitive damages—underlying fraud claim established—The trial court did not err by awarding punitive damages where the court had correctly refused to dismiss plaintiff's claims for fraud. **Stamm v. Salomon, 672.**

DISCOVERY

Bank customer's financial records—production by bank—not violation of Financial Privacy Act—The trial court's order compelling the production of documents by defendant bank in a car purchaser's action for fraud and unfair trade practices against the bank and the car dealer did not violate the Financial

DISCOVERY—Continued

Privacy Act because (1) the Act applies only to access to financial records by a government authority; (2) although the superior court is, in a general sense, an agency of the State, the fact that the superior court compelled discovery pursuant to plaintiff's motion did not transform plaintiff's discovery request into a request by a government authority; and (3) it was not necessary for plaintiff to comply with the stringent service requirements of N.C.G.S. § 53B-5 in order to obtain discovery of a bank customer's financial records from the bank. **Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 589.**

Factual work product—hardship requirement—safeguards—The trial court did not abuse its discretion in an action for misrepresentation and unfair and deceptive trade practices arising out of plaintiff's purchase of a vehicle by concluding plaintiff was entitled to discovery of certain factual work product information created by defendant bank based on the trial court's determination that plaintiff met the hardship requirement. **Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 589.**

Interrogatories—failure to supplement—sanctions denied—The trial court did not abuse its discretion by denying defendants' pre-trial motions for sanctions in a negligence action arising from a Rottweiler attack where plaintiffs did not supplement their responses to interrogatories regarding a veterinarian's testimony, defendants filed motions in limine to prohibit the testimony and for sanctions on the morning of trial, and the court denied those motions but ordered that the witness be made available to defendants by telephone that day. **Hill v. Williams, 45.**

Marked money—undercover cocaine buys—The trial court did not abuse its discretion in a prosecution for trafficking in cocaine, possession of cocaine with intent to sell and deliver, and selling cocaine by denying defendant's request to exclude the marked money seized from defendant although defendant requested disclosure of the evidence but was not informed of the State's intent to offer it into evidence until the day before trial because defendant had an opportunity to inspect the money but chose not to do so. **State v. Redd, 248.**

Prior criminal records of non-law enforcement witnesses of the State—not required—The trial court did not err by denying defendant's motion to require the State to furnish the prior criminal records of non-law enforcement witnesses for the State. **State v. Haywood, 223.**

Refusal to produce documents—spoliation of evidence—The trial court did not err by denying a motion for a new trial in a products liability action where the motion raised the issue of spoliation of evidence in the context of defendant failing to produce documents after being ordered by the court to do so. Whether to impose sanctions for failing to obey an order to provide discovery is within the discretion of the trial court and plaintiff has not shown an abuse of discretion. **Jones v. GMRI, Inc., 558.**

Trigger pull test—no notice—The trial court did not abuse its discretion in a first-degree murder and armed robbery prosecution by admitting evidence of a trigger pull test conducted by an S.B.I. agent where defendant contended that he was not notified that the agent would testify about trigger pull tests where the prosecutor provided defendant with a copy of the agent's report, although it did not contain the trigger pull information. **State v. Nolen, 172.**

EVIDENCE—Continued

motion to suppress the results of a blood analysis where defendant contended that his consent to having his blood drawn was limited to analysis for an unrelated murder investigation and that his Fourth Amendment rights were violated. Once the blood was lawfully drawn, defendant no longer had a possessory interest in the blood and suffered no additional intrusion by the comparison of the DNA characteristics with the evidence in this case. Moreover, the court's findings support the conclusion that a reasonable person would have understood that his blood analysis could be used generally for investigative purposes. **State v. Barkley, 514.**

Card written by girlfriend to defendant—probative value outweighed by prejudicial effect—The trial court did not abuse its discretion in an aiding and abetting case involving robbery and murder by denying defendant's motion to introduce into evidence a card written to him by his girlfriend while the two were in jail awaiting trial in an effort to attack the girlfriend's statement that she was afraid of defendant. **State v. Belfield, 320.**

Cross-examination—audiotape not allowed—not prejudicial—The trial court neither abused its discretion nor coerced defendant into presenting evidence in a prosecution for the armed robbery of a store by refusing to allow defendant to cross-examine an employee with a tape recording of her 911 call. The judge merely ruled against the use of an audiotape and did not prevent defendant from exploring this avenue of inquiry; furthermore, defendant was permitted to introduce the tape during his case in chief. **State v. Mason, 20.**

Defendant's appearance on the night of the crimes—other evidence admitted—There was no prejudice in a prosecution for first-degree murder and armed robbery where defendant contended that the court erred by sustaining the State's objections to questions eliciting information about whether defendant appeared drunk and irrational on the night of the crimes, but defendant elicited testimony from other witnesses who saw him consume drugs and alcohol throughout the day before the commission of the crimes. **State v. Nolen, 172.**

Defendant's reputation for non-violence—warning to defense counsel—opening door for defendant's previously excluded past convictions—The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by warning defense counsel that his questioning of a witness regarding the witness's opinion of defendant's reputation for non-violence might allow the State to introduce previously excluded evidence of defendant's past convictions. **State v. Haywood, 223.**

