NORTH CAROLINA COURT OF APPEALS REPORTS

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3. Appointed and sworn in 28 June 2002.
4. Appointed and sworn in 27 February 2002.
5. Appointed and sworn in 5 July 2002.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CARLTON B. DAVIS, EMPLOYEE, PLAINTIFF v. TAYLOR-WILKES HELICOPTER SERVICE, INC., EMPLOYER AND/OR TAYLOR MANUFACTURING, INC., EMPLOYER AND ZENITH INSURANCE COMPANY, (FORMERLY RISCORP), CARRIER, DEFENDANTS

No. COA00-948

(Filed 17 July 2001)

1. **Workers' Compensation— subcontractor—independent contractor—attempted waiver of benefits**

The Industrial Commission did not err by concluding that defendant company was liable for plaintiff subcontractor's compensable injuries sustained in 1995 while he was working for defendant even though the parties agreed plaintiff was an independent contractor rather than an employee and plaintiff signed a waiver of any workers' compensation rights in 1992, because: (1) there is no evidence defendant obtained the necessary certificate from the Commission certifying that plaintiff was covered by workers' compensation insurance, which left defendant liable for plaintiff's compensable injuries under N.C.G.S. § 97-19 while he was working under a subcontract for defendant; and (2) there is no evidence that the waiver signed in 1992 was applicable in any subsequent year in which plaintiff might be hired, including 1995.

2. **Workers' Compensation— benefits—failure to file written notice within thirty days**

The Industrial Commission did not err in a workers' compensation case by finding that defendant company was not prej-

udiced by plaintiff subcontractor's failure to file written notice within thirty days of his accident as required by N.C.G.S. § 97-22, because: (1) plaintiff's excuse for not filing written notice was reasonable since both parties assumed plaintiff was not entitled to benefits based on their agreement that plaintiff was an independent contractor; (2) defendant had notice of the injury on the same day it occurred; and (3) plaintiff filed his claim for compensation within two years of the injury.

3. Workers' Compensation— average weekly wage—calculation

The Industrial Commission did not err in a workers' compensation case by its calculation of plaintiff subcontractor's lost wages using the amount he would have earned in 1995 divided by fifty-two weeks in order to get his average weekly wage based on what plaintiff was paid before his injury and what another employee was paid for completing the job after plaintiff was injured, because: (1) N.C.G.S. § 97-2(5) provides for an alternate method of calculation that will most nearly approximate the amount the injured employee would be earning if the method provided in the statute would be unfair; (2) the Commission found that using plaintiff's earnings in 1994 would be unfair based on the amount of work available for plaintiff declining from year to year; and (3) the use of the other employee's total income as the basis for establishing plaintiff's earnings would be incorrect since the employee had received income from defendant for work other than for the completion of plaintiff's work.

Appeal by plaintiff and defendants from opinion and award filed 9 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 April 2001.

Lore & McClearen, by R. Edwin McClearen, for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by W. Scott Fuller and Jaye E. Bingham, for defendant Taylor-Wilkes Helicopter Service, Inc.

Reid, Lewis, Deese, Nance & Person, LLP, by Renny W. Deese, for defendant Taylor Manufacturing, Inc.

WALKER, Judge.

At the time of his injury, plaintiff was working on a seasonal basis spraying witchweed, a parasite which attacks blade crops. Defendant

Taylor-Wilkes Helicopter Service, Inc., (Taylor-Wilkes) was under contract with the United States Department of Agriculture (USDA) to eradicate witchweed through spraying. Prior to 1992, plaintiff was employed by Taylor-Wilkes as a witchweed sprayer. However, after plaintiff suffered an injury in 1991, he was terminated. In 1992, plaintiff agreed to spray witchweed for Taylor-Wilkes as an independent contractor, to allow Taylor-Wilkes to avoid workers' compensation liability. On 13 July 1995, plaintiff was injured when the highboy sprayer he was operating tipped over. Plaintiff's claim for workers' compensation benefits provides the basis for this appeal.

On 17 November 1998, the deputy commissioner concluded that plaintiff was not entitled to benefits because he was an independent contractor and because he failed to file timely notice of his claim. Plaintiff appealed to the Commission on 23 November 1998. After a hearing, the Commission reversed the deputy commissioner and entered an opinion and award finding that plaintiff was entitled to compensation for his injury.

The findings of the Commission include, in pertinent part:

1. Plaintiff was sixty-five years old at the time of the hearing before the deputy commissioner. He attended school through the third grade and is able to read and sign his name, but he is functionally illiterate. Plaintiff has worked as a farm hand, a lumber mill worker, a farm machine builder, a crop sprayer, and as a self-employed mechanic.

2. From 1961 through 1974, plaintiff was employed during the months of March through October by [TAYLOR-WILKES] to prepare and maintain crop spraying equipment. For the remainder of the year, plaintiff was employed by Taylor-Wilkes Massey Ferguson where he repaired farm machinery. As the Taylor family owned both of these businesses, it was not unusual to assign the employees to work where they were needed.

. . .

5. In 1989, Ron Taylor rehired plaintiff to work at [Taylor-Wilkes] during the witchweed season and at [Taylor Manufacturing, Inc.] for the rest of the year. Plaintiff was paid $400.00 per week.

6. On 23 January 1991, plaintiff sustained a compensable on-the-job injury which was the subject of I.C. File No. 121630. Plaintiff received six weeks of benefits for this injury.

7. On 18 March 1991, [Taylor Manufacturing, Inc.] terminated plaintiff's employment. Personnel records reflect that plaintiff was not to be rehired because he was considered a health risk. At all times while employed by Taylor Manufacturing, Inc.] or [Taylor-Wilkes] before 18 March 1991, plaintiff received a W-2 form from his employer which reflected the withholdings from his pay for taxes and social security. Plaintiff was an employee of [Taylor Manufacturing, Inc.] or [Taylor-Wilkes] while performing services for the respective company.

8. In 1992, plaintiff negotiated with Ron Taylor, in Taylor's capacity as president of [Taylor-Wilkes], to allow plaintiff to perform [Taylor-Wilkes'] contract with the USDA. Plaintiff and Taylor agreed that plaintiff would not be hired as an employee but would be hired as an independent contractor. Plaintiff understood that Taylor and defendant-employers were unwilling to rehire him as an employee.

9. In the years from 1992 through the date of the injury in 1995, plaintiff performed witchweed spraying as he had when defendants recognized him as an employee, with a few exceptions: plaintiff was hired and paid only by [Taylor-Wilkes] and only during the witchweed season, and [Taylor-Wilkes] issued an IRS Form 1099 at the end of the year and did not deduct taxes from plaintiff's pay. As was the situation when plaintiff was an employee with defendants, an employee of [Taylor Manufacturing, Inc.] ordered all of plaintiff's spraying parts and chemicals for the spraying jobs, and [Taylor Manufacturing, Inc.] employees delivered a highboy tractor to the job sites for plaintiff's use. Plaintiff's primary assistant, Cleo McCoy, was an acknowledged employee of defendants. Plaintiff used [Taylor-Wilkes] equipment, parts, and water. On days when inclement weather prevented plaintiff from spraying, he worked at the main [Taylor Manufacturing, Inc.] plant driving a forklift and doing odd jobs at the direction of Ron Taylor or [Taylor Manufacturing, Inc.] employees; however, there is no evidence that [Taylor Manufacturing, Inc.] did or did not pay plaintiff for these services. Because of his years of experience, plaintiff needed no supervision from [Taylor-Wilkes] in the performance of his spraying duties. USDA agents directed plaintiff to the various fields to be sprayed and remained on site to view the spraying. Plaintiff performed spraying only for [Taylor-Wilkes] and was not engaged in an independent business or occupation, did not hire his own

assistants, and worked for [Taylor-Wilkes] under the supervision of the USDA.

10. Before plaintiff returned to work for [Taylor-Wilkes] in 1992, he signed a subcontractor's waiver of workers' compensation coverage at Ron Taylor's request. Plaintiff signed this agreement voluntarily. The agreement provided that it was to be effective until the expiration date of [Taylor-Wilkes'] then-current workers' compensation policy, which was renewable yearly. However, there is no evidence that, in 1992, [Taylor-Wilkes] or Ron Taylor agreed to hire plaintiff in any subsequent witchweed season, nor is there any evidence that the waiver signed in 1992 was applicable in any subsequent year in which plaintiff might be hired, including 1995.

11. At the end of the witchweed season in 1992, [Taylor-Wilkes'] contract with USDA in 1992 was concluded. [Taylor-Wilkes'] contract in 1995 was a new contract for witchweed spraying. Likewise, plaintiff's employment with [Taylor-Wilkes] in 1995 was a new contract for performing the spraying.

12. In 1992, [Taylor-Wilkes] paid plaintiff $9,890.00 for witchweed spraying and provided plaintiff an IRS Form 1099. No taxes or social security were withheld.

13. In 1993, [Taylor-Wilkes] paid plaintiff $14,248.80 for witchweed spraying and provided plaintiff an IRS Form 1099.

14. In 1994, plaintiff asked that his paychecks be made payable to his wife, Faye. He provided Faye's social security number to defendants for the payroll forms. In 1994, [Taylor-Wilkes] paid $11,600.00 to Faye Davis and provided her an IRS Form 1099 even though plaintiff was providing the witchweed spraying services.

15. In 1995, [Taylor-Wilkes] provided Faye Davis an IRS Form 1099 indicating payments of $5,950.00 that had been paid for plaintiff's services. Of this amount, $3,300 was paid after plaintiff's injury. If he had not been injured, plaintiff would have earned an additional $1,104.75, which was the amount paid to Cleo McCoy based on the number of acres sprayed after 13 July 1995, at $1.25 per acre. Thus, if plaintiff had not been injured, he would have earned $7,054.75 in 1995.

. . .

20. A Report of Vocational Evaluation performed on 4 December 1997 revealed that despite the surgery on plaintiff's left shoulder, his left arm remains functionally useless. Therefore, plaintiff is without the bi-manual dexterity required to perform as a diesel mechanic or as a tractor operator, jobs that he has previously performed, and he does not possess transferable skills to jobs within his residual functional capacity. Given plaintiff's education, low IQ, illiteracy, and age, he is not a candidate for retraining in another field. For these reasons, plaintiff is no longer a viable candidate for competitive employment, and he is permanently and totally disabled.

21. Plaintiff's failure to file a Form 18 Notice of Accident within 30 days of the injury as required by the Act was due to both parties assumption that plaintiff was not an employee entitled to workers' compensation but was an independent contractor as they had agreed. Plaintiff's excuse is found reasonable. Defendants had actual knowledge of plaintiff's accident within a few hours of the incident. Defendants denied plaintiff's claim based on their contention that plaintiff was an independent contractor, pursuant to the parties' agreement. Defendants were not prejudiced by plaintiff's failure to give written notice within 30 days.

22. Plaintiff filed his claim for compensation under the Act within two years of the date of injury.

Based on these findings, the Commission concluded, in pertinent part:

1. Defendant Taylor-Wilkes Helicopter Service, Inc., could not by contractual agreement absolve itself of responsibility under the Act to provide workers' compensation for plaintiff, if plaintiff would otherwise be covered under the Act. G.S. 97-6; *Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 293 S.E.2d 807 (1982); *Grouse v. DRB Baseball Management, Inc.*, 121 N.C. App. 376, 465 S.E.2d 568 (1996). Despite the parties' attempt in this case to designate their relationship by contract their actual relationship is a legal question. *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999).

2. Applying case law principles, plaintiff was an employee of defendant Taylor-Wilkes Helicopter Service, Inc., and was not an independent contractor when he was injured on 13 July 1995. G.S.

97-2(2); *see Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944).

3. Even if plaintiff could be considered an independent contractor, he would be a subcontractor of defendant Taylor-Wilkes Helicopter Service, Inc., with no employees hired to perform the contract between defendant Taylor-Wilkes Helicopter Service, Inc. and the USDA. Under G.S. 97-19, as it is written at the time of plaintiff's injury, defendant Taylor-Wilkes Helicopter Service, Inc., would be liable to plaintiff as subcontractor unless plaintiff waived in writing his right to workers' compensation. As there is insufficient evidence that a valid waiver was in effect on 13 July 1995, plaintiff would be entitled to workers' compensation benefits from defendant Taylor-Wilkes Helicopter Service, Inc., as a subcontractor. G.S. 97-19 (1994) (subsequently amended).

4. Plaintiff's injury arose out of and in the course of his employment with defendant Taylor-Wilkes Helicopter Service, Inc., and plaintiff is entitled to compensation under the Act. G.S. 97-2.

5. Plaintiff's employment was seasonal in nature. The proper method for calculating the average weekly wage in this case is to take plaintiff's annual income while working for [Taylor-Wilkes] and divide that number by 52. *Barber v. Going West Transp., Inc.*, 134 N.C. App. 482, 517 S.E.2d 914 (1999), *citing Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966). Even though plaintiff did not work the full season in 1995, it would not be equitable to calculate plaintiff's average weekly wage based on the amount he earned during the 1994 season, which was $11,600.00, because the number of acres available for witchweeding was declining from year to year, and plaintiff's salary in 1994 would not fairly reflect the wages he was earning at the time of his injury. The amount plaintiff would have earned in 1995, or $7,056.75, divided by 52, more nearly approximates the amount plaintiff would be earning were it not for the injury. Accordingly, plaintiff's average weekly wage for the purpose of calculating his compensation rate is $135.71, which yields a compensation rate of $90.38. G.S. 97-2(5).

6. Due to his compensable injury, plaintiff is permanently and totally disabled; therefore, he is entitled to compensation in the weekly amount of $90.38, beginning on 13 July 1995 and continuing for the remainder of his life. G.S. 97-29.

7. Plaintiff is entitled to medical compensation for any treatment he has received or may receive in the future which is related to his compensable injury and which is reasonably calculated to effect a cure, give relief, or lessen the period of plaintiff's disability. G.S. 97-25.

Both plaintiff and defendants appeal from the Commission's opinion and award. At the outset, one of the issues on appeal is whether the Commission erred in finding that Taylor-Wilkes and Taylor Manufacturing, Inc. were not the "same business or establishment." Pursuant to an agreement announced by the parties at oral argument, we treat Taylor-Wilkes and Taylor Manufacturing, Inc. as separate entities and need not address any issues regarding Taylor Manufacturing, Inc.

[1] Taylor-Wilkes argues that the Commission erred in finding plaintiff was an employee of Taylor-Wilkes rather than an independent contractor. We first address this issue on the assumption that plaintiff was not an employee of Taylor-Wilkes, but instead was a subcontractor. Pursuant to N.C. Gen. Stat. § 97-19, in effect at the time of plaintiff's injury on 13 July 1995, plaintiff, as a subcontractor of Taylor-Wilkes, would be entitled to benefits.

In its opinion and award, the Commission found that, before plaintiff returned to work for Taylor-Wilkes in 1992, he signed a subcontractor's waiver of workers' compensation benefits at the request of Ron Taylor. The waiver provided that it would expire at the end of that year. However, the Commission found no evidence that Ron Taylor agreed to hire plaintiff in any year subsequent to 1992 or that plaintiff signed a waiver in any other year. Taylor-Wilkes' contract with the USDA in 1995 was a new contract for that year, likewise, plaintiff's employment with Taylor-Wilkes constituted a new contract to perform the spraying. On the basis of these findings, the Commission concluded that even if plaintiff were an independent contractor rather than an employee, he was a subcontractor. As such, Taylor-Wilkes would be liable for plaintiff's injuries under N.C. Gen. Stat. § 97-19 unless plaintiff waived his right to such benefits. The Commission found that the evidence was insufficient to establish that there was a valid waiver in place in 1995. Thus, we elect to first determine whether plaintiff is entitled to benefits pursuant to N.C. Gen. Stat. § 97-19.

At the time of plaintiff's injury in 1995, N.C. Gen. Stat. § 97-19 imposed conditional liability on contractors for the compensable

injuries of their subcontractors and their subcontractors' employees. The statute provided, in pertinent part, that:

> Any . . . contractor . . . who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 [requiring that employers carry workers' compensation insurance] . . . shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death *of any such subcontractor, any principal or partner of such subcontractor or any employee of such subcontractor* due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the . . . contractor . . . shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable *to any such subcontractor, any principal or partner of such subcontractor or any employee of such subcontractor* for compensation or other benefits under this Article.

N.C. Gen. Stat. § 97-19 (Supp. 1990) (emphasis added)[1]. As this statute applied to Taylor-Wilkes, it imposed liability for plaintiff's injury to the extent Taylor-Wilkes had not obtained a certificate from the Commission signifying plaintiff had workers' compensation insurance.

Our Supreme Court addressed this issue in *Southerland v. B.V. Hedrick Gravel & Sand Co.*, 345 N.C. 739, 483 S.E.2d 150 (1997). In *Southerland*, the plaintiff was injured while working as an independent contractor under a subcontract with the defendant. *Id.* at 740, 483 S.E.2d at 150. Although the plaintiff assured the defendant that he was covered by workers' compensation insurance, the defendant failed to obtain the necessary certificate from the Commission. *Id.* at 741, 483 S.E.2d 150. The plaintiff had workers' compensation insurance to cover his employees; however, he did not have coverage on himself. *Id.* In granting plaintiff's claim for benefits, our Supreme Court held that N.C. Gen. Stat. § 97-19 applied to "not only employees

1. We note that N.C. Gen. Stat. § 97-19 has since been amended to alter the scope of contractor's liability to subcontractors. However, this amendment became effective 10 June 1996, after the date of plaintiff's injury. *See* 1995 N.C. Sess. Laws ch. 555 § 1; *Boone v. Vinson*, 492 S.E.2d 356, 127 N.C. App. 604 (1997).

of the subcontractor but also the subcontractor himself" and that it "extended workers' compensation benefits to plaintiff under the same conditions as it extended coverage to plaintiff's employees." *Id.* at 744, 483 S.E.2d at 152-53.

In the case at bar, there is no evidence that Taylor-Wilkes obtained the necessary certificate from the Commission certifying that plaintiff was covered by workers' compensation insurance. Thus, under N.C. Gen. Stat. § 97-19, Taylor-Wilkes remained liable for plaintiff's compensable injuries while he was working under a subcontract from Taylor-Wilkes. Further, there is no evidence that plaintiff executed a written waiver of his rights under this statute. Although plaintiff signed such a waiver in 1992, that waiver provided it would only apply until the expiration of Taylor-Wilkes workers' compensation policy, which was renewable yearly. Thus, the Commission properly determined that there is no "evidence that the waiver signed in 1992 was applicable in any subsequent year in which the plaintiff might be hired, including 1995."

[2] Taylor-Wilkes next asserts that plaintiff's claim should have been barred since he failed to provide notice to Taylor-Wilkes within thirty days of the accident and failed to file his claim within two years. N.C. Gen. Stat. § 97-22 (1999) provides, in part:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

The Commission found that plaintiff's excuse for not filing written notice in thirty days was reasonable in that both parties assumed

plaintiff was not entitled to benefits because they had agreed plaintiff was an independent contractor.

In *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985), the defendant argued plaintiff's claim should have been barred by N.C. Gen. Stat. § 97-22 because plaintiff failed to provide written notice within thirty days of his injury. However, the record reflected that defendant knew of plaintiff's injury by virtue of a doctor's bill it received within one month of plaintiff's accident. *Id.* at 123, 334 S.E.2d at 395. This Court held that because defendant "was on notice of the injury to plaintiff soon after it occurred," defendant "could not have been prejudiced by plaintiff's failure to give written notice." *Id.*

Here, Taylor-Wilkes had notice of the injury on the same day it occurred. The Commission did not err in finding Taylor-Wilkes was not prejudiced by the lack of written notice. In addition, the Commission properly found that plaintiff filed his claim for compensation within two years of the injury.

[3] Both parties assign as error the Commission's calculation of plaintiff's lost wages. Taylor-Wilkes first contends that the Commission used an incorrect methodology in determining plaintiff's average weekly wage.

N.C. Gen. Stat. § 97-2(5) provides that where the employee's period of employment prior to the injury is less than fifty-two weeks of the calendar year, the average weekly wage should be determined by dividing the employee's income for the past year by the number of weeks the employee worked. N.C. Gen. Stat. § 97-2(5) (1999). However, where this method would be "unfair, either to the employer or employee," the statute also allows for the use of "such other method . . . as will most nearly approximate the amount the injured employee would be earning were it not for the injury." *Id.* Additionally, where "it is impractical to compute the average weekly wages as above defined, regard shall be had to the average . . . being earned by a person of the same grade and character employed in the same class of employment in the same locality or community." *Id.*

Here, the Commission found that using plaintiff's earnings in 1994 would be unfair because the amount of work available for plaintiff was declining from year to year. Thus, the Commission determined the appropriate method for calculating plaintiff's wages was by divid-

ing the amount he would have earned in 1995 by fifty-two weeks in order to arrive at his average weekly wage. *See Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966); *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999). The Commission determined the amount of plaintiff's earnings by adding what he was paid before the injury and what Cleo McCoy (McCoy), an employee of Taylor-Wilkes, was paid for completing the witchweed spraying after plaintiff was injured. Subsequently, the Commission found that plaintiff earned $7,056.75 in 1995, on which his compensation rate was based.

Plaintiff agrees with the method of calculation used by the Commission but contends the Commission used inaccurate evidence of McCoy's income. Plaintiff does not argue his award for lost income should not have been based on the income of McCoy. However, he asserts that the Commission erred in using "spray tickets" as evidence of McCoy's income. The "spray tickets" were turned in by McCoy to indicate the number of acres he had sprayed. Plaintiff argues that these records are incomplete and the Commission should have used McCoy's actual 1995 income, as shown by his tax forms, as the basis for the award. However, evidence was presented to the Commission that McCoy was an employee of Taylor-Wilkes and had received income from Taylor-Wilkes for work other than that from witchweed spraying. Thus, the Commission did not err in rejecting McCoy's total income as the basis for establishing plaintiff's earnings on which his benefits were based.

After a careful review of the Commission's calculations, we conclude the method utilized would not be unfair to either the employee or the employer. Further, the Commission's findings are conclusive on appeal if supported by competent evidence despite the presence of evidence to the contrary. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

Affirmed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. RICKY NELSON BAILEY, DEFENDANT

No. COA00-627

(Filed 17 July 2001)

1. Confessions and Other Incriminating Statements— improper inducement—statements of officers—charges and punishments—better to tell the truth

The trial court did not err in a prosecution for statutory rape (for which defendant was acquitted) and statutory sexual offense by denying defendant's motion to suppress his statement to officers where defendant contended that the statement resulted from improper inducement. The only factor weighing in favor of a finding of improper inducement is the fact that defendant apparently had no prior experience with the criminal justice system. Defendant was not in custody and was free to leave, he was not deceived, the duration of the interview does not appear to have been excessively long and the nature of the interview does not appear to have been improperly coercive; there were no physical threats or shows of violence and there was no evidence that defendant's mental condition was impaired; statements that things would go easier if defendant gave a truthful statement do not amount to improper promises; and informing defendant of the crimes for which he might be charged and the range of punishment does not constitute improper inducement.

2. Indictment and Information— subsequent information— different offense

There was no error in a prosecution arising from the sexual abuse of a child where defendant was originally indicted for two counts of statutory rape or sexual offense against a person 13 to 15 years old; and information on one count alleging the offense of indecent liberties was included in the record and may have been filed (but may have been submitted to the trial court as a part of plea bargain which was rejected); and defendant contends that the court erred by proceeding to trial on the two original indictments after the information was filed. Assuming that the information charging indecent liberties was filed, defendant appealed only from his conviction on the other indictment and the issue was not properly before the Court of Appeals. Moreover, the circumstances addressed by N.C.G.S. § 15A-646, which requires dismissal of a superseded indictment, are not present here because

the information charged defendant with an entirely different offense and did not supersede either of the original indictments

3. Criminal Law— plea arrangement rejected—terms not modified

The requirements of N.C.G.S. § 15A-1023(b) were not violated in a prosecution arising from the sexual abuse of a child where defendant argued that the State proceeded upon the original indictment after a plea arrangement was rejected without modifying the terms of the arrangement. However, this statute merely requires the court to afford the parties an opportunity to modify the terms of a rejected plea agreement if both parties so desire; here, there is no indication that the State wished to modify the terms of the arrangement or that the court denied the State the opportunity to do so.

4. Attorneys— criminal case—motion to withdraw denied—unlimited written notice of representation

The trial court did not err in a prosecution arising from the sexual abuse of a child by denying a motion to withdraw by defendant's attorney where the attorney had made a written notice of representation pursuant to N.C.G.S. § 15A-141 without indicating the limited extent of his representation. The attorney was thus obligated to represent defendant at all subsequent stages of the case. N.C.G.S. § 15A-141(1), (3).

5. Constitutional Law— effective assistance of counsel

A defendant accused of sexually abusing his daughter did not receive ineffective assistance of counsel from an attorney whose motion to withdraw had been denied where defendant did not establish that any particular error by the attorney directly affected the outcome of the trial. Any error in seeking to suppress only a written statement and not a similar oral statement would not have affected the outcome of the trial because other evidence of defendant's confession was admitted.

Appeal by defendant from judgment entered 3 November 1999 by Judge Dennis J. Winner in Rutherford County Superior Court. Heard in the Court of Appeals 25 April 2001.

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

Neville S. Fuleihan, for defendant-appellant.

HUDSON, Judge.

On 28 September 1998, defendant Ricky Nelson Bailey was indicted on two counts of violating N.C.G.S. § 14-27.7A (1999) ("Statutory rape or sexual offense of person who is 13, 14, or 15 years old.") for allegedly sexually abusing his minor daughter. The two indictments were designated as 98 CRS 9156 and 98 CRS 9157.[1] On 20 November 1998, attorney Neville S. Fuleihan filed a "Notice of Representation" stating that he would represent defendant in 98 CRS 9156. On 7 December 1998, defendant signed a "Waiver of Counsel" form in 98 CRS 9157, waiving his right to all assistance of counsel, and stating that he desired to appear on his own behalf. In March of 1999, a proposed plea arrangement was presented to the trial court. The proposed plea provided that the State would dismiss the charge in 98 CRS 9156, that the State would amend the charge in 98 CRS 9157 to taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1 (1999), and that defendant would plead guilty to taking indecent liberties with a child. However, the proposed plea arrangement was rejected by the trial court.

On 11 May 1999, prior to trial, defendant moved to suppress a written statement transcribed by Detective Mike Hollifield of the Rutherford County Sheriff's Department and signed by defendant on 28 July 1998. On 4 August 1999, Fuleihan filed a "Motion for Withdrawal by Attorney," requesting permission to withdraw as defendant's attorney in 98 CRS 9156. The motion states that Fuleihan was hired only for the purpose of representing defendant in the plea arrangement, and that defendant was without funds to pay Fuleihan or to pay for necessary "investigative work." Also on 4 August 1999, defendant filed an "Ex-Parte Motion for Funds for Investigation," requesting $2,500.00 to retain an investigator to investigate facts pertinent to the sexual abuse allegations. The motion requesting funds was granted on 24 August 1999. Fuleihan's motion to withdraw was apparently denied.

Prior to trial on 2 November 1999, the trial court conducted a hearing to address defendant's motion to suppress. At the conclusion of the hearing, the trial court denied defendant's motion to suppress.

1. We note that the indictments in 98 CRS 9156 and 98 CRS 9157 allege only "statutory sexual offense" pursuant to G.S. § 14-27.7A, whereas defendant was tried on one count of statutory sexual offense pursuant to G.S. § 14-27.7A and one count of statutory rape pursuant to G.S. § 14-27.7A. However, defendant was ultimately convicted only on the statutory sexual offense charge and was acquitted on the statutory rape charge, and this appeal pertains only to the statutory sexual offense conviction.

Defendant was then tried on the two original charges. Defendant was convicted of statutory sexual offense in 98 CRS 9156, but was found not guilty of statutory rape in 98 CRS 9157. Defendant appeals the judgment in 98 CRS 9156. On appeal, defendant raises three assignments of error.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress the statement made on 28 July 1998. Defendant argues that the trial court should have granted the motion because the statement was the result of improper inducement and was therefore involuntary. The *voir dire* testimony presented during the hearing to address the motion consisted of the testimony of Special Agent Steven Miller of the State Bureau of Investigation, Detective Hollifield, and defendant.

Agent Miller testified to the following facts. Miller administered a polygraph test to defendant on 28 July 1998 while he was alone with defendant and while Hollifield was watching by closed circuit television in an adjacent room. Following the test, Miller told defendant that if defendant gave a statement admitting to the sexual abuse, the district attorney would have the option of offering a plea bargain to defendant. Miller also told defendant that neither he nor Hollifield could speak on behalf of the district attorney regarding the way in which defendant's case would ultimately be handled. Defendant then orally made a statement to Miller admitting to the sexual abuse of his daughter. When Hollifield entered the room, Miller communicated defendant's statement to Hollifield and then left the room.

Defendant testified to the following facts. Defendant got a full night's sleep before he went in to take the polygraph test on 28 July 1998. After he took the polygraph test, Miller told him that he had failed the test. Miller then told him about a situation in which an individual had killed himself after an incident involving the sexual abuse of a minor child. Miller told defendant that Hollifield felt that if defendant pled guilty to the offense it would help him, and that Hollifield would help him "as much as he could." After Hollifield entered the room where defendant had taken the polygraph test with Miller, Hollifield took defendant to another room and got defendant a cup of coffee. Defendant then repeated his statement to Hollifield who transcribed the statement which defendant then signed. Defendant specifically testified that Miller did not make any promises to him. Defendant also testified that Hollifield and Miller didn't tell him exactly what would happen, but that what they did tell him made

him believe that if he pled guilty, he would have "a better chance at not going to prison."

Detective Hollifield testified to the following additional facts. Defendant had voluntarily traveled to Asheville for an interview with Hollifield and Miller. Defendant was not in custody at the time he made the statement and was free to leave. Prior to defendant providing the statement, Hollifield told defendant that if defendant gave a truthful statement about what had happened, "everything would probably have a little less consequence to it" and "[t]hings would probably go easier." Hollifield specifically testified that he did not make any promises to defendant in order to obtain the statement. He also testified that he explained to defendant that if defendant admitted to committing sexual abuse, "there was a good chance" he would be able to go on probation and go through sex offender treatment and otherwise be able to lead a normal life with his family.

At the conclusion of the *voir dire* testimony, the trial court made the following oral findings and conclusion:

> That on the occurrence of the [] polygraph examination of the defendant, that SBI Agent Miller who was the polygraph operator informed defendant that the result of the test was that he was not telling the truth. Told him it would be better if he told the truth, or words to that effect. Made no promises to him whatsoever. Informed the defendant that ultimately the decisions that would be made on this case would be made by the DA's office and not by law enforcement officers.
>
> That the defendant admitted orally essentially the facts that are contained in this later written statement made to Officer Hollifield.
>
> That that oral statement was made at a place and time that Officer Hollifield was able to observe and hear the oral statement made.
>
> That subsequent to that in a conference at the same place with Officer Hollifield, Officer Hollifield made statements which indicated to the defendant that if the defendant made a written statement admitting what's been alleged that Officer Hollifield thought things would go easier for him. That he did discuss with him sex offender treatment and probation, but that he made no promise or anything from which it could logically be inferred by

> the defendant that he had made a promise that those things would occur; particularly since Officer Miller had just previously told him that ultimate decisions in the case would be made by the DA's office and not law enforcement.
>
> The Court concludes from this that there was no improper inducement made by either of the officers and that consequently . . . the statement made to Miller and the statement made to Hollifield were voluntarily made.

In challenging the trial court's denial of his motion to suppress, defendant argues that his statement was the result of improper inducement because it was based on promises by Hollifield and Miller that he would receive relief from the charges he faced if he confessed to the sexual abuse. We disagree.

"The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993). Here, the trial court found that although both Hollifield and Miller indicated to defendant that it would be better if he told the truth, there were no promises made to defendant, and it was made clear to defendant that the district attorney, rather than either Miller or Hollifield, would ultimately determine how to handle the case. These findings are fully supported by competent evidence in the record. Hollifield and Miller both testified that they did not make any promises to defendant in order to induce his statement. Moreover, defendant testified that he was told only that he would have "a better chance at not going to prison" if he confessed. Because we hold that the findings are supported by competent evidence, they are binding on appeal.

Based on these findings, the court concluded as a matter of law that there was no improper inducement by either Miller or Hollifield and that the statements were given voluntarily. This conclusion is a fully reviewable legal question. *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 775 (2001). We believe the trial court's conclusion is supported by the findings. A confession is either voluntary or involuntary. *See State v. Cabe*, 136 N.C. App. 510, 513, 524 S.E.2d 828, 830, *appeal dismissed and disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). The vol-

untariness of a defendant's confession is determined by viewing the totality of the circumstances. *State v. Wallace*, 351 N.C. 481, 520, 528 S.E.2d 326, 350, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 498 (2000). Factors to be considered in determining whether a confession was voluntary include whether the defendant was in custody, whether he was deceived, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the defendant's mental condition. *See Hyde*, 352 N.C. at 45, 530 S.E.2d at 288. In addition, the physical environment and the overall manner of the interrogation may be considered. *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995).

Here, the only factor weighing in favor of a finding of improper inducement is the fact that defendant apparently had no prior experience with the criminal justice system. Every other relevant factor weighs against a finding of improper inducement. Defendant was not in custody, but rather appeared voluntarily for the purpose of taking a polygraph test. Defendant was therefore free to leave at any time. There was no evidence that defendant was in any way deceived by Miller or Hollifield. The duration of the interview does not appear to have been excessively long, and the nature of the interview does not appear to have been improperly coercive. In fact, defendant was offered and accepted a cup of coffee during the interview. Defendant testified that he got a full night's sleep before the interview, and there was no evidence that defendant's mental condition was impaired. In addition, there were no physical threats or shows of violence.

As to the statements by Hollifield that if defendant gave a truthful statement about what had happened, "everything would probably have a little less consequence to it" and "[t]hings would probably go easier," such statements do not amount to improper promises. *See State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975) (an "improper inducement generating hope must promise relief from the criminal charge to which the confession relates"). Rather, we believe such statements are similar to those examined in *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986). In *Richardson*, a detective and an assistant district attorney expressed to the defendant that the district attorney, who would ultimately determine how the defendant would be prosecuted, usually responded favorably when a defendant cooperated. However, the defendant was not promised a lesser sentence in return for his cooperation. The Court

held that these statements did not constitute improper inducement. *Id.* at 604, 342 S.E.2d at 830. Furthermore, Hollifield's statements that if defendant admitted to committing sexual abuse "there was a good chance" he would be able to go on probation and go through sex offender treatment and otherwise be able to lead a normal life with his family did not render defendant's subsequent statement involuntary. Merely informing a defendant of the crimes for which he might be charged and the range of punishment does not constitute improper inducement. *See id.* at 602, 342 S.E.2d at 829-30. In sum, the circumstances indicate that defendant's confession was voluntary and was not the result of improper inducement. This assignment of error is overruled.

[2] Defendant next contends the trial court committed plain error by proceeding to trial on the two original indictments after an information was subsequently filed in 98 CRS 9157 alleging the offense of taking indecent liberties with a child. Although the record does include an information in 98 CRS 9157 charging defendant with taking indecent liberties with a child, it is not clear that this information—which we note is not dated—was ever, in fact, filed. Rather, it appears from the record that the information was submitted to the trial court as part of the proposed plea arrangement, which was ultimately rejected. However, even assuming *arguendo* that the information in 98 CRS 9157 charging defendant with taking indecent liberties with a child was actually filed, defendant's argument is without merit.

Defendant's argument relies upon N.C.G.S. § 15A-646 (1999), which states:

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge. The first instrument is not, however, superseded with respect to any count contained therein which charged an offense not charged in the second indictment or information.

G.S. § 15A-646. We need not review the standard employed where plain error is alleged because we conclude no error occurred.

We believe that defendant's argument is inconsistent with the meaning and purpose of G.S. § 15A-646. Occasionally there is an error in the form of an indictment which, if left uncorrected, would provide the defendant with grounds for relief. To address the problem, the State must file a subsequent indictment to correct the error. G.S. § 15A-646 requires that, in such situations, the original indictment must be dismissed at the time the defendant is arraigned upon the superseding indictment or information, thereby precluding potential problems of double jeopardy. *See State v. Carson*, 320 N.C. 328, 333, 357 S.E.2d 662, 665-66 (1987).

The circumstances to which the statute is addressed are not present here. The original indictments charged defendant with two separate counts of violating G.S. § 14-27.7A. The subsequent information in 98 CRS 9157 alleges that defendant committed the offense of taking indecent liberties with a child pursuant to G.S. § 14-202.1, an entirely different offense than the offense charged in the original indictments. Therefore, the information did not "supersede" either of the original indictments because it did not "charg[e] the defendant with an offense charged or attempted to be charged in the first instrument" as required by G.S. § 15A-646.

As the State points out in its brief, this assignment of error is also without merit because it involves the effect of the State's filing a subsequent information in 98 CRS 9157. Since defendant appeals only from his conviction in 98 CRS 9156, this issue is not properly before us on appeal.

[3] Defendant also argues that the requirements of N.C.G.S. § 15A-1023(b) (1999) were violated here. That statute provides, in pertinent part: "If the judge rejects the [plea] arrangement . . . [he] must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly." G.S. § 15A-1023(b). Defendant contends that, following rejection of a plea arrangement, the statute requires that the State must modify the terms of the plea arrangement, and that the State may not proceed against the defendant upon the original indictment. We do not so interpret the statute. The statute merely requires the court to afford the parties an opportunity to modify the terms of a rejected plea if both parties so desire. Here, there is no indication that the State wished to modify the terms of the plea arrangement, or that the trial court denied the State an opportunity to do so. This assignment of error is overruled.

[4] Defendant lastly argues that the trial court erred in denying attorney Fuleihan's motion to withdraw, and that, as a result, defendant was denied effective assistance of counsel at trial. Fuleihan filed a Notice of Representation in 98 CRS 9156 on 20 November 1998. This written notice of entry was expressly made pursuant to subsection (1) of N.C.G.S. § 15A-141 (1999), which provides that an attorney may enter a criminal proceeding by filing "a written notice of entry with the clerk indicating an intent to represent a defendant in a specified criminal proceeding." G.S. § 15A-141(1). Fuleihan did not avail himself of subsection (3) of that statute, which allows an attorney to enter a criminal proceeding "for a limited purpose" by filing a written notice with the clerk indicating the limited extent of his representation. G.S. § 15A-141(3). "An attorney who enters a criminal proceeding without limiting the extent of his representation pursuant to G.S. 15A-141(3) undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage." N.C.G.S. § 15A-143 (1999). Thus, once Fuleihan undertook to represent defendant in 98 CRS 9156 without limiting the extent of his representation, Fuleihan was obligated by statute to represent defendant at all subsequent stages of that case through entry of final judgment. The only remedy for an attorney seeking to withdraw from the representation of a criminal defendant in a particular case, where no limitation on the representation has been established at the outset, is found in N.C.G.S. § 15A-144 (1999). Fuleihan's motion to withdraw was made pursuant to this statute, which provides that "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." G.S. § 15A-144.[2]

[5] "In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). To establish ineffective assistance of counsel, a defendant

2. Although there is no indication in the record that the trial court expressly ruled on the motion to withdraw, we note that the motion was filed along with an "Ex-Parte Motion for Funds for Investigation" on 4 August 1999. In ruling on the motion requesting funds for investigation, the trial court entered an order authorizing "Counsel for the Defendant" to retain a private investigator, and that order was accompanied by a form entitled "Order of Assignment or Denial of Counsel," which states that the applicant (defendant) is entitled to receive funds for investigation expenses, and further states: "The Court is not appointing counsel. Defendant has retained counsel." Thus, despite the absence of an express ruling in the record on Fuleihan's motion to withdraw, we presume that the trial court denied the motion.

must satisfy a two-prong test which was promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

> [D]efendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. . . . Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Lee, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (citations omitted).

Here, defendant contends that attorney Fuleihan committed the following errors: (1) not limiting the extent of his representation pursuant to G.S. § 15A-141, thereby rendering defendant vulnerable to the consequences of representation by inexperienced counsel; (2) not requiring the State to follow the mandate of G.S. § 15A-1023; and (3) not objecting to Agent Miller's testimony regarding the oral statement made by defendant to Agent Miller, on the grounds that defendant was not informed during discovery that Agent Miller would so testify. The first alleged error amounts to the following circular proposition: defendant received ineffective assistance of counsel because his attorney made the error of not limiting the extent of his representation, which error resulted in the attorney representing defendant at trial and providing ineffective assistance of counsel. This argument is without merit because it fails to establish any particular error by Fuleihan at trial that directly affected the outcome of the trial, and such a showing is necessary to establish ineffective assistance of counsel.

The substance of the second alleged error was addressed and rejected above. To reiterate, G.S. § 15A-1023(b) does not require the State to modify the terms of a plea arrangement after the plea arrangement has been rejected; it merely guarantees that the parties will be afforded an opportunity to modify the terms of the arrangement if both the State and the defendant wish to do so. The second alleged error is, therefore, also without merit.

The final alleged error appears to pertain to the fact that defendant's motion to suppress sought only to suppress defendant's written statement to Detective Hollifield, and did not seek to suppress defendant's similar oral statement to Agent Miller. Even assuming

arguendo that the failure to move to suppress defendant's oral statement to Miller constituted an error on the part of defendant's attorney, we are not persuaded that the trial result would have been different absent the error. This is because even if defendant had successfully sought to suppress Miller's testimony regarding defendant's oral statement, evidence establishing that defendant confessed to the sexual abuse would still have been admitted at trial through three sources: (1) Hollifield's testimony regarding the oral statement made by defendant to Agent Miller; (2) the written statement transcribed by Hollifield and signed by defendant; and (3) defendant's own testimony at trial admitting to having made the statement.[3] This assignment of error is overruled.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

IN THE MATTER OF: JONATHAN HEIL

No. COA00-679

(Filed 17 July 2001)

1. Juveniles— delinquency—crime against nature—motion to dismiss

The trial court did not err by failing to dismiss a juvenile delinquency petition at the close of all evidence regarding the charge of crime against nature under N.C.G.S. § 14-177, because: (1) there was some evidence from which the trial court could find that some penetration occurred; (2) any inconsistencies in the testimony cannot be the basis for granting a motion to dismiss or for overruling a trial court's denial of said motion; and (3) resolving contradictions in the evidence falls within the province of the trial court when it performs as the fact-finder.

2. Juveniles— delinquency—condition of probation—restitution

The trial court erred by ordering a juvenile to pay restitution to the North Carolina Victim's Compensation Fund as a condition

3. At trial, defendant admitted to having made the statement transcribed by Hollifield and signed by defendant, although he maintained that he did not commit the sexual abuse and that his confession statement was made in an effort to avoid going to prison.

of his probation based on his alleged delinquency for the charge of crime against nature, because: (1) the court made no inquiry or findings concerning whether ordering the juvenile to make restitution as a condition of his probation was in his best interest; (2) the amount of restitution ordered by the court reflected the exact amount quoted by the State in reference to the minor victim's therapy bills, indicating a concern to compensate the victim with no consideration for or adjustment based upon the juvenile's best interest and whether the juvenile, not his family, had the ability to pay restitution; (3) N.C.G.S. § 7A-649(2) requires restitution to be payable within a 12-month period, and the court ordered the period of restitution payments to perpetuate until the total is paid; and (4) there was a $200 discrepancy between the amount of the restitution award and the amount of the minor victim's therapy bills.

Appeal by juvenile from orders entered 11 January 1999 and 18 June 1998 by Judge Pattie S. Harrison in District Court, Caswell County. Heard in the Court of Appeals 25 April 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Amy C. Kunstling, for the State.

George B. Daniel, P.A., by John M. Thomas, for juvenile-appellant.

TIMMONS-GOODSON, Judge.

Jonathan Heil ("juvenile") appeals from an order adjudicating him delinquent within the meaning of section 7A-517(12) of the North Carolina General Statutes[1] and a dispositional order placing him on probation and ordering him to make restitution. For the reasons herein stated, we affirm the adjudication of delinquency but reverse the trial court's dispositional order and remand for reconsideration of the restitution issue.

On 28 January 1998, a juvenile petition was filed alleging that juvenile was delinquent, in that he "commit[ted] the abominable and detestable crime against nature with [C.I.] in violation of [North Carolina General Statutes section] 14-177." The adjudication hearing

1. Section 7A-500, *et seq.*, the Juvenile Code applicable to the present case, was repealed by Session Laws 1998-202, s. 5, effective 1 July 1999. Chapter 7B, the Juvenile Code replacing section 7A-500, *et seq.*, became effective 1 July 1999 and applies to acts committed on or after that date.

was held on 8 and 18 June 1998, and the State's evidence showed that at the time of the incident alleged in the petition, juvenile was eleven years old and the victim, C.I., was four years old. Juvenile's and C.I.'s family socialized together at their church and in other settings. One night in October 1996, C.I. and his mother, Janet Isackson ("Mrs. Isackson"), visited the Heil's home. At some point during the visit, C.I. and juvenile went upstairs to play, but after approximately fifteen minutes, C.I. returned downstairs and informed his mother that he was ready to go home.

Mrs. Isackson later asked C.I. whether he had fun at the Heil's house, to which C.I. responded that he had not enjoyed the visit. C.I. informed his mother that juvenile had put him in a closet, shut the door, and touched his penis. Upon further inquiry, C.I. demonstrated how juvenile touched him by placing his hands on his penis.

The next day, C.I.'s father, Bradley Isackson ("Mr. Isackson"), questioned C.I. concerning the incident. Mr. Isackson testified as a rebuttal witness for the State. According to Mr. Isackson, C.I. informed his father and mother that while in a closet at the Heil's house, juvenile wanted C.I. to lick his penis. Mrs. Isackson then inquired, " '[C.I.] show me what [juvenile] wanted you to do,' " to which C.I. responded, " 'He wanted me to lick.' " Mrs. Isackson further inquired, " 'Exactly what did you do?' " According to his father's testimony, " '[C.I.] just went over there and just licked [Mrs. Isackson's] thumb and that was it. And then [C.I.] said, '[Juvenile] wanted me to do it again,' and he said, 'No, I don't want out [sic].' He said, 'I don't like that. I'm not going to do that.' "

In October 1997, C.I. informed Mrs. Isackson that on another occasion, juvenile had put his hands down C.I.'s pants underneath his underwear and touched his penis. The Isacksons reported this and the October 1996 incident to the Department of Social Services and later to the police.

Shortly thereafter, an investigator with the Caswell County Sheriff's Department, now Chief of the Yanceyville Police Department, Eric Taylor ("Chief Taylor"), interviewed juvenile and C.I. separately. During his interview with Chief Taylor, juvenile denied that the incidents ever occurred. However, C.I. told Chief Taylor that one day at the Heil's home, juvenile made him go into a closet, shut the door, and touched his penis. C.I. further mentioned that juvenile put his hands down his pants. However, according to Chief Taylor, "[C.I.] stated that [juvenile] did not put his mouth on him and—did

not put his mouth on [C.I.] and that [C.I.] did not put his mouth on him in any way."

Dr. Mary Baker Sinclair ("Dr. Sinclair"), an expert in pediatric psychology, conducted interviews with C.I. and his parents concerning his alleged encounters with juvenile. Dr. Sinclair testified at trial that C.I. identified the penis on an anatomically correct drawing of a male, although her assessment otherwise indicated that C.I. had limited exposure to sexual content. Dr. Sinclair stated that despite some inconsistencies in his story, including the number of times he was fondled and where the fondling took place, C.I. consistently identified juvenile as the person who touched his penis. Dr. Sinclair explained that the "somewhat inconsistent" nature of C.I.'s accounts indicated to her that he was truthful and was not being coached into a "robotic" answer. C.I. did not testify at the adjudication proceeding.

Juvenile's evidence included testimony from his mother, Johnetta Heil ("Mrs. Heil"), and his sister that during C.I.'s fall 1996 visit to their home, C.I. and juvenile never went upstairs together. Mrs. Heil specifically testified that during that particular visit, she never saw any of her children or C.I. go upstairs. Mrs. Heil further testified that juvenile denied to her that the incident ever occurred and that she believed him. Juvenile's sister likewise testified that she did not believe that juvenile fondled the alleged victim. She further related an incident in which C.I., whom she described as "very rambunctious," pinched her breast. According to juvenile's sister, when she informed C.I.'s parents of the incident, Mrs. Isackson simply stated, " 'Well, you know, you're going to like it when you're older.' "

Also testifying on juvenile's behalf, his Boy Scout master stated that he had never received any reports of misconduct on the part of juvenile, nor had he personally witnessed any misconduct. Members of the church attended by both juvenile and C.I. generally described juvenile as being of good character and obedient, while they described C.I. as being "hungry for attention" and undisciplined. Juvenile, testifying on his own behalf, denied the allegations in the petition.

After the presentation of all the evidence, juvenile moved to dismiss the petition, arguing that there was insufficient evidence to support the allegations contained therein. The court denied the motion and upon hearing arguments from counsel, adjudicated juvenile delinquent. The dispositional portion of the proceedings was postponed for the completion of a sex offender evaluation of juvenile.

Following the dispositional hearing, the trial court ordered juvenile committed to the Division of Youth Services for a period not to exceed his eighteenth birthday. The court suspended the aforementioned disposition in lieu of a one-year period of probation. As a condition of juvenile's probation, the court further ordered, *inter alia*, that he receive psychotherapy and that juvenile have no contact with the victim or any unsupervised contact with children younger than himself. The "Dispositional Order" also included the following provision: "[Juvenile] shall pay restitution in the sum of $1,305.00 . . . to be disbursed to [the North Carolina] Victims Compensation Fund. Monthly payments in the amount of $50.00 shall be made on or before the 3rd [of] each month beginning February 3, 1999 until the total is paid." Juvenile gave notice of appeal in open court.

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[1] We first examine juvenile's argument that the trial court erred in failing to dismiss the petition at the close of all of the evidence, in that there was insufficient evidence to prove his guilt beyond a reasonable doubt as to each of the elements of a crime against nature.

"[A]ll rights afforded adult offenders" are bestowed upon juveniles in adjudication proceedings. N.C. Gen. Stat. § 7A-631 (1995) (repealed 1 July 1999). The juvenile is therefore "entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985). Like adult defendants, juveniles "may challenge the sufficiency of the evidence by moving to dismiss the juvenile petition." *In re Davis*, 126 N.C. App. 64, 65-66, 483 S.E.2d 440, 441 (1997). Juvenile in the case *sub judice* satisfied the aforementioned requirement, and therefore, his argument concerning the sufficiency of the evidence is properly before this Court. *See* N.C.R. App. P. 10(b)(3) (2000).

Where the juvenile moves to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). When the evidence raises no more than "a suspicion or conjecture as to either the commission of the offense or the identity of the [juvenile] as the perpetrator of it, the motion should be allowed." *Id.*

The existence of only circumstantial evidence, however, does not warrant dismissal. *State v. Barnes*, 334 N.C. 67, 430 S.E.2d 914 (1993).

Where the evidence is circumstantial, "the court must consider whether a reasonable inference of [juvenile's] guilt may be drawn from the circumstances." *Id.* at 75, 430 S.E.2d at 919 (citation omitted). When the court determines that an inference may be drawn, it is then within the court's fact-finding function to determine "whether the facts, taken singly or in combination, satisfy [the court] beyond a reasonable doubt" that the juvenile is delinquent. *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). "Both competent and incompetent evidence must be considered." *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). Moreover, the court must disregard the juvenile's evidence, unless it supports or explains the State's case without contradicting it, or unless it is otherwise favorable to the State. *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

In reviewing a challenge to the sufficiency of evidence, it is not our duty to weigh the evidence, but to determine whether there was substantial evidence to support the adjudication, viewing the evidence in the light most favorable to the State, and giving it the benefit of all reasonable inferences. *Id.* at 378-79, 526 S.E.2d at 455.

The petition in the present case alleged that juvenile was delinquent for violating North Carolina General Statutes section 14-177, which provides: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished . . . ." N. C. Gen. Stat. § 14-177 (1999). The essential element of the so-called "crime against nature, with mankind" is "some penetration, *however slight*, of a natural orifice of the body." *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (1961) (emphasis added); *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978). Our Supreme Court has previously stated that "penetration need not be to any particular distance." *Whittemore*, 255 N.C. at 585, 122 S.E.2d at 398.

C.I.'s father, Mr. Isackson, testified that when inquiring of C.I. "[e]xactly what did you do" after juvenile asked C.I. to lick his penis, C.I. "just went over there and just licked [Mrs. Isackson's] thumb." On appeal, juvenile contends that even if the aforementioned testimony were taken as true, it was insufficient to support a finding that penetration occurred. We disagree.

We recognize that the evidence of penetration is, at best, slight. However, in light of the relative size difference between a four-year

old and an eleven-year old, and the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find based on Mr. Isackson's testimony that there was some penetration, albeit slight, of juvenile's penis into C.I.'s mouth. We therefore find the evidence sufficient to support juvenile's adjudication, as there was evidence from which the trial court could find that "some penetration" had occurred. *Whittemore*, 255 N.C. at 585, 122 S.E.2d at 398.

Juvenile further contends that the evidence does not support his adjudication because Mr. Isackson's testimony, the only evidence allegedly demonstrating penetration, was hearsay, was uncorroborated, and was even contradicted. Juvenile points to the testimony of C.I.'s mother, Mrs. Isackson, Chief Taylor, and Dr. Sinclair, none of whom testified that C.I. ever mentioned the incident described by Mr. Isackson. Juvenile specifically references Chief Taylor's testimony, in which he stated that C.I. expressly informed him that juvenile never put his mouth on C.I. and that C.I. never put his mouth on juvenile. With this argument, we also disagree.

First, in his appellate brief, juvenile expressly withdraws his assignment of error concerning the admission of Mr. Isackson's testimony and further does not present any support for his contention that it was hearsay or inadmissible. We therefore presume that juvenile has abandoned any argument he may present against the admissibility of that testimony and its effect on his adjudication. *See* N.C.R. App. P. 28(b)(5) (2000). Second, concerning the inconsistencies in the testimony, as noted *supra*, inconsistencies and discrepancies cannot be the basis for granting a motion to dismiss or for overruling a trial court's denial of said motion. *Barnes*, 334 N.C. 67, 430 S.E.2d 914. Resolving contradictions and inconsistences in the evidence falls within the province of the trial court when performing as the fact finder, and thus, it is not our place to now weigh the evidence on appeal. *See Fritsch*, 351 N.C. 373, 526 S.E.2d 451. As we find the evidence sufficient to support the adjudication of delinquency, juvenile's first argument is overruled.

[2] By his second argument, juvenile contends that the trial court erred in ordering restitution payable to the North Carolina Victim's Compensation Fund. Juvenile argues that no evidence was introduced at the adjudication or dispositional proceedings indicating the amount of restitution due the victim or his family. Juvenile further argues that the Victim's Compensation Fund was not entitled to

receive restitution, as it suffered no loss based upon his alleged delinquency. Because juvenile did not object to the award of restitution based upon the particular grounds he raises on appeal, he has not preserved the aforementioned argument for appellate review. *See* N.C.R. App. P. 10(b)(1).

Juvenile's failure to preserve his arguments for review notwithstanding, the State has brought to our attention errors in the juvenile court's disposition, which we believe necessitate remanding the case for entry of a modified dispositional order. The State notes that given the statutory provisions and relevant case law governing restitution in juvenile dispositions, the trial court erred in failing to consider or make findings concerning juvenile's best interest and in considering his parents' ability to pay. We must agree.

Section 7A-649 of our General Statutes authorized the juvenile court to order a delinquent juvenile to "make specified financial restitution" as a condition of his probation. N.C. Gen. Stat. § 7A-649(8)(e) (1995) (repealed 1 July 1999). This Court has consistently "endors[ed] the discriminate and prudent use of restitution in juvenile cases" but has cautioned that "compensation of victims should *never* become the only or paramount concern in the administration of juvenile justice." *In re Register*, 84 N.C. App. 336, 339, 352 S.E.2d 889, 891 (1987) (emphasis added); *see also* N.C. Gen. Stat. § 7A-646 (1995) (repealed 1 July 1999) ("The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction.") As such, requiring "that a juvenile make restitution as a condition of probation *must* be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition." *In re Berry*, 33 N.C. App. 356, 360, 235 S.E.2d 278, 280-81 (1977); *In re Schrimpsher*, 143 N.C. App. 461, 546 S.E.2d 407 (2001). *See also In re McKoy*, 138 N.C. App. 143, 530 S.E.2d 334 (2000).

Furthermore, the juvenile court "shall not require the juvenile to make restitution if the juvenile satisfies the court that he does not have, and could not reasonably acquire, the means to make restitution." N.C. Gen. Stat. § 7A-649(2). Section 7A-649(2) emphasizes that the focus of the restitution award should be the ability of the juvenile, not his parents, to pay restitution. *See McKoy*, 138 N.C. App. at 148, 530 S.E.2d at 336. Thus, the statute "does not authorize the juvenile court to consider the parents' ability to pay restitution when or-

dering the juvenile to make restitution to the victim as a condition of [his] probation." *Id.*

At the dispositional proceeding in the present case, the juvenile court made no inquiry or findings concerning whether ordering juvenile to make restitution as a condition of his probation was in his best interest. Immediately upon being informed by the State that C.I.'s therapy bills totaled $1,305.00, the court stated, "*They* will have to pay restitution . . . ," presumably referring to juvenile's family. (Emphasis added). Juvenile's mother, Mrs. Heil, informed the court that she could afford to pay only "five dollars now," at which time the court informed her, "*You're* going to have to do some extra work or something." (Emphasis added). The court did acknowledge that juvenile "himself [could] clean yards or something" and that "really it should be his bill, not his parents." However, the court went on to state that it "expect[ed] the parents to help[.]"

This excerpt from the dispositional proceeding reveals that the court's paramount concern was indeed the ability of juvenile's family to pay restitution, not juvenile's best interest. Likewise, the amount of restitution ordered by the court reflected the exact amount quoted by the State in reference to C.I.'s therapy bills, indicating a concern to compensate the victim with no consideration for or adjustment based upon juvenile's best interest or his ability to pay. Accordingly, we conclude that the court erred in failing to consider or make findings concerning whether the restitution award was in juvenile's best interest and whether juvenile, not his family, had the ability to pay restitution.

The State likewise points out other blatant errors in the court's dispositional order which require our consideration. First, by ordering that the period of restitution payments perpetuate "until the total is paid," the court also violated section 7A-649(2), which requires that restitution must be "payable within a 12-month period." N.C. Gen. Stat. § 7A-649(2). Also, there was an unexplained $200.00 discrepancy between the amount of the restitution award, $1,305.00, and the amount of C.I.'s therapy bills, as reflected in a "Determination of Director Award," filed by the commission who administers the Victim's Compensation Fund.

Despite juvenile's failure to challenge the errors raised by the State and preserve them for appellate review, we suspend the Rules of Appellate Procedure, *see* N.C.R. App. P. 2, and vacate that portion of the 11 January 1999 dispositional order making restitution a con-

dition of juvenile's probation. We remand the present case to the juvenile court to structure a modified dispositional order reflecting a reexamination of the restitution amount and payment schedule consistent with this opinion. In so doing, we specifically instruct the court to (1) consider and make findings concerning whether restitution is in juvenile's best interest; (2) examine whether juvenile had or could reasonably acquire the means to pay restitution; and (3) if the court finds that a restitution payment schedule is in juvenile's best interest, restrict the schedule to a period of twelve months or less and reexamine the restitution amount in light of the above noted $200.00 discrepancy. We further affirm the 18 June 1998 adjudication order and 11 January 1999 dispositional order in all other respects.

Affirmed in part, vacated and remanded in part.

Judges WYNN and HUDSON concur.

PHILLIP E. SWEATT, JR., ADMINISTRATOR OF THE ESTATE OF RACHEL SWEATT, DECEASED, PLAINTIFF v. SHE LING WONG, M.D., AND EUGENE S. STANTON, M.D., DEFENDANTS

No. COA00-608

(Filed 17 July 2001)

1. Witnesses— expert—medical malpractice—general surgeon

An emergency room physician who was board certified in laparoscopic procedures was qualified to testify as an expert witness under N.C.G.S. § 8C-1, Rule 702 against defendant general surgeons as to the applicable standard of care for a laparoscopic cholecystectomy, because: (1) the witness engaged in the same diagnostic procedures as did defendants, including an active clinical practice which included diagnosing patients with post-abdominal surgery complications such as infections; and (2) the witness was engaged in instructing residents in the emergency department regarding his patients. Furthermore, the admission of this testimony was not prejudicial error because another expert witness offered testimony from which the jury could find defendants failed to adhere to the applicable standard of care in their diagnosis and treatment of the patient.

2. Jury— alternate manner and procedure of selection—employees of sheriff's department

The trial court did not err in a medical malpractice action by the manner and procedure of selecting and summoning jurors even though jury selection is handled in Richmond County by employees of the sheriff's department, because: (1) N.C.G.S. § 9-2.1 allows for alternate procedures to be utilized for selecting jurors in certain counties, and Richmond County has utilized this alternate procedure for a number of years; (2) defendant failed to make a timely objection to the manner in which jurors were selected; and (3) defendant failed to show prejudice in the manner in which jurors were selected for the jury pool.

3. Agency— apparent—doctors—medical malpractice—motion for judgment notwithstanding the verdict

The trial court did not err in a medical malpractice action by denying defendant's motion for judgment notwithstanding the verdict under N.C.G.S. § 1A-1, Rule 50(b) on plaintiff's claim of apparent agency between defendant doctors, because: (1) the evidence showed the defendant who performed surgery on the patient told the patient and her family that he was going on vacation but was leaving the patient in the care of the other defendant doctor whom he believed would take good care of her; (2) this defendant also informed the patient and her family that the other defendant doctor had assisted him in the patient's surgery; and (3) the patient and her family justifiably relied on this defendant's representation of agency.

Appeal by defendant Wong from judgment entered 28 September 1999 by Judge Steve A. Balog in Richmond County Superior Court. Heard in the Court of Appeals 28 March 2001.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson, for defendant-appellant Wong.

WALKER, Judge.

This appeal arises out of a medical malpractice action in which the jury awarded the estate (plaintiff) of deceased Rachel Sweatt (Sweatt) $850,000 in damages as a result of the joint and several neg-

ligence of general surgeons She Ling Wong (defendant) and Eugene Stanton (Stanton). Sweatt was admitted to the Emergency Room of Richmond Memorial Hospital on 12 December 1993 experiencing extreme abdominal pain. The next day a sonogram revealed multiple gallstones and possible acute cholecystitis. Dr. Gilbert Arenas (Dr. Arenas), her family physician, recommended that she see defendant for a laparoscopic cholecystectomy (lap choley) to remove Sweatt's gallblader. Defendant advised Sweatt that she would be out of the hospital within a "couple of days" after the surgery, which was performed on 14 December 1993. Stanton assisted in the surgery at defendant's request.

Defendant reported to the Sweatt family that the surgery had gone well. However, during the time Sweatt would have been discharged under normal circumstances, she experienced symptoms of complications which included distention of her abdomen, constant need of pain medication and listlessness. At this time, defendant ordered tests, including a series of x-rays of Sweatt's abdomen. A radiologist interpreted the x-rays "as revealing a large amount of free air in the abdomen." Defendant read the x-ray report on 16 December 1993.

On 17 December 1993, before defendant went on vacation, he left Sweatt in the care of Stanton. According to Stanton, defendant reported to him that Sweatt probably had some obstruction in the small intestine or other problems, but that she was progressing relatively well. Defendant did not report to Stanton the findings of the x-ray report. Stanton testified that upon first examining Sweatt on 17 December 1993, he suspected she had an abdominal abscess; however, he took no action to treat that infection.

Dr. Arenas, who had continued to visit Sweatt daily, became increasingly concerned about her deteriorating condition. On 21 December 1993, after learning she had an abnormally high white blood count, Dr. Arenas ordered a CT scan and consulted with Dr. Charles Collins (Dr. Collins), a general surgeon. On the same day, Stanton recorded in Sweatt's chart that she could be discharged "because she was doing so well."

As soon as Dr. Collins reviewed Sweatt's records, he determined she was in need of an emergency, life-saving laparotomy which he performed later that day. The surgery revealed Sweatt had a perforation in the lower portion of her stomach caused by the lap choley procedure. Sweatt was then transferred to the University of North

Carolina Hospital at Chapel Hill under the care of Dr. Robert Rutledge (Dr. Rutledge). She remained there almost continuously until 31 March 1994, during which time she underwent several major surgeries. After being discharged, Sweatt was unable to return to work due to her weakened physical condition. She retired from her employment and later died on 12 April 1998.

[1] We first address defendant's assignment of error that the trial court erred in allowing Dr. David Wellman to testify in that he was not properly qualified under Rule 702 of the North Carolina Rules of Evidence. N.C.R. Evid. 702 (1999).

At trial, plaintiff called two expert witnesses who testified as to the negligence of defendants. The first of the experts, Dr. Samuel Esterkyn (Dr. Esterkyn), is a board certified general surgeon practicing and teaching in San Francisco, California. He was one of the first surgeons in this country to perform lap choleys and had performed approximately 950 to 1000 such procedures, continuing on a weekly basis at the time of trial. The second expert, Dr. David Wellman (Dr. Wellman), is a general surgeon who was board certified in laparoscopic procedures. In 1990, he became director in the emergency department at Duke University Medical Center, where he examined and diagnosed patients who, after surgery, presented signs and symptoms similar to those of Sweatt. In addition, Dr. Wellman instructed residents in the emergency department regarding patients he treated.

At the outset, we note this Court has recently addressed the qualifying of an expert witness within Rule 702, where we held "[o]rdinarily whether a witness qualifies as an expert is exclusively within the discretion of the trial judge." *Formyduval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000) (citation omitted). Rule 702 of our Rules of Evidence, which sets forth the qualifications of an expert witness, provides in pertinent part:

> (b) In a medical malpractice action . . ., a person shall not give expert testimony on the appropriate standard of health care . . . unless the person is a licensed health care provider . . . and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

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

(2) During the year immediately preceding the date of the occurrence . . . have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice [in that specialty] . . . ; or

b. The instruction of students [in that specialty]. . . .

N.C.R. Evid. 702 (b)(1),(2). In addition, we held "a doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a 'specialist' for purposes of Rule 702." *Formyduval* at 388, 530 S.E.2d at 101. This is because our legislature intended the term "specialist" to include a broader category of physicians than those who are board certified. *Id.* at 389, 530 S.E.2d at 102.

Defendants cite *Allen v. Carolina Permanente Med. Grp., P.A.*, 139 N.C. App. 342, 533 S.E.2d 812 (2000), in which this Court held that a general surgeon did not qualify as an expert witness in a medical malpractice case against a physician who was board certified in family practice medicine. In *Allen*, we stated the general surgeon "did not and could not qualify as an expert witness against [defendant] . . . because family practice is not within the specialty of general surgery." *Id.* at 348, 533 S.E.2d at 815. In that case, when asked about how the patient should have been treated, the general surgeon answered ". . . I have an opinion as to how [the patient] possibly could have been treated, but as far as the way [the patient] should have been, again it falls in the expertise out of my field. . . ." *Id.* at 350, 533 S.E.2d at 816-17. Thus, the general surgeon admitted he did not specialize in the same or similar specialty as that of the defendant family practitioner.

Defendant argues the rule in *Formyduval* supports his position that Dr. Wellman, as an emergency room physician, was not qualified to testify against defendant and Stanton who are general surgeons. *Formyduval* at 381, 530 S.E.2d at 96. In *Formyduval*, the malpractice action centered around the defendant physicians' negligence in diagnosis and treatment. *Id.* at 382-83, 530 S.E.2d at 98. There, defendant was a general practitioner engaged in clinical practice and diagnostic work without a specialty. *Id.* at 382, 530 S.E.2d at 98. The expert wit-

ness which plaintiff sought to proffer specialized in emergency medicine but he was disqualified because he did not engage in diagnostic work as defendant nor did he engage in substantial clinical practice. *Id.* at 383, 530 S.E.2d at 98. This Court also noted the expert witness spent more time in administrative duties than in treating patients. *Id.* at 391, 530 S.E.2d at 103. This Court further stated "[a]s plaintiff tendered no other expert witness to testify on the standard of care applicable to defendant, the trial court also properly granted defendant's motion for directed verdict." *Id.*

We find *Formyduval* to be distinguished from the instant case. First, there is evidence Dr. Wellman engaged in the same diagnostic procedures as did defendants. He had an active clinical practice which included diagnosing patients with post-abdominal surgery complications such as infections. In addition to his active clinical diagnostic practice, Dr. Wellman was also engaged in instructing residents in the emergency department regarding his patients. Therefore, Dr. Wellman was properly qualified as an expert witness under Rule 702(b)(1)(b) and (2).

Additionally, Dr. Esterkyn offered testimony from which the jury could find defendant and Stanton failed to adhere to the applicable standard of care in their diagnosis and treatment of Sweatt. Thus, even in the absence of Dr. Wellman's testimony, there was sufficient evidence on which the jury could base its verdict. The trial court did not err in allowing Dr. Wellman to testify as to the applicable standard of care.

[2] In his second assignment of error, defendant contends the manner and procedure of selecting and summoning jurors was improper and prevented him from receiving a fair trial. Defendant contends the system utilized in Richmond County violates the statutory requirements because it contains no procedural safeguards to ensure fairness, since jury selection is handled by employees of the sheriff's department.

The selection of jurors in this State is controlled by N.C. Gen. Stat. § 9-1 (1999), which provides "there shall be appointed in each county a jury commission of three members." It is the duty of each jury commission to prepare a list of prospective jurors qualified to serve, using the voter registration records of each county, as well as a list of licensed drivers residing in each county. N.C. Gen. Stat. § 9-2(b) and (c) (1999). The jury commission is then permitted to merge the two lists, remove duplicate names from each source and

then randomly select the names to form the list from which potential jurors are selected. N.C. Gen. Stat. § 9-2(e).

N.C. Gen. Stat. § 9-2.1 (1999) further allows for an alternate procedure to be utilized for selecting jurors in certain counties and is set forth as follows:

> (a) In counties having access to electronic data processing equipment, the functions of preparing and maintaining custody of the list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused, been delayed in service, or been disqualified, *may be performed by this equipment*, except that decisions as to mental or physical competency of prospective jurors shall continue to be made by jury commissioners.

N.C. Gen. Stat. § 9-2.1 (emphasis added). This alternate procedure had been utilized in Richmond County for a number of years.

There, a computer program run by a privately owned company merges a voter registration list with the list of licensed drivers in the county and then turns this list over to the jury commission. The jury commission then eliminates duplicates and disqualifications before using the list as its juror selection database. The only individuals who may access this database and have knowledge of its password consist of the information technology support manager for the county, as well as two civil employees of the sheriff's department. When the clerk of court needs a jury pool, the sheriff's department is notified and one of its two civil employees accesses the database to enter the number of jurors needed. This results in a list of randomly selected names arranged in numerical order. These named persons are then summoned for jury duty by the sheriff's department.

In this State, a " 'mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, would not vitiate the list or afford a basis for a challenge to the array.' " *State v. Massey*, 316 N.C. 558, 570, 342 S.E.2d 811, 818-19 (1986), *quoting State v. Ingram*, 237 N.C. 197, 204, 74 S.E.2d 532, 537 (1952). Further, the mere failure to follow a statutory requirement, without a showing or allegation of how such failure affected [the complainant], is not a sufficient basis to quash the jury list. *State v. Riggs*, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

In denying defendant's motion for a new trial, the trial court found in pertinent part the following:

> a. All of the information raised by [defendant] in his [motion and affidavits] [were] available to [him] well before the commencement of this matter on September 7th, 1999.
>
> b. At no time prior to September 7th, 1999 or on the date when this trial commenced, nor at any time during the course of the trial up to and through the conclusion of the jury's verdict, did [defendant] raise any issues or questions concerning the manner and procedure of selecting and summoning the jury.
>
> c. During the course of the *voir dire* examination of the jury, [defendant] did not utilize all of his peremptory challenges and, in fact, according to the record, had two such challenges remaining when he, through his counsel, passed on the jury panel as seated and found them acceptable.
>
> d. The provisions of N.C.G.S. § 9.2-1 for selecting and summoning a jury *venire* for the trial of this action were followed, and there was no prejudice to any one, including [defendant], in the manner by which the jury *venire* was drawn and summoned for this trial.
>
> e. There was no prejudice to anyone, including [defendant], by virtue of the fact that a civil employee of the Sheriff's Office entered the password that commanded the data processing equipment to randomly produce a list of jurors for the September 7, 1999 Session of Superior Court in Richmond County.
>
> f. [Defendant] was not prejudiced in the manner and procedure of selecting and summoning the jury *venire* for the trial of this action commencing September 7th, 1999.

On appeal, defendant cites *Lupton v. Spencer*, 173 N.C. 126, 91 S.E. 718 (1917) and *Boyer v. Teague*, 106 N.C. 576, 11 S.E. 665 (1890), where in each case a new trial was ordered because the sheriff had been involved in selecting and summoning certain jurors under an allegation that he was an interested party or that he was intermeddling or perpetrating a fraud. However, this case differs from *Lupton* and *Boyer*, in that defendant failed to make a timely objection to the manner in which jurors were selected, as did the defendants in those cases.

Furthermore, based on the findings by the trial court and our review of the record, we conclude the trial court properly determined defendant had failed to show prejudice in the manner in which jurors were selected for the jury pool in this trial. This assignment of error is therefore overruled.

[3] In his third assignment of error, defendant contends the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV) under Rule 50(b) of our Rules of Civil Procedure in part because there was no evidence of an agency relationship. N.C.R. Civ. P. 50(b) (1999). In support of this contention, defendant specifically contends there was no evidence: (1) he represented to Sweatt that Stanton was his agent; or (2) that Sweatt relied upon any representation of an agency relationship between defendant and Stanton.

A motion for JNOV "is essentially a renewal of an earlier motion for directed verdict[,]" and "is cautiously and sparingly granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337-38, *affirmed in part and reversed in part*, 313 N.C. 362, 329 S.E.2d 333 (1985) (citations omitted). The standard is whether the evidence is sufficient "to take the case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993) (citations omitted). Further, ". . . the evidence must be considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference." *Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 228, 542 S.E.2d 303, 311 (2001) (citation omitted).

This Court has held that a party can be held liable for another party's negligence based on the doctrine of apparent agency. This doctrine holds "a principal who represents to a third party that another is his agent is liable for harm caused the third party by the apparent agent if the third party justifiably relied on the principal's representation." *Hoffman v. Moore Regional Hospital*, 114 N.C. App. 248, 252, 441 S.E.2d 567, 570, *disc. review denied*, 336 N.C. 605, 447 S.E.2d 391 (1994) (citation omitted).

Defendant cites the recent case of *Noell v. Kosanin*, 119 N.C. App. 191, 457 S.E.2d 742 (1995), where plaintiff alleged defendant surgeon was liable for defendant anesthesiologist's negligence under the doctrine of apparent agency. This Court held the evidence was sufficient for the jury to consider the issue of apparent agency where

plaintiff's evidence showed defendant anesthesiologist had provided plaintiff with a pamphlet before surgery stating that he worked jointly with defendant plastic surgeon. *Id.* at 197, 457 S.E.2d at 746.

Defendant also cites *Hoffman* where this Court held even when agency is established, there nevertheless must be evidence plaintiff relied on such representation in order to recover under the doctrine of apparent agency. *Hoffman* at 252, 441 S.E.2d at 570. In that case, the plaintiff patient sought to recover damages for alleged medical negligence from a hospital under the theory of *respondeat superior* for the negligence of the treating physician who was found to be an independent contractor. *Id.* at 249, 447 S.E.2d at 568. Plaintiff's evidence failed to show reliance in that she "would have sought treatment elsewhere or done anything differently had she known for a fact that [defendant surgeon] was not an employee of the hospital." *Id.* at 252, 447 S.E.2d at 570.

Here, the evidence showed defendant told Sweatt and her family he was going on vacation but was leaving Sweatt in the care of Stanton, whom he believed would take good care of her. Also, defendant informed Sweatt and her family that Stanton had assisted him in her surgery. Prior to that time, neither Sweatt nor any member or her family had spoken to Stanton nor had they been offered a choice as to which physician would continue Sweatt's care in defendant's absence. Sweatt and her family thus justifiably relied on defendant's representation of agency. These facts, in the light most favorable to plaintiff, create an issue of whether an agency relationship exists between defendant and Stanton. Thus, the trial court did not err in denying defendant's motion for JNOV.

We have carefully considered defendant's remaining assignments of error and consider them to be without merit.

No error.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. WILLIAM LYDA MESSER

No. COA00-709

(Filed 17 July 2001)

1. Criminal Law— felonious failure to appear—calendaring of case—docketing

The placement of defendant's case for breaking into a coin/currency machine on the superior court calendar for the 28 September 1998 session of court violated the provisions of former N.C.G.S. § 7A-49.3 and defendant was not guilty of felonious failure to appear, because: (1) the district attorney did not file a calendar containing defendant's case with the clerk of court at least one week before the superior court session; and (2) the record does not contain any evidence defendant's case was docketed after an initial calendar for the 28 September 1998 session was filed with the clerk of court and prior to the filing of the addendum calendar.

2. Criminal Law— felonious failure to appear—calendar violation

A defendant was not required to appear in court on 28 September 1998 for his breaking into a coin/currency machine case within the meaning of N.C.G.S. § 15A-543 and defendant was not guilty of felonious failure to appear, because the placement of defendant's case on the court calendar violated N.C.G.S. § 7A-49.3.

Judge JOHN dissenting.

Appeal by defendant from judgment dated 29 September 1999 by Judge Loto G. Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 15 May 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Leah Broker for defendant-appellant.

GREENE, Judge.

William Lyda Messer (Defendant) appeals a judgment dated 29 September 1999 entered after a jury rendered a verdict finding

him guilty of felonious failure to appear pursuant to N.C. Gen. Stat. § 15A-543 and after he pleaded guilty to being an habitual felon.

Defendant was arrested on 30 July 1998 for allegedly breaking into a coin/currency machine on 29 July 1998 in violation of N.C. Gen. Stat. § 14-56.1. On 31 July 1998, a release order was issued authorizing Defendant's release upon execution of a secured bond. The release order stated: "You are Ordered to appear before the Court as provided above and at all subsequent continued dates. If you fail to appear, you will be arrested and may be imprisoned for as many as three years and fined as much as $3,000.00." On 13 August 1998, Defendant was released from custody on a surety appearance bond. On 21 August 1998, it was noted on a district court calendar that the charge of breaking into a coin/currency machine was "transf[erred] to Sup[erior Court] w[ith] related felony."

On 14 September 1998, Defendant was indicted in case number 98-CRS-60819 for breaking into a coin operated machine on 29 July 1998. This case number appeared on a superior court "ADDENDUM" calendar dated 25 September 1998, and the "ADDENDUM" calendar indicated the case would be called for trial on 28 September 1998. On 28 September 1998, Defendant's case was called and he failed to appear. A "CALLED AND FAILED ORDER" was then signed by the trial court. Defendant was indicted on 2 November 1998 in case number 98-CRS-60819A for failure to appear in superior court on 28 September 1998. Additionally, on 7 December 1998, Defendant was indicted as an habitual felon in case number 98-CRS-11655, based on the underlying felony in case number 98-CRS-60819A.

On 27 September 1999, Defendant was tried for case numbers 98-CRS-60819A and 98-CRS-11655. Nicole Roberts (Roberts), a deputy clerk of superior court for Buncombe County, testified at trial that her job duties include "maintain[ing] and keep[ing] all Superior [Court] files [and] all records [of] pending and disposed cases in Buncombe County." Roberts testified an "add-on to the Criminal Calendar" for the Superior Court of Buncombe County was published on 25 September 1998 and Defendant's case was listed on the calendar. Defendant, however, failed to appear when his case was called. The calendar indicated Defendant was represented by an attorney at the time his case was placed on the calendar. Roberts gave the following testimony regarding how a defendant is notified that his case has been placed on a calendar:

> If the defendant has an attorney, then it's the attorney's responsibility to keep up with that. Or the defendant can also call our office and check with us. If the defendant does not have an attorney, the D.A.'s Office sends [him] a letter to notify [him] of the Court date.

When a defendant telephones the office of the clerk of court to check on a court date and there is "not a date in the computer," the standard procedure is to "tell [a defendant] to call back on Friday afternoon, because [the clerk's office] gets [its] add-on [calendar] around lunchtime on Friday. That way [the clerk's office] know[s] for sure if [a defendant is] going to be in Court that next week." A copy of the calendar, including the add-on calendar, is posted on a bulletin board in the clerk's office. Additionally, a copy of the calendar is posted outside of the courtroom "before Monday of that Court date."

During cross-examination, Roberts testified that the court file on Defendant indicated he appeared in court on 31 July 1998 and 21 August 1998. Roberts stated Defendant's appearance bond and release bond did not indicate any date on which Defendant was required to appear in court. Also, Defendant's court file did not contain any documents that indicated Defendant or his attorney were notified of the 28 September 1998 court date.

At the close of the State's evidence, Defendant made a motion to dismiss the charge against him based on insufficiency of the evidence. The trial court denied the motion. Defendant did not present any evidence at trial. Subsequent to its deliberations, the jury returned a verdict finding Defendant guilty of felonious failure to appear. After this verdict was returned, Defendant pleaded guilty to being an habitual felon.

The issues are whether: (I) the placement of Defendant's case on the 28 September 1998 superior court calendar violated N.C. Gen. Stat. § 7A-49.3;[1] and, if so, (II) Defendant's failure to appear in court on 28 September 1998 constituted felonious failure to appear pursuant to N.C. Gen. Stat. § 15A-543.

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1. Repealed by Session Laws 1999-428, 2.2, effective January 1, 2000. See now N.C. Gen. Stat. § 7A-49.4.

I

[1] Defendant argues the placement of his case on the superior court calendar for the 28 September 1998 session of court violated the provisions of section 7A-49.3. We agree.

Section 7A-49.3 sets forth the procedure for calendaring criminal trials in the superior court. N.C.G.S. § 7A-49.3 (1995). Section 7A-49.3 provides, in pertinent part:

> (a) At least one week before the beginning of any session of the superior court for the trial of criminal cases, the district attorney shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session. The trial calendar shall fix a day for the trial of each case listed thereon. . . . Any case docketed after the calendar has been filed with the clerk may be placed on the calendar at the discretion of the district attorney.

Id. § 7A-49.3(a).[2] A case is "docketed" within the meaning of section 7A-49.3(a) when initial entry of the case is made in a "docket book" in the office of the clerk of court. *See Black's Law Dictionary* 495 (7th ed. 1999).

In this case, the record shows Defendant's case was placed on a superior court "ADDENDUM" calendar dated 25 September 1998 and the calendar was filed with the clerk of court on that date. The calendar indicated Defendant's case would be called at the 28 September 1998 session of the superior court. The district attorney, therefore, did not file a calendar containing Defendant's case with the clerk of court "[a]t least one week before" the superior court session. Additionally, we are unable to determine from the record before us the date upon which Defendant's case was docketed; thus, the record does not contain any evidence Defendant's case was docketed after an initial calendar for the 28 September 1998 session was filed with the clerk of court and prior to the filing of the "ADDENDUM" calendar. *See id.* (district attorney may add a case to the calendar if the case is docketed after the calendar has been filed); *State v. Edwards*, 70 N.C. App. 317, 321-22, 319 S.E.2d 613, 616 (1984) (district attorney

2. We note that section 7A-49.4, which replaced section 7A-49.3 effective 1 January 2000, requires the district attorney to publish the trial calendar "[n]o less than 10 working days before cases are calendared for trial." N.C.G.S. § 7A-49.4(e) (1999). Additionally, section 7A-49.4 does not contain any provision allowing the addition of cases to the published calendar when the cases are docketed after publication. *Id.*

did not violate section 7A-49.3 by placing case on calendar less than one week prior to trial date when the case was docketed after the district attorney filed the calendar of cases), *reversed on other grounds*, 315 N.C. 304, 337 S.E.2d 508 (1985). The placement of Defendant's case on the calendar for the 28 September 1998 session of the superior court therefore violated section 7A-49.3.

II

[2] Defendant argues he was not required to appear in court on 28 September 1998, within the meaning of N.C. Gen. Stat. § 15A-543, because the placement of Defendant's case on the court calendar violated section 7A-49.3. We agree.

Section 15A-543 provides, in pertinent part:

> (a) In addition to forfeiture imposed under G.S. 15A-544, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.
>
> (b) A violation of this section is a Class I felony if:
>
> (1) The violator was released in connection with a felony charge against him; or
>
> (2) The violator was released under the provisions of G.S. 15A-536.

N.C.G.S. § 15A-543 (1999). Thus, to survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence: (1) the defendant was released on bail pursuant to Article 26 of the North Carolina General Statutes in connection with a felony charge against him or, pursuant to section 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful. *Id.*

In this case, the State presented evidence Defendant's case appeared on the superior court calendar for the 28 September 1998 session of superior court and Defendant failed to appear in court on that day. As noted above, however, the placement of Defendant's case on the 28 September 1998 calendar violated section 7A-49.3(a). Thus, Defendant was not "required" to appear in court on 28 September 1998 within the meaning of section 15A-543 and the trial court erred

by denying Defendant's motion to dismiss.[3] Accordingly, the trial court's 29 September 1999 judgment is reversed.

Because we reverse the trial court's 29 September 1999 judgment, we need not address Defendant's additional assignments of error.

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge JOHN dissents.

JOHN, J., dissenting.

The majority holds the State's failure to comply with N.C.G.S. § 7A-49.3 mandates reversal of defendant's conviction of violation of N.C.G.S. § 15A-543. I respectfully disagree and therefore dissent.

Initially and parenthetically, I note the majority posits its conclusion the State failed to comply with G.S. § 7A-49.3 in part upon the failure of the record to reflect the date defendant's case was docketed. Further, in footnote three, the majority cites defendant's assertion that the record contains no evidence that he or his counsel received notice of the 28 September 1998 calendar. These circumstances simply highlight the absolute necessity that parties to an appeal include within the record *all* pertinent information.

In any event, the majority properly sets out the elements of a violation of N.C.G.S. § 15A-543. Contrary to the majority, however, I believe the instant record contains sufficient evidence of each element to send the case to the jury.

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3. Defendant argues in his brief to this Court that his failure to appear in court on 28 September 1998 was not "willful" within the meaning of section 15A-543 because the record does not contain any evidence Defendant or Defendant's counsel received notice of the 28 September 1998 calendar. Because we hold Defendant was not required to appear in court on 28 September 1998 within the meaning of section 15A-543, we need not address this issue.

Additionally, we need not address the issue of whether a defendant in a properly calendared case is "required" to appear in court within the meaning of section 15A-543 when the defendant does not receive notice of the calendar. We do note, however, that section 7A-49.4 provides the district attorney must "publish" the trial calendar. N.C.G.S. § 7A-49.4(e). Section 7A-49.4 does not, however, state whether publication may be accomplished by filing the calendar with the clerk of court or whether additional action, such as mailing the calendar to the appropriate parties and/or their attorneys, is required.

Viewed in the light most favorable to the State, *see State v. Whitaker*, 316 N.C. 515, 519, 342 S.E.2d 514, 517 (1986) (citation omitted) ("[i]n considering the sufficiency of the evidence to survive a motion to dismiss, 'the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom' "), the evidence at trial tended to show the following: Defendant was released following his arrest on a felony charge upon posting a secured appearance bond. The release order, signed by the processing magistrate, directed defendant to appear "at all subsequent continued dates."

In addition, defendant signed the appearance bond, likewise processed by a magistrate, acknowledging the release condition that he

> shall appear in the above entitled action(s) whenever required and will at all times remain amendable to the orders and processes of the Court.

Defendant's case was set for 21 August 1998 in Buncombe County District Court. Defendant was represented by counsel, a preliminary hearing was waived, and the case transferred to superior court. Following return of a true bill of indictment, the case was placed on a 28 September 1998 calendar, published 25 September 1998 and listing defendant's district court counsel as his attorney. Defendant did not appear at the 28 September 1998 term of superior court, an order for his arrest was issued, and an indictment charging defendant with failure to appear in violation of G.S. § 15A-543 was returned 2 November 1998.

Defendant subsequently was brought into the Greenville County, South Carolina, Detention Center on 20 June 1999 and released to be returned to Buncombe County on 3 August 1999. Testimony by a law enforcement officer indicated defendant had stated he was the "vending machine bandit" and that he had been hiding out in a Motel 6 in South Carolina for nearly one year.

Our Supreme Court has observed that

> "An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which

> case the defendant could not be released until discharged by order of the court."

State v. Mallory, 266 N.C. 31, 42, 145 S.E.2d 335, 343 (1965) (quoting *State v. Eure*, 172 N.C. 874, 875, 89 S.E. 788, 789 (1916)), *cert. denied*, 384 U.S. 928, 16 L. Ed. 2d 531 (1966).

Further,

> [a] recognizance for the appearance of the defendant at the next term of the court to be held for a given county is valid and binds the defendant to appear at the next term and at the court house; although neither time nor place be specifically named; because every one knows, or is presumed to know, the time and place of holding the court.

State v. Houston, 74 N.C. 174, 176, — S.E. —, — (1876).

Finally,

> "[w]illful" as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law. "Wilfulness" is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case.

State v. Davis, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610, *stay allowed*, 320 N.C. 172, 357 S.E.2d 172 (1987) (citations omitted).

Applying the foregoing evidence and legal principles to the elements of the offense of Failure to Appear under G.S. § 15A-543 (section violated by person released on felony charge "who wilfully fails to appear before any court or judicial official as required"), it appears defendant was released from custody on a felony charge, was directed by a judicial official to appear at all continued dates, acknowledged before a judicial official his responsibility to appear whenever required and to remain amenable to the processes of the court, failed to appear on the date the case was calendared in Buncombe County Superior Court, and wilfully "hid out" in South Carolina until arrested nearly one year later. Further, the record contains no indication either defendant or his counsel sought at any time to have his failure to appear excused or the order for arrest stricken on grounds of lack of notice or improper calendaring.

I also note that the General Assembly has neither provided that violation of G.S. § 7A-49.3 constitutes an element of the offense of Failure to Appear under G.S. § 15A-543 nor has it required, notwithstanding the majority opinion herein, that the State's violation of G.S. § 7A-49.3 mandates dismissal of any subsequent G.S. § 15A-543 charge of Failure to Appear. Had the General Assembly so intended, " 'it would have been a simple matter [for it] to [have] include[d],' " *State v. Reaves*, — N.C. App. —, —, 544 S.E.2d 253, 258 (2001) (quoting *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994)), such provisions within the statutes.

In sum, I believe the evidence presented was sufficient to withstand defendant's motion to dismiss and that no error was committed in defendant's trial. I note the State agrees with defendant's further contention that there exists a discrepancy in the sentence imposed and that this case must be remanded for re-sentencing. Defendant and the State are correct. I therefore vote no error in the trial, but to vacate the judgment and remand for re-sentencing.

STATE OF NORTH CAROLINA v. DELLWYN R. JOHNSON

No. COA00-780

(Filed 17 July 2001)

1. Discovery— motion to quash subpoenas duces tecum—in camera inspection

The trial court erred in a first-degree rape and indecent liberties case by granting the motion to quash subpoenas duces tecum issued by defendant teacher to the attorneys for the board of education and to an individual of the board of education seeking records compiled during the board's investigation of the charges against defendant, because: (1) there is no indication the trial court made the proper inquiry into the requested documents; and (2) the trial court must conduct an in camera inspection of the requested documents to determine whether documents exist containing information material to defendant's guilt or innocence.

2. Rape; Sexual Offenses— first-degree rape—indecent liberties—motion to dismiss—alleged variance between evidence and bill of particulars—window of time

The trial court did not err in a first-degree rape and indecent liberties case by denying defendant's motion to dismiss based on an alleged variance between the evidence at trial and the State's responses to defendant's request for a bill of particulars regarding the window of time in which the alleged crimes took place, because: (1) the State is not required to forecast exact dates and times in its indictments when time is not of the essence for the charges of first-degree rape or taking indecent liberties; and (2) the testimony at trial was not inconsistent with the State's indictments or its bill of particulars.

3. Evidence— prior crimes or acts—victim's testimony of sexual acts committed by defendant—common plan or scheme

The trial court did not err in a first-degree rape and indecent liberties case by admitting the testimony of a prior victim as to sexual acts committed against her by defendant teacher, because N.C.G.S. § 8C-1, Rule 404(b) allows this evidence to show an ongoing plan or scheme by defendant to commit sexual offenses against female students and other young women.

4. Evidence— cross-examination of detective—limitation

The trial court did not abuse its discretion in a first-degree rape and indecent liberties case by limiting the scope of defendant's cross-examination of a detective, because: (1) defendant has made no showing that the trial court's limitation of the cross-examination improperly influenced the verdict; and (2) defendant was permitted to question the victims regarding the specific dates and times of the offenses.

Appeal by defendant from judgments entered 7 October 1999 by Judge Henry E. Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 30 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Jane T. Hautin, for the State.

Duane K. Bryant for defendant-appellant.

MARTIN, Judge.

Defendant was charged with two counts of first degree rape in violation of G.S. § 14-27.2, and multiple counts of taking indecent liberties with children in violation of G.S. § 14-202.1. Defendant entered pleas of not guilty.

Briefly summarized, the evidence at trial tended to show that defendant was employed at Mendenhall Middle School in the Guilford County School System as a teacher and coach during the period of the alleged criminal acts. Most of the victims were students at Mendenhall from 1983 to 1993, when the crimes were allegedly committed by defendant. Tosha Manuel testified that during the summer of 1987, when she was twelve years old, defendant drove her from the Warnersville pool to Mendenhall and had sexual intercourse with her on a mat on the gym stage. Ms. Manuel testified that she had sexual intercourse with defendant on at least two other occasions in 1987. When Ms. Manuel moved on to high school, she and defendant continued to have a sexual relationship; the sexual contact ended in 1995, when Ms. Manuel was in college. Ms. Manuel's mother, father, and brother testified at trial that Ms. Manuel had reported to them having had sexual intercourse with defendant beginning in the seventh grade.

Terri Colson testified that in 1983 or 1984, when she was 14 or 15 years old, defendant engaged in sexual intercourse with her on a gymnasium mat at the school; she further testified that defendant had intercourse with her on two other occasions that school year. Angela Morgan Cooper testified that defendant had sexual intercourse with her on several occasions during the summer before she entered the eighth grade. Cooper was thirteen at the time. Roxanne Doyle testified that defendant, who had been her seventh grade gym coach, french-kissed her on the school gym stage during the summer after her eighth grade year, when she was 14 years old; during this incident defendant also put his hand up Ms. Doyle's shirt and felt her breast. Ms. Doyle testified that defendant instructed her to relax and that he would teach her how to be comfortable sexually with her boyfriend. Defendant then persuaded her to lie on the gym mats, but when defendant attempted to climb on top of her, she pushed him aside and ran to the bathroom.

Debra Smith testified that she met defendant at the Warnersville Pool in the summer of 1988, when she was thirteen years old. Defendant asked her to accompany him to the store one day, but

instead he drove her to his home where they had sexual intercourse. According to Ms. Smith's testimony, she and defendant had sexual intercourse on other occasions in 1988 and 1989.

In addition to the testimony of the victims named in the bills of indictment, the State also offered the testimony of Betrice Gardner pursuant to G.S. § 8C-1, Rule 404(b). Ms. Gardner testified that she met defendant when she was sixteen years old after he approached her and offered to help her gain an athletic scholarship for college. According to her testimony, defendant began coaching Ms. Gardner during her senior year at Ben L. Smith High School in 1985. One day in defendant's office, defendant french-kissed Ms. Gardner; he later explained that he wanted to prepare her for college by demonstrating how a man should treat a woman and what to expect from a man. Defendant and Ms. Gardner eventually had sexual intercourse on mats on the gym stage at Mendenhall Middle School. They also had sex in defendant's car and at his home.

The Greensboro Police Department served the Guilford County Board of Education with a search warrant seeking defendant's personnel files in November 1998. As a result, the Board conducted an investigation into the charges against defendant. Prior to trial, defendant served subpoenas *duces tecum* on the Board of Education seeking production of records compiled during the Board's investigation which might be material to defendant's guilt or innocence. The trial court granted the Board's motion to quash the subpoenas *duces tecum*.

The jury returned verdicts finding defendant guilty of two counts of first degree rape and twelve counts of taking indecent liberties with children. Defendant appeals from the judgments entered upon the verdicts.

I.

[1] Defendant first argues the trial court erred when it granted the motion to quash the subpoenas *duces tecum* issued by defendant to the attorneys for the Guilford County Board of Education and to Shirley Morrison of the Guilford County Board of Education. His argument has merit.

It is well established that a defendant has a due process right to any information material to his guilt or innocence. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L. Ed. 2d 40, 57 (1987) (citing *Brady v.*

Maryland, 373 U.S. 83, 10 L. Ed. 2d 215 (1963)). Nevertheless, a government entity has a statutorily protected right to maintain confidential records containing sensitive information such as child abuse. *Id.* The Supreme Court held that in such circumstances, a defendant's due process rights are adequately protected by an *in camera* review of the files of the government agency, after which the trial court must order the disclosure of any information discovered which is material to the defendant's guilt or innocence. *Id.*

The North Carolina Supreme Court considered the duties of the trial court confronted with a request for records compiled on a victim of child abuse by social services agencies and a school board in *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). The defendant in *Phillips* sought, among other things, school records of the victim and three child witnesses. The Supreme Court held: "[a] judge is required to order an *in camera* inspection and make findings of fact concerning the evidence at issue only if there is a possibility that such evidence might be material to guilt or punishment and favorable to the defense." *Id.* at 18, 399 S.E.2d at 301 (citation omitted). The trial court in *Phillips* reviewed the confidential records *in camera*, including those records in the possession of the Bladen County Board of Education, then entered an order declaring that no information in the records was either relevant or material. *Id.* at 18, 399 S.E.2d 301-02. The trial court then sealed the records for appellate review. The Supreme Court reviewed these records and affirmed the decision of the trial court, concluding that the records were not subject to discovery by the defendant. *Id.*

In the present case, we cannot ascertain whether the trial court followed the procedure required by *Ritchie* and *Phillips*. In its Order Quashing Subpoenas of Defendant, there is no indication the trial court made the proper inquiry into the requested documents. The court noted the Guilford County Board of Education's argument that, "for the most part," the documents requested were protected as privileged and work product and were therefore "not discoverable." However, at the evidentiary hearing, the attorney for the School Board acknowledged:

> Now, there are some documents, I would acknowledge, some documents that were—that we received from some of the witnesses and this was part of our investigative file. Now, I don't claim that those documents are attorney/client privileged or subject to work product.

The court nevertheless quashed the subpoenas, concluding, "[t]hat the documents subpoenaed are privileged and work products of School Board Attorney's [sic]." Because we cannot determine from this record whether material documents in the possession of the Guilford County Board of Education or its attorneys exist, we must remand this case to the trial court with instructions to conduct an *in camera* inspection of the requested documents and to determine whether any such documents exist which contain information material to defendant's guilt or innocence. If no such documents exist, or if the non-disclosure of the documents was harmless error, the trial court is instructed to re-enter judgment against defendant; if, on the other hand, material documents exist, defendant is entitled to a new trial. *Ritchie*, 480 U.S. at 58, 94 L. Ed. 2d at 58.

II.

[2] Defendant next assigns error to the trial court's denial of his motion to dismiss because of the alleged "variances" between the evidence presented at trial and the State's responses to defendant's request for a bill of particulars. This argument is without merit.

In *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983), the North Carolina Supreme Court rejected the contention that the defendant was denied a fair trial because the bill of particulars and the evidence presented at trial did not precisely establish the date and time of the alleged rape:

> [A] child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense.

Id. at 749, 309 S.E.2d at 207 (citing *State v. King*, 256 N.C. 236, 123 S.E.2d 486 (1962)). In *State v. Burton*, 114 N.C. App. 610, 442 S.E.2d 384 (1994), the defendant challenged his convictions of incest, rape, and taking indecent liberties with minors on the ground that the State failed to offer sufficient evidence that the crimes occurred within the time periods noted in the indictments. This Court sustained the convictions, holding that the " 'variance between allegation and proof as to time is not material where no statute of limitations is involved.' " *Id.* at 612, 442 S.E.2d at 385 (citation omitted). Indeed, " 'the date

given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.' " *Id.* at 612, 442 S.E.2d at 386 (citing *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991)).

> In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring years before. (citations omitted).

Id. at 613, 442 S.E.2d at 386. The purpose of a bill of particulars is " 'to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry.' " *State v. Jacobs*, 128 N.C. App. 559, 565, 495 S.E.2d 757, 762, *disc. review denied*, 348 N.C. 506, 510 S.E.2d 665 (1998) (citation omitted). When time is not of the essence of the crime charged, such as first degree rape and taking indecent liberties with children, the State is not required to forecast exact dates and times in its indictments. *State v. McKinney*, 110 N.C. App. 365, 430 S.E.2d 300, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 182 (1993).

In the present case, the State provided defendant with a bill of particulars and later with an amended bill of particulars. In each case, the State presented a window of time in which defendant allegedly raped or took indecent liberties with the respective victims. At trial, Tosha Manuel testified that during the summer of 1987, when she was twelve years old, defendant drove her to Mendenhall and had sexual intercourse with her; she also testified that she had sexual intercourse with defendant on at least two other occasions in 1987. Terri Colson testified that in 1983 or 1984, when she was 14 or 15 years old, defendant engaged in sexual intercourse with her on a gymnasium mat at the school; she further testified that defendant had intercourse with her on two other occasions that school year. Angela Morgan Cooper testified that defendant had sexual intercourse with her on several occasions during the summer before she entered eighth grade, when Cooper was thirteen years old. Roxanne Doyle testified that defendant french-kissed her and felt her breast during the sum-

mer after her eighth grade year, when she was 14 years old. Finally, Debra Smith testified that defendant drove her to his home where they had sexual intercourse. According to Ms. Smith's testimony, she and defendant had sexual intercourse on other occasions in 1988 and 1989. The testimony at trial was not inconsistent with the State's indictments or its bills of particulars. This assignment of error is overruled.

III.

[3] Defendant next contends the trial court erred in admitting the testimony of Betrice Garner as to sexual acts committed against her by defendant. 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). Indeed, North Carolina's appellate courts have been "markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)." *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986) (citations omitted).

The use of evidence under Rule 404(b) is guided by two constraints: "similarity and temporal proximity." *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).

> 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.

Id.

In the present case, the State offered the testimony of Betrice Gardner under Rule 404(b) to show an ongoing plan or scheme to commit sexual offenses against female students and other young women. Betrice Gardner met defendant when she was a sixteen-year-old high school student; defendant approached her and offered to help her with her basketball skills so she could win an athletic

scholarship. Defendant later explained to Ms. Gardner that he wanted to prepare her for dating men in college by demonstrating "how a man should treat" her. Defendant eventually had sexual intercourse with Ms. Gardner on the mats on the gym stage at Mendenhall, the same location where he allegedly had sexual intercourse with some of the victims in these cases. Ms. Gardner also testified that she had sex with defendant in his car and in his home, often after practicing basketball. The trial court instructed the jury that the testimony of Ms. Gardner was being offered "solely for the purpose of showing that there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it is being received." Because defendant's alleged contact with Ms. Gardner and the sexual offenses committed against the victims in this case were sufficiently similar, and because the acts involving Ms. Gardner occurred in 1985, which is during the period of the alleged sexual crimes, we hold Ms. Gardner's testimony was admissible under Rule 404(b). Moreover, for the reasons explained above, we also hold that it was not an abuse of discretion for the trial court to admit Ms. Gardner's testimony under 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).

IV.

[4] Defendant next alleges the trial court erred in limiting the scope of defendant's cross-examination of Detective Michael Loy. This argument is without merit.

A trial court "has broad discretion over the scope of cross-examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998) (citation omitted). Further, the long-standing rule in North Carolina is that the trial court's rulings regarding the scope of cross-examination "will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 221, 297 S.E.2d 574, 579 (1982) (citations omitted).

In the present case, defendant has made no showing that the trial court's limitation of the cross-examination of Detective Loy improperly influenced the verdict. The State offered Loy's testimony for the limited purpose of rebutting the testimony of Jacqueline Walker Benner, who denied at trial that she ever made a statement that she had sexual contact with defendant when she was a student

at Mendenhall. Defendant alleges that if he had been permitted to ask Detective Loy questions about specific dates and times of the alleged sexual offenses involving other victims, he could have possibly raised a reasonable doubt as to defendant's guilt in the minds of the jurors. Defendant, however, was permitted to question the victims regarding specific dates and times of the offenses. Moreover, as explained above, time is not an essential element of the crimes of first degree rape and taking indecent liberties with children. *State v. Norris*, 101 N.C. App. 144, 398 S.E.2d 652 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991). For these reasons, the trial court did not abuse its discretion in limiting defendant's cross examination of Detective Loy.

Finally, because defendant offers no argument in support of his remaining assignments of error, they are deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5).

No error in part; remanded for further proceedings in accordance with this opinion.

Judges HUNTER and HUDSON concur.

LORA ROBINSON, AND CHRISTY ROBINSON, PLAINTIFF-APPELLEES v. TAMELA SHUE, DEFENDANT-APPELLANT

No. COA00-1059

(Filed 17 July 2001)

Costs— attorney fees—offer of settlement—*Washington* factors

The trial court did not abuse its discretion by awarding attorney fees to plaintiff under N.C.G.S. § 6-21.1 in an automobile negligence action where defendant offered to settle the case for $1,650 before plaintiff filed suit, defendant later made an offer of judgment of $1,718, the jury awarded plaintiffs $1,600, and the judgment awarded plaintiffs the $1,600 jury verdict, interest at a rate of 8% per year until the judgment was paid in full, $4,410 in attorney fees, and $486 in costs. While defendant argued that the only amount to compare against the offer of judgment is the verdict amount of $1,600 and that no attorney fees are therefore

allowed, the verdict is not synonymous with the judgment finally obtained. The trial court's consideration of the factors in *Washington v. Horton*, 132 N.C. App. 347, was adequate.

Appeal by defendant from judgment entered 15 May 2000 by Judge Lisa Thacker in Union County District Court. Heard in the Court of Appeals 6 June 2001.

The Law Offices of William K. Goldfarb, by William K. Goldfarb, for plaintiff appellees.

Morris, York, Williams, Surles & Barringer, LLP, by John H. Capitano, for defendant appellant.

McCULLOUGH, Judge.

Plaintiffs Lora Robinson and Christy Robinson are mother and daughter, respectively. On 4 March 1997, Lora Robinson was driving her 1986 Pontiac in Monroe, North Carolina; her daughter was in the car with her. As plaintiffs traveled in a northerly direction, defendant was backing her 1988 Oldsmobile out of a residential driveway, moving in a southerly direction. Defendant failed to yield the right-of-way and collided with plaintiffs' vehicle, causing damages to the vehicle and injuries to plaintiffs.

On 3 December 1997, defendant contacted plaintiffs and offered to pay $1,000.00 to settle Lora Robinson's claim, and $650.00 to settle Christy Robinson's claim. Plaintiffs rejected defendant's offer and filed a complaint, alleging that defendant was negligent in causing the accident. Plaintiffs also stated that they suffered injuries and underwent medical treatment as a result of the accident. Defendant answered, denying that she was negligent. Some time later, on 22 April 1998, defendant made an offer of judgment to plaintiffs, stating that she would

> allow judgment to be entered against her in this action, as to the claims of Lora Robinson for the lump sum of $1,050.00, said amount specifically to include attorney's fees taxable as costs, and any remaining costs accrued at the time this offer is filed in which the Court might subsequently tax as costs, and as to the claims of Christy Robinson, for the lump sum of $668.00 said amount specifically to include attorney's fees taxable as costs, and any remaining costs accrued at the time this offer is filed in which the Court might subsequently tax as costs.

Plaintiffs rejected defendant's offer of judgment and the case proceeded to a trial by jury.

During the trial, defendant stipulated that she was negligent in causing the car accident. On 4 April 2000, the jury found defendant's negligence caused plaintiffs' injuries, and awarded $1,000.00 to Lora Robinson and $600.00 to Christy Robinson. The issue of attorney fees was set aside for later consideration, with both plaintiffs' and defendant's attorneys agreeing to submit written arguments to the trial court regarding appropriate attorney fees.

In his letter, plaintiffs' attorney informed the trial court that he expended a total of 29.4 hours of work on plaintiffs' case and that his normal fee was $150.00 per hour. He therefore asked the trial court to award attorney fees to plaintiffs in the amount of $4,410.00. Defendant's attorney asked the trial court to fully deny plaintiffs' motion and award no attorney fees.

The trial court made the following findings of fact:

1. The Plaintiffs' lawyer incurred time and expense prior to the making of the offers of judgment.

2. The judgment finally obtained exceeded the offers of judgment.

3. The Defendant appealed the arbitration award and failed to make any additional offers prior to trial.

4. The attorney's fee agreement between Plaintiffs and Plaintiffs' counsel is contingent in part and hourly in part. The agreement that Plaintiffs' counsel has with the Plaintiffs is if the case is resolved without an award of attorney's fee, the Plaintiffs' counsel would take a contingent fee. In the event attorney fees are awarded, Plaintiffs' counsel charges $150 per hour for the time spent in the preparation and execution of the case.

In the exercise of the discretion of the Court and based on the Findings of the Court, Plaintiffs' counsel shall recover from the Defendant attorney fees necessitated by this litigation in the amount of $4,410 and Plaintiffs' costs in this action shall be taxed against the Defendant, said costs being reflected in the Court's records, the attached billing statement, and a reasonable fee for the testimony of Keith Pittman, D.C., to wit:

Certified Mailing (Service on Defendant)	$ 3.00
Trial Subpoenas (Certified Mailing—11 @ 3.00 each)	33.00
Expert Fee—Testimony of Keith Pittman, D.C.	450.00
Total Costs	$486.00

The trial court then made the following conclusions of law:

1. The parties have agreed that this Judgment may be signed out of Term, out of County and out of Session;

2. That the Plaintiff, Lora Robinson, have and recover from the Defendant, Tamela Shue, the sum of $1,000;

3. That the Plaintiff, Lora Robinson, have and recover from the Defendant, Tamela Shue, interest at a rate of eight percent (8%) per annum from the date this lawsuit was instituted on February 11, 1998, until the Judgment is paid in full pursuant to N.C.G.S. 24-5;

4. That the Plaintiff, Christy Robinson, have and recover from the Defendant, Tamela Shue, the sum of $600;

5. That the Plaintiff, Christy Robinson, have and recover from the Defendant Tamela Shue, interest at a rate of eight percent (8%) per annum from the date this lawsuit was instituted on February 11, 1998, until the Judgment is paid in full pursuant to N.C.G.S. 24-5;

6. That Plaintiffs' counsel made a motion unto the Court for his attorney's fees pursuant to N.C.G.S. 6-21.1 and expenses and the Court finds:

   (a) Plaintiffs' counsel expended 29.4 hours on this case;

   (b) That Plaintiffs' counsel's hourly rate of $150.00 is reasonable and typically charged by an attorney of his experience.

The trial court ultimately awarded plaintiffs $4,410.00 in attorney fees and $486.00 in costs. Defendant appealed.

Defendant brings forth three assignments of error challenging the trial court's findings of fact and conclusions of law with regard to the award of attorney fees to plaintiffs. Defendant contends that the trial court's decision constituted an abuse of discretion. For the reasons set forth, we disagree with defendant and affirm the judgment of the trial court.

"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). However, N.C. Gen. Stat. § 6-21.1 (1999) "creates an exception to the general rule that attorney's 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). N.C. Gen. Stat. § 6-21.1 (1999) provides as follows:

> [i]n 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.

Since plaintiffs' combined jury verdict was only $1,600.00, plaintiffs properly requested attorney fees under N.C. Gen. Stat. § 6-21.1.

The purpose of N.C. Gen. Stat. § 6-21.1 is

> to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973).

Though defendant concedes that N.C. Gen. Stat. § 6-21.1 is the proper method for requesting attorney fees, she maintains that the trial court's findings of fact are insufficient to support its

award of attorney fees to plaintiffs and that the award itself constitutes an abuse of discretion. To prevail, defendant must show that the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). *See also Porterfield v. Goldkuhle*, 137 N.C. App. 376, 528 S.E.2d 71 (2000). "Allowance of counsel fees under the authority of this statute is, by its express language, in the discretion of the presiding judge, and is reversible only for abuse of discretion." *McDaniel v. N.C. Mutual Life Ins. Co.*, 70 N.C. App. 480, 483, 319 S.E.2d 676, 678, *disc. reviews denied*, 312 N.C. 84, 321 S.E.2d 897 (1984). In reviewing this assignment of error, we are also mindful that "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).

"The discretion accorded the trial court in awarding attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 is not unbridled." *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. When attorney fees are at issue, the trial court must examine the entire record, as well as the following factors: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. *Id.* at 351, 513 S.E.2d at 334-35. " '[T]o determine if an award of counsel fees is reasonable, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney" based on competent evidence.' " *Brookwood Unit Ownership Assn. v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) (quoting *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995) (quoting *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993) (citations omitted)).

We will review each of the *Washington* factors in turn.

As to factor one, the trial court considered defendant's settlement offer made prior to institution of the action. In his letter to the trial court, defendant's attorney stated that

> 1. On December 3, 1997, Defendant offered $650.00 to Christy Robinson and $1,000.00 to Lora Robinson.

Plaintiffs rejected that offer and filed their complaint on 11 February 1998.

As to factor two, the trial court heard evidence from both attorneys regarding an offer of judgment made after plaintiffs' suit had been filed. Just before trial, on 22 April 1998, defendant made an offer of judgment to plaintiffs in the amount of $1,718.00. Plaintiffs rejected the offer, and the jury ultimately returned a verdict for plaintiffs for $1,600.00. The trial court found that plaintiffs incurred costs of $486.00 for certified mailings and an expert witness fee. The trial court further found, in finding of fact four, that plaintiffs and their attorney had a fee agreement that was contingent in part and hourly in part. In finding of fact two, the trial court found that the judgment finally obtained exceeded the offer of judgment made on 22 April 1998. This finding of fact also satisfies *Washington* factor six—the amounts of settlement offers as compared to the jury verdict.

As to factor three, plaintiffs concede that defendant did not exercise superior bargaining power. In his letter to the trial court, plaintiffs' attorney stated that

> I cannot argue that the defendant unjustly exercised superior bargaining power since Allstate Insurance Company was the person in control of the purse strings.

As to factor four, both parties stipulated that "unwarranted refusal by an insurance company" did not apply in this case. Moreover, because this suit was not brought by an insured or a beneficiary against an insurance company defendant, findings of fact are not necessary regarding this *Washington* factor. *See Crisp v. Cobb*, 75 N.C. App. 652, 331 S.E.2d 255 (1985).

Lastly, as to factor five, the trial court was aware of the timing of defendant's settlement offer. Defendant's attorney clearly explained to the trial court that defendant offered to settle the case for $1,650.00 on 3 December 1997. Defendant's attorney also informed the trial court that defendant tendered an offer of judgment on 22 April 1998 in the amount of $1,718.00; this sum included attorney fees taxable as

costs and any remaining costs accrued at the time the offer was filed which the trial court might later tax as costs.

Of the six *Washington* factors, the parties disagree most fervently as to whether the judgment finally obtained exceeded the offer of judgment made. Plaintiffs argue that attorney fees and costs should be added to the $1,600.00 jury verdict to "beat" the $1,718.00 offer of judgment. Defendant, on the other hand, argues that only the amount of attorney fees actually awarded as costs should be added to the jury verdict.

Offers of judgment are addressed by N.C. Gen. Stat. § 1A-1, Rule 68. Rule 68 states:

> (a) *Offer of judgment.*—At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

"[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) (emphasis added), *reh'gs denied*, 342 N.C. 666, 467 S.E.2d 722 (1996). In the recent case of *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000), the North Carolina Supreme Court stated that "costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the 'judgment finally obtained[.]' " *Id.* at 250-51, 538 S.E.2d at 569. In the present case, reasonable attorney fees qualify as part of the costs. *See Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001); and N.C. Gen. Stat. § 6-21 (1999).

Before plaintiffs filed suit, defendant offered to settle the case for $1,650.00, and later made an offer of judgment in the amount of $1,718.00. The jury verdict awarded plaintiffs $1,600.00. The trial court obtained an affidavit from plaintiffs' attorney, stating that he worked a total of 29.4 hours on the case, and that he normally charged $150.00 per hour, for a total of $4,410.00. He stated that, before the offer of judgment from defendant on 22 April 1998, he

had expended 8.5 hours of work on the case, totaling $1,275.00 (a rate of $150.00 per hour). He also presented evidence of $486.00 in costs.

The judgment obtained totaled $1,600.00, plus costs and interest, with the issue of attorney fees argued by counsel in letters to the trial court. It should be noted that the jury verdict, costs and interest exceeded the offer of judgment without considering the attorney fees. Plaintiffs' attorney maintains that the offer of judgment under Rule 68 was therefore less than the judgment finally obtained, so that he is entitled to the entire $4,410.00 in attorney fees. Defendant's attorney argues that the offer of judgment ($1,718.00) "beat" the judgment finally obtained ($1,600.00) because the judgment finally obtained should include only those attorney fees actually awarded under N.C. Gen. Stat. § 6-21.1. *See Poole*. Since no attorney fees were actually awarded in the judgment, defendant argues that the only amount to compare against the offer of judgment is the verdict amount of $1,600.00. Under his reasoning, the offer of judgment "beats" the judgment finally obtained and no attorney fees are allowed.

A judgment is " '[t]he final decision of the *court* resolving the dispute and determining the rights and obligations of the parties,' " and " '[t]he law's last word in a judicial controversy.' " *Poole*, 342 N.C. at 352, 464 S.E.2d at 411 (quoting *Black's Law Dictionary* 841-42 (6th ed. 1990) (emphasis added)). The *Poole* Court also explained that the judgment finally obtained is not the jury verdict, but the actual judgment rendered by the trial court. *Id.* Here, the trial court's judgment awarded plaintiffs the $1,600.00 jury verdict, interest at a rate of eight percent (8%) per year from 11 February 1998 until the judgment was paid in full, $4,410.00 in attorney fees, and $486.00 in costs. We cite with approval our recent decision in *Tew*, wherein this Court stated that "[t]he verdict by the jury is not synonymous with the judgment finally obtained." *Tew*, 143 N.C. App. at 538, 546 S.E.2d at 186.

After carefully reviewing each of the six *Washington* factors and the entire record, we find that the trial court's consideration of the factors was adequate. The trial court was presented with letters from both plaintiffs' and defendant's attorneys, and those letters clearly delineated the relevant case law, as well as the six *Washington* factors. Detailed findings of fact are not required for each factor. *See Tew*, 143 N.C. App. at 537, 546 S.E.2d at 185. The trial court also directly addressed the parties' arguments concerning whether the judgment finally obtained exceeded the offer of judgment. In its find-

ing of fact two, the trial court definitively stated that "[t]he judgment finally obtained exceeded the offers of judgment."

We agree with the parties that the timing and the amount of settlement offers and the amount of the jury verdict are the most important issues in this case. *See Culler v. Hardy*, 137 N.C. App. 155, 526 S.E.2d 698 (2000). However, contrary to defendant's assertions, we find that the trial court adequately examined the timing of the pre-suit offer, as well as the offer of judgment. Defendant's attorney set out the timing of the pre-suit offer and the offer of judgment in his letter to the trial court. He also made clear arguments that defendant's pre-suit offer and the offer of judgment were timely, made in good faith, and were reasonable in amount as compared to the ultimate jury verdict.

We are not persuaded by defendant's argument that our decision will encourage plaintiffs to reject fair settlement offers and proceed to trial, depending on a trial judge to "rescue" them by later awarding attorney fees. Rather, we agree with plaintiffs that defendant has presented no evidence that the trial court ignored the pretrial motions, affidavits, or the written arguments concerning the *Washington* factors delivered by both attorneys. Absent such a showing by defendant, we cannot find an abuse of discretion by the trial court in this case. Consequently, we hold that the trial court made adequate findings of fact concerning the *Washington* factors. While the better practice would be for the trial court to include a statement making it clear that it had fully considered the factors set forth in *Washington*, we are satisfied that the trial court did so here.

The judgment of the trial court awarding attorney fees to plaintiffs is

Affirmed.

Judges WALKER and THOMAS concur.

KEITH BRENT VEST v. MICHAEL F. EASLEY, NORTH CAROLINA ATTORNEY GENERAL; SAM F. BOYD, EXECUTIVE DIRECTOR NORTH CAROLINA PAROLE COMMISSION; FRANKLIN FREEMAN, ADVISOR TO GOVERNOR AND PAST SECRETARY OF NORTH CAROLINA DEPARTMENT OF CORRECTION; MACK JARVIS, PAST SECRETARY OF NORTH CAROLINA DEPARTMENT OF CORRECTION; JOSEPH HAMILTON, SECRETARY OF NORTH CAROLINA DEPARTMENT OF CORRECTION; JUANITA BAKER, CHAIRMAN OF NORTH CAROLINA PAROLE COMMISSION; ELBERT BUCK, CHARLES L. MANN, SR., WILLIAM LOWRY, PEGGY STAMEY, MEMBERS OF THE NORTH CAROLINA PAROLE COMMISSION

No. COA00-635

(Filed 17 July 2001)

1. Appeal and Error— appealability—denial of motion for summary judgment

The denial of a motion for summary judgment was immediately appealable because it involved an immunity defense.

2. Immunity— Parole Commission and Corrections officials—miscalculation of parole eligibility

Summary judgment should have been granted on plaintiff's negligence claims arising from the miscalculation of his parole eligibility date where the remaining defendants were entitled to public official immunity. Plaintiff did not allege a waiver; did not show evidence that defendants' conduct was malicious, corrupt or outside the scope of their official authority; and failed to show injury.

3. Civil Rights— § 1983 claim—miscalculation of parole eligibility

Summary judgment should have been granted for defendants on a 42 U.S.C. § 1983 claim arising from the miscalculation of the parole date of an inmate serving multiple sentences. Neither the state nor its officials are considered "persons" within the meaning of the statute when an action is brought seeking monetary damages; there is no right to be released before the expiration of a valid sentence and plaintiff's parole eligibility was re-calculated; and, although plaintiff's parole was denied, his case manager twice recommended him for a custody change hearing once the mistake was realized and there was no evidence of a willful and knowing violation of plaintiff's rights.

4. Declaratory Judgments— miscalculation of parole eligibility—mootness

An action seeking declaratory or injunction relief by a prison inmate whose parole eligibility date was miscalculated was moot where plaintiff had become eligible for parole even under the miscalculation and a declaratory judgment would in no way affect his parole eligibility status.

Appeal by defendants from judgment entered 3 November 1999 by Judge James Floyd Ammons, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 29 March 2001.

No brief for plaintiff-appellant filed.

Michael F. Easley, Attorney General, by Elizabeth F. Parsons, Assistant Attorney General, for defendant-appellant State.

George B. Currin, amicus curiae.

THOMAS, Judge.

Defendants appeal from a partial denial of summary judgment granted in favor of plaintiff, Keith Brent Vest, who had brought an action requesting both damages and a declaratory judgment regarding his parole eligibility status. For the reasons stated herein, we reverse in part and dismiss in part.

The facts are as follows: In March 1990, plaintiff was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. For these two felonious assault charges, plaintiff received a consolidated twenty-year sentence. At the same sentencing hearing, plaintiff also received a consecutive life sentence for the offense of first-degree burglary.

Plaintiff filed a complaint on 24 May 1999, alleging defendants incorrectly calculated his parole eligibility. Defendants were sued in both their individual and official capacities. The North Carolina Parole Commission (Commission) had originally calculated that plaintiff was eligible for parole on the assault charges on 11 February 1991. Because of the consecutive life sentence, the Commission calculated his parole eligibility date on the total sentences to be 23 June 2006. In June 1998, however, prior to this action, it was corrected by the Commission to 8 February 2001. By error, according to the Commission's calculations, plaintiff was

actually considered for parole and had a hearing on 11 February 1999. Parole was denied.

Plaintiff contends his eligibility date has not been properly aggregated, or properly reduced through earned gain time and/or meritorious gain time. In his complaint, plaintiff claims he is entitled to compensatory damages in excess of $10,000 due to loss of wages, loss of benefits, loss of status, loss of reputation and inconvenience all caused by defendants' discrimination, violation of due process and cruel and unusual punishment. Plaintiff also requested a declaratory judgment computing and setting his earliest parole eligibility date, punitive damages, attorney fees and court costs.

Defendants answered by claiming sovereign immunity and alleging they properly calculated the date plaintiff would be eligible for parole. Plaintiff and defendants all moved for summary judgment and, on 1 November 1999, the trial judge: 1) dismissed all claims against defendant Easley; 2) dismissed plaintiff's claims for punitive damages against the remaining defendants; 3) denied defendants' summary judgment motion as to state and federal constitutional claims, declaratory judgment claims and negligence claims; and 4) denied plaintiff's motion for summary judgment. Defendants appeal the denial of their motion for summary judgment. Plaintiff assigned error to the dismissals, but failed to brief them. Accordingly, plaintiff's assignments of error are not properly before this Court and we do not address them. N.C.R. App. P. 10(a) (2000).

[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 a motion for summary judgment is immediately appealable if it involves an immunity defense. *Staley v. Lingerfelt*, 134 N.C. App. 294, 517 S.E.2d 392, *rev. denied*, 351 N.C. 109, 540 S.E.2d 367 (1999). Such a defense is present in the instant case.

[2] By defendants' first assignment of error, they argue the trial court erred in denying their summary judgment motion because there were

no genuine issues of material fact. More specifically, defendants argue the following: 1) sovereign immunity protects defendants in their official capacities against plaintiff's negligence claims; 2) public official immunity protects defendants in the claims arising under 42 U.S.C. § 1983; 3) qualified immunity protects defendants in their individual capacities in claims arising under 42 U.S.C. § 1983; 4) quasi-judicial immunity protects defendants Boyd, Baker, Buck, Lowry, Mann and Stamey in their individual capacities in plaintiff's claims for damages; 5) plaintiff failed to show malicious conduct; and 6) plaintiff failed to show injury. We agree.

We note that 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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999).

Sovereign immunity is a theory or defense established to protect a sovereign or state as well as its officials and agents from suit in certain instances. *See Herring v. Winston-Salem/Forsyth County Board of Education*, 137 N.C. App. 680, 529 S.E.2d 458, *rev. denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). The doctrine applies when the agency or entity is being sued for the performance of a governmental 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). It mandates that the state is immune from suit unless it expressly consents to be sued through a waiver, evidenced by the purchase of liability insurance or, unless a statutory waiver of immunity applies. *Id. See also Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 529 S.E.2d 693 (2000); *Coastland Corp. v. North Carolina Wildlife Resources Comm'n*, 134 N.C. App. 343, 517 S.E.2d 661 (1999). Sovereign immunity has several forms, including quasi-judicial and public official immunity, all deriving from the English feudal theory of "the king can do no wrong." *See Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 468 S.E.2d 846, *rev. denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. *Northfield Development Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 523 S.E.2d 743 (2000) (citations omitted). In effect, the rule of judicial immunity extends to those performing quasi-judicial func-

tions. *See Hoke v. Bd. of Medical Examiners of the State of N.C.*, 445 F.Supp. 1313, 1314 (W.D.N.C. 1978). "Quasi-judicial 'decisions involve the application of . . . policies to individual situations rather than the adoption of new policies.' " *Northfield*, 136 N.C. App. at 282, 523 S.E.2d at 750. Further, it has been held that the members of a state parole board perform quasi-judicial functions and are immune from suit under section 1983. *See Franklin v. Shields*, 569 F.2d 784 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003, 56 L. Ed. 2d 92 (1978); *Pope v. Chew*, 521 F.2d 400, 405 (4th Cir. 1975). In the case at bar, six of the defendants are members or former members of the Commission. We hold that quasi-judicial immunity extends to them.

Public official immunity, or qualified immunity, on the other hand, is not an absolute bar, as it has three exceptions. Under public official immunity, if a public officer lawfully exercises judgment and discretion, is within the scope of his official authority, and acts without malice or corruption, he is protected from liability. *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). However, public officials must be distinguished from public employees. 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). In the case at bar, all of the remaining defendants clearly hold discretionary jobs. The members of the Commission have jobs established by N.C. Gen. Stat. § 148-57 (1999). N.C. Gen. Stat. § 143B-263 (1999) establishes a Secretary of the Department of Correction as the head of the department. We hold defendants are all entitled to public official immunity.

As to plaintiffs' negligence claims, defendants contend sovereign immunity protects them in their official capacities against plaintiff's negligence claims. There is no question that defendants were performing a governmental function. It is well-established law that with no allegation of waiver in a plaintiff's complaint, the plaintiff is absolutely barred from suing the state and its public officials in their official capacities in an action for negligence. *See Messick*, 110 N.C. App. at 714, 431 S.E.2d at 493; *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997); *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 468 S.E.2d 846 (1996). In the instant case, plaintiff did not allege a waiver. Plaintiff may only pierce the defendants' sovereign immunity by showing one of the three exceptions to public official immunity: 1) the conduct was malicious; 2) the conduct was corrupt; or 3) the con-

duct was outside the scope of official authority. *Epps*, 122 N.C. App. at 205, 468 S.E.2d at 851-52.

Plaintiff has alleged these immunity exceptions. However, plaintiff has not shown any *evidence* that defendants' conduct was malicious, corrupt or outside the scope of their official authority. A mere allegation is not sufficient to overcome summary judgment. *See Briley v. Farabow*, 348 N.C. 537, 544, 501 S.E.2d 649, 654 (1998); *Justus v. Deutsch*, 62 N.C. App. 711, 714, 303 S.E.2d 571, 573, *rev. denied*, 309 N.C. 821, 310 S.E.2d 349 (1983). Moreover, even sued individually, defendants claim they are still immune from a claim of mere negligence because plaintiff fails to show injury. Because we hold defendants are entitled to public official immunity, however, we do not reach this issue. Consequently, we find summary judgment should have been granted as to plaintiff's negligence claims and reverse the trial court.

[3] Concerning plaintiff's claims under 42 U.S.C. § 1983, defendants contend official capacity immunity protects them from a section 1983 action. Section 1983 authorizes civil actions for the deprivation of any rights, privileges, or immunities secured by the U.S. Constitution. 42 U.S.C. § 1983 (2001). However, our Supreme Court in *Corum v. University of North Carolina*, held that when an action under 42 U.S.C. § 1983 is brought seeking monetary damages against "the State, its agencies, and/or its officials acting in their official capacities" in state court, neither the state nor its officials are considered "persons" within the meaning of the statute. *Corum*, 330 N.C. 761, 771, 413 S.E.2d 276, 282, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Because plaintiff sued defendants in their official capacities, a claim under section 1983 cannot be made against defendants.

Defendants further contend qualified immunity protects them in their individual capacities against section 1983 claims. Governmental officials sued in their individual capacities may be held liable for money damages under section 1983. *Corum*, 330 N.C. at 772, 413 S.E.2d at 283. They may, however, defend by raising the defense of qualified immunity. *Id.* Qualified immunity protects public officials from personal liability for performing official, discretionary functions if the conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Moore v. Evans*, 124 N.C. App. 35, 48, 476 S.E.2d 415, 425 (quoting *Corum v. University of North Carolina*, 330 N.C. 761, 772-73, 413

S.E.2d 276, 284 (1992)). We note there is no right for a convicted person to be released before the expiration of a valid sentence. *See Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 60 L. Ed. 2d 668 (1979). Plaintiff claims defendants knowingly and wrongfully continued to use paper paroles, which required an inmate serving multiple sentences to be paroled to the second sentence before being treated as having begun service of the second sentence for parole eligibility purposes. Pursuant to *Robbins v. Freeman*, 127 N.C. App. 162, 487 S.E.2d 771 (1997), *aff'd per curiam*, 347 N.C. 664, 496 S.E.2d 375 (1998), the Commission discontinued the use of paper paroles. The effect was to aggregate consecutive sentences imposed at the same sentencing hearing as one sentence for the purpose of determining parole eligibility. *See* N.C. Gen. Stat. § 15A-1354(b) (1999). However, plaintiff alleges his rights were violated as early as 1993. Yet, *Robbins* was not decided until 1997. After *Robbins*, defendants re-calculated plaintiff's parole eligibility. Thus, defendants did not violate any *clearly established* rights of plaintiff's.

Plaintiff further argues his rights were violated by defendants' refusing custody promotion due to erroneous calculation. However, once the mistake regarding plaintiff's parole hearing was realized, Charnita McNeill, plaintiff's case manager, immediately recommended plaintiff twice for a custody change hearing. Although plaintiff's parole was denied, plaintiff has shown no evidence of defendants' willful and knowing violation of his rights. Consequently, we find summary judgment should have been granted as to plaintiff's section 1983 claims.

We thus hold there is no basis for compensatory damages against defendants. Sovereign immunity, the wording of the complaint and lack of evidence combine to defeat those claims. Summary judgment should have been granted in favor of defendants on all such issues and we therefore reverse the trial court as to the constitutional and negligence claims. The question remaining is whether plaintiff has standing to require the court to issue a declaratory judgment.

[4] By defendants' second assignment of error, they argue plaintiff is not entitled to injunctive or declaratory relief. We agree.

A plaintiff is entitled to injunctive relief when there is no adequate remedy at law and irreparable harm will result if the injunction is not granted. *Asheville Mall, Inc. v. Sam Wyche Sports World, Inc.*,

97 N.C. App. 133, 387 S.E.2d 70 (1990). In the instant case, it appears plaintiff is arguing that his parole eligibility actually began in 1995 and the life sentence should have been reduced from twenty years to five years, with good time cutting the twenty years in half and then gain time cutting in half the remaining ten years. It further appears plaintiff actually has had one full parole hearing and at least two custody change hearings, all of which were denied. However, since filing the suit, plaintiff has become technically eligible for parole even under the Commission's computation as of February 2001. Consequently, the imminent query is whether the issue is now moot as to a declaratory judgment.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). A declaratory judgment issued at the present time by the trial court would not in any way affect plaintiff's parole eligibility status. We note this is not a class action. Under the circumstances of *this* plaintiff, a ruling for or against a declaratory judgment would not affect *this* plaintiff's controversy. Thus, although it may have been appropriate for the trial court to have ruled upon the declaratory judgment at the time of the commencement of this action, the issue is now non-justiciable and, as such, must be dismissed as moot. *See Shella v. Moon*, 125 N.C. App. 607, 609, 481 S.E.2d 363, 364 (1997).

In conclusion, we reverse the trial court's denial of defendants' summary judgment motion and dismiss plaintiff's motion for declaratory judgment for the reasons stated herein.

REVERSED IN PART, DISMISSED IN PART.

Judges MARTIN and BIGGS concur.

JOHN S. RENEGAR, PLAINTIFF v. R.J. REYNOLDS TOBACCO COMPANY, DEFENDANT

No. COA00-450

(Filed 17 July 2001)

Statute of Limitations— wrongful discharge—filing state action after voluntary dismissal of federal action

The trial court did not err in a wrongful discharge action by granting summary judgment in favor of defendant employer based on the expiration of the three-year statute of limitations under N.C.G.S. § 1-52(5) even though plaintiff filed the instant state action within one year of the voluntary dismissal without prejudice of his non-diversity federal complaint under Federal Rule 41, because: (1) plaintiff's voluntary dismissal of a non-diversity case failed to implicate the savings provision of N.C.G.S. § 1A-1, Rule 41(a) and Federal Rule 41 contains no savings provision; (2) plaintiff's federal complaint reveals no basis upon which the federal court might have assumed supplemental jurisdiction under 28 U.S.C.A.§ 1367(a) for plaintiff's wrongful discharge claim; and (3) plaintiff's state court action was not a new action based upon the same claims as those asserted in the prior action so as to bring N.C.G.S. § 1A-1, Rule 41(a) into play.

Appeal by plaintiff from order entered 29 November 1999 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 30 January 2001.

Herman L. Stephens for plaintiff-appellant.

Constangy, Brooks & Smith, L.L.C., by W.R. Loftis, Jr. and Virginia A. Piekarski, for defendant-appellee.

JOHN, Judge.

Plaintiff John S. Renegar appeals the trial court's 29 November 1999 order granting summary judgment in favor of defendant R.J. Reynolds Tobacco Company (RJR). We affirm the trial court.

Our disposition of plaintiff's appeal renders a lengthy recitation of the underlying facts unnecessary. Plaintiff began employment with RJR on 2 June 1984 and was terminated 15 April 1996. In June 1998, plaintiff filed a *pro se* civil action (plaintiff's federal action) against RJR in the United States District Court for the Middle District of

North Carolina. Plaintiff amended his complaint 7 July 1998, alleging the following six separate causes of actions: (1) discrimination against plaintiff in violation of title VII of the federal Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.* (1994); (2) discrimination against plaintiff in violation of 42 U.S.C.A. § 12101 *et seq.* (1995), the Americans With Disabilities Act; (3) violation of plaintiff's rights under the federal Family and Medical Leave Act, 29 U.S.C.A. § 2601 *et seq.* (1999); (4) violation of plaintiff's federal constitutional rights to privacy and speech under the First, Fourth and Fourteenth Amendments to the United States Constitution; (5) "infliction of daily emotional distress" as a result of discrimination, harassment and retaliation; (6) and discrimination against plaintiff in violation of 29 U.S.C.A. § 621 *et seq.* (1999), the Age Discrimination in Employment Act. On 29 August 1998, plaintiff filed a voluntary dismissal without prejudice, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure (Federal Rule 41), as to each of the foregoing claims. *See* Fed. Rules Civ. Proc. Rule 41(a), 28 U.S.C.A. (1992).

Precisely one year later, on 29 August 1999, plaintiff filed a complaint against RJR in Forsyth County Superior Court (plaintiff's state action) asserting a claim of wrongful discharge in violation of public policy. RJR thereupon moved to dismiss plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1999) on grounds "it fail[ed] to state a claim upon which relief can be granted because the claim asserted by Plaintiff therein is time-barred" (RJR's motion). The trial court treated RJR's motion as one for summary judgment and, by order dated 29 November 1999, granted the motion on the basis that the applicable statute of limitations had expired. Plaintiff appeals.

It is undisputed that the statute of limitations for a wrongful discharge action under North Carolina law is three years from the date of discharge. *See* N.C.G.S. § 1-52(5) (1999). In the case *sub judice*, therefore, the statute began to run 15 April 1996, the date of plaintiff's termination, and thus ordinarily would have expired 15 April 1999, several months prior to the filing of plaintiff's state action.

Rule 41 of the North Carolina Rules of Civil Procedure differs from its federal counterpart in that it contains the following additional provision:

> If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be

> commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

G.S. § 1A-1, Rule 41(a)(1) (1999). "The effect of this provision is to extend the statute of limitations by one year after a voluntary dismissal." *Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395, *disc. review denied*, 351 N.C. 109, 540 S.E.2d 367 (1999). Disposition of the instant appeal therefore turns upon the applicability of the one-year savings provision of N.C. Rule 41 to plaintiff's state action.

Plaintiff argues the trial court erred in allowing RJR's motion in light of the savings provision of N.C. Rule 41. According to plaintiff, the federal court had supplemental or "pendent" jurisdiction over his wrongful discharge claim. *See* 28 U.S.C.A. § 1367(a) (1993) (when federal district court has original jurisdiction over a civil action, it may also exercise "pendent" or "supplemental" jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy). As such, plaintiff maintains "state substantive law governs all pendent jurisdiction North Carolina state law claims" in a federal case. Because he commenced the instant state action within one year of the voluntary dismissal of his federal complaint, plaintiff concludes his state action was timely filed under N.C. Rule 41(a).

However, regarding his initial federal action, plaintiff concedes "[t]here was no diversity of citizenship between plaintiff and [RJR]," and that "[t]he federal court's jurisdiction was based on the federal questions he presented in his federal complaint." Accordingly, plaintiff's first complaint was not predicated upon diversity of citizenship jurisdiction, *i.e.*, it was a "non-diversity" case. This is significant because determination of the law to be applied in federal court is governed by the source of the right or issue being adjudicated. 19 C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc. 2d § 4520 (1996).

For example, "[t]he tolling of a state statute of limitation *in a diversity case* is strictly a substantive matter of state law," *Kahn v. Sturgill*, 66 F.R.D. 487, 491 (M.D.N.C. 1975) (emphasis added), which the federal court must follow, *id.; see Erie Railroad v. Tomkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194 (1938) (federal court in diversity case is to apply substantive provisions of state law), and *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 89 L. Ed. 2079, 2086 (1945) ("federal

court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State"). Conversely, where a

> federal court gains jurisdiction over state claims *supplementally*, pursuant to 28 U.S.C.A. § 1367(a), because the action was . . . brought based on federal or constitutional law, the [federal] court is not bound to state substantive law only.

Harter v. Vernon, 139 N.C. App. 85, 94, 532 S.E.2d 836, 841, *appeal dismissed and disc. review denied*, 453 N.C. 263, 546 S.E.2d 97 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d — (2001).

In response to plaintiff's arguments, RJR maintains that plaintiff's voluntary dismissal under Federal Rule 41 of a non-diversity case failed to implicate the savings provision of N.C. Rule 41(a), and further that plaintiff's state court action in any event was not "a new action based upon the *same* claims as those asserted in the prior action" (emphasis in original) so as to bring N.C. Rule 41(a) into play.

In sum, the issue before us is whether plaintiff, after having first filed a voluntary dismissal without prejudice under Federal Rule 41 of his federal action, a non-diversity case, was improperly precluded, in light of the one-year savings provision of N.C. Rule 41(a)(1), from pursuing a claim in state court after the statute of limitations had run on that claim. Previous decisions of our appellate courts indicate this issue must be resolved against plaintiff.

In *Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991), the plaintiffs filed a complaint in federal court sitting in diversity jurisdiction alleging various state malpractice claims. *Id.* at 437, 402 S.E.2d at 628. Plaintiffs subsequently stipulated to a voluntary dismissal without prejudice as to one of the claims, refiling that claim in state court within one year of the voluntary dismissal, but beyond the applicable limitations period for the dismissed claim. *Id.* The trial court rejected the suit as untimely and plaintiffs appealed.

Our Supreme Court characterized the issue on appeal as

> the effect of the dismissal[] on plaintiffs' subsequent attempt to refile the action in state court within the one-year savings provision in N.C.G.S. § 1A-1, Rule 41(a)(1), but outside the period of limitations that controls unless N.C.G.S. § 1A-1, Rule 41(a)(1) applies.

Id. at 438, 402 S.E.2d at 628. Citing decisions from the federal courts, the Court stated that the effect of a voluntary dismissal under Federal Rule 41 was dependent upon "whether the federal court's jurisdiction was based on the existence of a federal question or on diversity of citizenship." *Bockweg*, 328 N.C. at 441, 502 S.E.2d at 630. Further,

> [f]ederal courts ordinarily need not consider the applicability of a savings provision, as the federal rule contains no such provision. *This applies to cases in federal court in which jurisdiction is not based on diversity of citizenship* and in which there is no occasion for the federal court to apply state substantive law.

Id. at 438, 402 S.E.2d at 629 (emphasis added). Finally, relying on *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959), the Court stated that "a voluntary dismissal under the Federal Rules in a nondiversity case in federal court does not toll the statute of limitations or invoke [the] savings provision." *Bockweg*, 328 N.C. at 439, 402 S.E.2d at 629.

The Court also pointed out that federal courts sitting in diversity, and thus following North Carolina law, have applied the one-year savings provision of N.C. Rule 41 to diversity cases dismissed in federal court and recommenced in that court. *Id.* at 439-40, 402 S.E.2d at 629-30; *see Haislip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981); *Shuford v. K.K. Kawamura Cycle Co.*, 649 F.2d 261 (4th Cir. 1981); and *Webb v. Nolan*, 361 F. Supp. 418 (1972), *aff'd*, 484 F.2d 1049 (4th Cir. 1973), *cert. denied*, 415 U.S. 903, 39 L. Ed. 2d 461 (1974). Accordingly,

> [i]n diversity cases in which state law concerning voluntary dismissal is different from federal law, the federal court will conduct an analysis under *Erie* and its progeny to determine the applicable law. Further, federal courts sitting in diversity applying North Carolina substantive law have concluded that when a plaintiff voluntarily dismisses in federal court and recommences in federal court, he is entitled to the benefit of the North Carolina savings provision as a matter of state substantive law.

Bockweg, 328 N.C. at 441, 402 S.E.2d at 630.

Applying the foregoing reasoning to the case before it, the Court held that

> a plaintiff who stipulates to a voluntary dismissal, without prejudice, of a timely filed action in a federal court *sitting in diversity and applying North Carolina law*, and refiles the action in North

> Carolina state court, may invoke the one-year savings provision in N.C.G.S. § 1A-1, Rule 41.

Id. at 450, 402 S.E.2d at 635 (emphasis added).

However, as in *Clark v. Velsicol Chemical Corp.*, 110 N.C. App. 803, 807, 431 S.E.2d 227, 229 (1993), *aff'd*, 336 N.C. 599, 444 S.E.2d 223 (1994) (plaintiff's federal case involuntarily dismissed because of lack of diversity, *Bockweg* inapplicable, and plaintiff's subsequent state action filed outside the appropriate statute of limitations properly dismissed as time barred), *Bockweg* is inapposite to the case *sub judice*. Unlike the plaintiffs in *Bockweg*, plaintiff by his own admission brought his federal action pursuant to the court's federal question jurisdiction as opposed to its diversity of citizenship jurisdiction. Under *Bockweg*, therefore, the effect of the voluntary dismissal of plaintiff's federal action upon his state action was governed by Federal Rule 41 which contains no savings provision. *See Bockweg*, 328 N.C. at 438, 402 S.E.2d at 629; *see also Harter v. Vernon*, 139 N.C. App. 85, 93-4, 532 S.E.2d 836, 841 (2000) (voluntary dismissal under federal Rule 41 in a nondiversity case does not toll the statute of limitations or implicate the savings provision of N.C. Rule 41(a)). Accordingly, because plaintiff's state action was filed outside North Carolina's three year statute of limitations for a wrongful discharge claim, *see* G.S. § 1-52(5), and the savings provision of N.C. Rule 41 was inapplicable to plaintiff's state action, the trial court did not err in entering summary judgment against plaintiff.

Notwithstanding, plaintiff advances the proposition that the federal court maintained "supplemental" jurisdiction, *see* 28 U.S.C.A § 1367(a), over his wrongful discharge claim in plaintiff's federal action, thereby necessitating application of North Carolina substantive law, including N.C. Rule 41, to that claim. We do not agree.

First, *Bockweg* did not address supplemental jurisdiction of a federal court over a state action, but rather held that a federal court *sitting in diversity and applying North Carolina law, i.e.*, N.C. Rule 41(a)(1), would allow up to one-year for refiling an action which had been voluntarily dismissed. *Bockweg*, 328 N.C. at 450, 402 S.E.2d at 635. We reiterate that plaintiff has conceded that jurisdiction over his federal action was based upon "federal question jurisdiction rather than diversity of citizenship jurisdiction."

Perhaps more significantly, careful review of plaintiff's federal complaint reveals no basis upon which the federal court might have

assumed supplemental jurisdiction of plaintiff's wrongful discharge claim. Assuming *arguendo* plaintiff's claim of wrongful discharge may have been "so related to claims in the action within [the] original jurisdiction [of the federal court] that [it] form[ed] part of the same case or controversy," 28 U.S.C.A. § 1367(a), plaintiff's federal complaint alleged six claims of action based solely upon federal statutes and the federal constitution and set forth no specific claim under North Carolina substantive law, and specifically no North Carolina wrongful discharge claim, such that the federal court would have been accorded supplemental jurisdiction over that claim.

It is well established, moreover, that

> [t]o benefit from the one year extension of the statute of limitation, the second action must be "substantially the same, involving the same parties, the same cause of action, and the same right. . . ."

Cherokee Ins. Co. v. R/I, Inc., 97 N.C. App. 295, 297, 388 S.E.2d 239, 240 (citation omitted), *disc. review denied*, 326 N.C. 594, 393 S.E.2d 875 (1990). Assuming *arguendo* North Carolina Rule 41(a)(1) was applicable to plaintiff's state action, therefore, plaintiff was not entitled to invoke the one-year savings provision because that action and his prior federal action were not "based on the same claim[s]." G.S. § 1A-1, Rule 41(a)(1).

In *Stanford v. Owens*, 76 N.C. App. 284, 332 S.E.2d 730, *disc. review denied*, 314 N.C. 670, 336 S.E.2d 402 (1985), a claim of fraud, first alleged during re-filing of a previously voluntarily dismissed negligence claim, was held to have been time-barred by the statute of limitations. The plaintiffs maintained the fraud claim was properly filed within one year of the dismissal in that it

> ha[d] in effect been before the court all along, since it rest[ed] upon somewhat the same allegations that were made in support of the negligent misrepresentation claim when the action was first filed . . . .

Id. at 289, 332 S.E.2d 733. This Court disagreed, concluding that "[a] claim for fraud is fundamentally different from a claim for negligence," *id.*, and that plaintiff's original allegations of negligence "did not in effect or otherwise," *id.*, allege fraud.

In *Staley v. Lingerfelt*, 134 N.C. App. 294, 517 S.E.2d 392, this Court considered the circumstance wherein the

> plaintiffs' first complaint [filed 4 August 1995] arose out of the [collision] on 11 June 1993, but alleged on a section 1983 claim and a claim of loss of consortium.

Id. at 298, 517 S.E.2d at 395. Plaintiffs subsequently voluntarily dismissed that action and thereafter instituted an action 5 September 1995 alleging the two original claims as well as claims of

> assault and battery, false arrest and imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, trespass by a public officer, violations of the North Carolina Constitution, and a claim for punitive damages.

Id. at 296, 517 S.E.2d at 394.

This Court held the latter claims, filed within one year after voluntarily dismissal of the first complaint but outside the applicable limitations period, did not fall within the one year savings provision of North Carolina Rule 41(a)(1) and thus were barred. *Id.* at 299, 517 S.E.2d at 396. We reasoned that

> [a]lthough the claims [in plaintiffs' second complaint] ar[o]se from the same events as the section 1983 and loss of consortium claims, defendants were not placed on notice that they would be asked to defend these claims within the time required by the statute of limitations.

Id.

In the case *sub judice*, the claims set forth in plaintiff's federal and state actions arose from the same event, his discharge by RJR. However, the claim of wrongful discharge alleged in the state action and the federal statutory and constitutional claims alleged in the federal action each constitute "independent cause[s] of action with unique elements which must be proven by plaintiff[]," *id.*, and RJR thus was not placed on notice by plaintiff's federal action that it would be asked to defend plaintiff's state wrongful discharge claim "within the time required by the statute of limitations," *id.* In short, plaintiff's state action thus was not "based on the same claims," G.S. § 1A-1, Rule 41(a)(1), alleged in his federal action.

To conclude, plaintiff's state action, filed 20 August 1999, was not timely filed, and the trial court properly granted summary judgment in favor of RJR.

Affirmed.

Judges GREENE and TYSON concur.

STATE OF NORTH CAROLINA v. DARRIUS CHARLES ANTON JACKSON

No. COA00-987

(Filed 17 July 2001)

1. **Homicide— second-degree murder—voluntary manslaughter—motion for nonsuit**

The trial court did not err by denying defendant's motion for nonsuit as to the charges of second-degree murder and the lesser included offense of voluntary manslaughter, because: (1) the State produced substantial evidence that defendant intentionally struck decedent with his automobile to satisfy the requisite element of intent in both second-degree murder and voluntary manslaughter; and (2) decedent's actions prior to the collision, defendant's statements to police following the collision, and the nature of the assault committed by defendant provide further evidence that defendant intentionally struck decedent with his automobile.

2. **Homicide— jury instruction—self-defense**

The trial court did not err in a second-degree murder case by refusing to instruct the jury on self-defense based on defendant's alleged fear for his own safety and the safety of his wife, because: (1) defendant's belief was not reasonable when the actual physical confrontation between defendant and decedent had ended, and defendant and his wife had retreated to the safety of their car; and (2) there was no evidence decedent posed any real immediate threat to defendant or his wife inside their vehicle when decedent made no movement toward defendant's vehicle prior to being struck.

Appeal by defendant from judgment entered 6 April 2000 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 6 June 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Hosford and Hosford, P.L.L.C., by Sofie W. Hosford, for defendant appellant.

McCULLOUGH, Judge.

On 4 March 1999, a jury convicted thirty-one-year-old Darrius Charles Anton Jackson (defendant) of voluntary manslaughter and nonfelonious hit and run in connection with the death of twenty-two-year-old Brian Melvin (decedent). The trial court sentenced defendant to a term of 64-86 months in prison on the voluntary manslaughter charge, and for an additional term of 45 days on the nonfelonious hit-and-run charge.

At trial, the State's evidence tended to show the following: On the evening of 2 March 1999, Wilmington Police Officer Leroy Cain responded to a reported fight on North 30th Street in the Creekwood Housing Development (Creekwood). Officer Cain arrived with his partner, Officer Alvin Wilson, only to find the area "fairly quiet." As the officers prepared to leave Creekwood, they noticed a group of about ten people "bunched up together" and "fighting" on the corner of Clayton Place and North 30th Street. Officers Cain and Wilson called for backup.

By the time the officers reached the crowd, it had grown to nearly fifty people, who were "yelling and screaming back and forth at each other." Officers managed to separate defendant, whose shirt had been ripped off, and decedent, both of whom had their fists