Forensic evidence from unrelated case—not turned over—The trial court did not err in a first-degree kidnapping and first-degree rape case by denying defendant's request to turn over all records and documents regarding DNA analysis and forensic evidence in an unrelated murder case where DNA tests from that case led to this conviction. The court reviewed the records in camera and provided defendant with chain of custody records. **State v. Barkley, 514.**

Hearsay—deceased victim—catchall exception—The trial court did not err in a prosecution for robbery and first-degree murder by admitting hearsay testimony regarding statements made by the victim before her death that defendant had stolen $200 from her under the catchall exception of N.C.G.S. § 8C-1, Rule

EVIDENCE—Continued

804(b)(5) where the court made numerous findings to the effect that the victim and the witness were extremely close and that the witness was the only person in the community who looked after the victim, whom the victim trusted, and in whom she confided. **State v. Stephenson, 465.**

Judicial notice—location of parcel of land—The trial court did not err by taking judicial notice that the "parcel of land at issue is located in downtown Englehard." **Williams v. N.C. Dep't of Env't & Natural Res., 479.**

Murder victim—irrelevant evidence about victim—not prejudicial—The trial court did not err in a prosecution for robbery and first-degree murder by admitting evidence that the victim had not been able to receive her Christmas gift basket from church, a portrait photograph of the victim taken before she died, and twelve items of clothing where there was convincing evidence of defendant's guilt and no reasonable possibility that the outcome was changed. **State v. Stephenson, 465.**

Other offense—drug use—not prejudicial—There was no plain error in a prosecution for robbery and first-degree murder in the admission of evidence that defendant had bought and used illegal drugs where the evidence was properly used to demonstrate motive and there was no reasonable possibility of a different outcome if the jury had not known of the drug use. **State v. Stephenson, 465.**

Other offense—similarities—not too remote in time—The trial court did not err in a prosecution for first-degree kidnapping and first-degree rape by admitting the testimony of another woman that defendant raped her and evidence that defendant was convicted of that rape. The similarities support a reasonable inference that the crimes were committed by the same person and, although the rapes were six years apart, defendant was paroled only three and a half months prior to this crime. **State v. Barkley, 514.**

OSHA regulations—evidence of industry custom—sufficient to survive summary judgment—OSHA regulations may be used as evidence of custom in the construction industry, which is admissible in proving the requisite standard of care, but is just one factor to be considered by the jury and is not dispositive; however, evidence of an OSHA violation is sufficient to survive a motion for summary judgment. **Sawyer v. Food Lion, Inc., 398.**

Prior crimes or acts—rape of another victim—identity—common plan or scheme—The trial court did not commit plain error in a first-degree rape case by admitting testimony under N.C.G.S. § 8C-1, Rule 404(b) regarding defendant's alleged rape of a prior victim less than ten months before the victim in this case. **State v. Bidgood, 267.**

Videotape—insufficient foundation—not prejudicial—The admission of a store security videotape in an armed robbery prosecution was harmless error where the State did not establish a proper foundation for its admissibility in that the evidence was insufficient to establish that the system was properly functioning on the date of the robbery, the testimony was insufficient to establish that the tape accurately represented the events it purported to show, and the chain of custody was not adequately established, but there was other evidence providing a substantial basis for the jury's verdict. **State v. Mason, 20.**

NEGLIGENCE—Continued

worker who was injured when the scaffolding on which he was standing collapsed after a wheel rolled into an uncovered hole. The evidence conclusively showed that plaintiff had knowledge of the uncovered holes, understood the risks associated with this hazard, disregarded those risks by placing his rolling scaffold in close proximity to one of the holes, and failed to take additional safety precautions by failing to set any of the wheel brakes. Plaintiff was contributorily negligent as a matter of law. **Sawyer v. Food Lion, Inc., 398.**

Contributory—electrical injury—directed verdict denied—The trial court did not err by denying defendant's motions for directed verdict, j.n.o.v., or a new trial in a negligence action arising from an electrical injury suffered during expansion of an industrial plant where defendants contended that plaintiff was contributorily negligent. **Whaley v. White Consol. Indus., Inc., 88.**

Contributory—instruction—The trial court did not err in a personal injury action in its instruction to the jury as to the standard of care required of plaintiff where the instruction given adequately informed the jury that plaintiff was required to use care commensurate with the circumstances. The court was not required to use the language requested by defendant. **Whaley v. White Consol. Indus., Inc., 88.**

Contributory—pedestrian struck by automobile—The trial court did not err by granting a directed verdict for defendant on the issue of plaintiff's contributory negligence in an action arising from a collision between a pedestrian and an automobile where plaintiff, after consuming alcohol, was crossing outside a marked crosswalk at night, in an area that was dimly lit, dressed in dark clothing, with the lanes of oncoming traffic unobstructed and plaintiff's headlights shining, and never looked toward the oncoming vehicles despite the imminent presence of two vehicles coming upon her. **Womack v. Stephens, 57.**

Gross—construction accident—evidence insufficient—The trial court did not err by granting summary judgment for defendants in an action arising from an injury suffered by a construction worker when his scaffold rolled into an uncovered hole intended for piping where plaintiff contended that defendants were grossly negligent in allowing the holes to remain uncovered, but the negligence was not willful or wanton, or deliberate or wicked in purpose. **Sawyer v. Food Lion, Inc., 398.**

Last clear chance—pedestrian struck by automobile—The trial court erred by failing to instruct the jury on last clear chance in an action arising from a collision between a pedestrian and an automobile where there was sufficient evidence of plaintiff's negligent failure to pay attention to her surroundings and to discover her imminent peril, the evidence establishes that defendant saw plaintiff and recognized plaintiff's position of peril, there was evidence raising an inference that defendant had the time and means to avoid hitting plaintiff, and evidence was presented from which a jury could infer that defendant negligently failed to use the available time and means to avoid plaintiff. **Womack v. Stephens, 57.**

OSHA regulations—evidence of industry custom—sufficient to survive summary judgment—OSHA regulations may be used as evidence of custom in the construction industry, which is admissible in proving the requisite standard of care, but is just one factor to be considered by the jury and is not dispositive;

PRODUCTS LIABILITY—Continued

Manufacture of batteries—safer alternative design—The trial court did not err by granting summary judgment in favor of defendant corporation based on its conclusion that defendant did not unreasonably fail to adopt a safer design for its batteries that plaintiff purchased which caused his injuries when defendant did not add an indicator dye to the potassium hydroxide contained in the batteries. **DeWitt v. Eveready Battery Co., 143.**

Sealed container—metal object in meatball—The trial court did not err in a products liability action arising from an alleged metal object in a meatball by submitting to the jury the N.C.G.S. § 99-2(a) defense that the seller was afforded no reasonable opportunity to inspect the product. **Jones v. GMRI, Inc., 558.**

RAPE

First-degree—alternative theories—There was no plain error in a rape prosecution where the trial court instructed the jury that it could find defendant guilty of first-degree rape if it found that defendant used a dangerous weapon or that the victim was seriously injured where there was evidence to support both theories. **State v. Barkley, 514.**

First-degree—disjunctive jury instruction proper—The trial court did not err by denying defendant's post-verdict motion to set aside the verdict on the charge of first-degree rape because of a disjunctive instruction permitting defendant to be found guilty if he displayed a dangerous weapon or was aided and abetted by another person. **State v. Haywood, 223.**

First-degree—dismissal of charges involving second victim—failure to declare a mistrial ex mero motu not error—The trial court did not abuse its discretion in a first-degree murder case by failing to declare a mistrial ex mero motu under N.C.G.S. § 15A-1063(1) after dismissing the charges involving a second victim which were joined for trial with the charge involving the first victim. **State v. Bidgood, 267.**

First-degree—motion for new trial, arrest of judgment, and other relief properly denied—The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape by denying defendant's motion for appropriate relief seeking a new trial, arrest of judgment, and other relief as appropriate. **State v. Haywood, 223.**

First-degree—second-degree not submitted—The trial court in a first-degree rape prosecution did not err by failing to submit the lesser offense of second-degree rape to the jury where all of the evidence established that some type of sharp weapon was placed against the victim's neck. **State v. Barkley, 514.**

First-degree—short-form indictment—constitutional—The trial court did not err in a first-degree rape case by failing to dismiss the short-form indictment even though it failed to allege all the essential elements of first-degree rape. **State v. Bidgood, 267.**

First-degree—short form indictment—constitutional—A short form indictment for first-degree rape was constitutional. **State v. Barkley, 514.**

First-degree—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree rape. **State v. Haywood, 223.**

ZONING—Continued

the search before the board of adjustment. The superior court sat as an appellate court and had no authority to address issues not argued before the board of adjustment. **Durham Video & News, Inc. v. Durham Bd. of Adjust., 236.**

Report from planning staff—not timely received—no prejudice—There was no prejudicial error in a zoning decision where a report from the planning staff was not mailed to petitioner the requisite ten days before the hearing. Everything in the report was a matter of public record, nothing in it could have taken petitioner by surprise, and petitioner showed no prejudice from its late receipt of the record. **Durham Video & News, Inc. v. Durham Bd. of Adjust., 236.**

Search for adult merchandise—administrative search warrant required—An administrative search warrant was needed for zoning officials to search a store for adult merchandise. The enforcement of the zoning code is not frustrated by requiring a warrant for administrative searches, video and book sales are not pervasively regulated industries, and Durham's zoning ordinance does not set forth specific and regularly enforced guidelines for the search of video and book stores. Inspectors may do a cursory inspection of a store's contents, as a customer might, and obtain a warrant based on their observations; the behavior of the zoning officials in this case clearly went beyond the bounds of a normal customer of the store and constituted a search as that term is understood under the Fourth Amendment. **Durham Video & News, Inc. v. Durham Bd. of Adjust., 236.**

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina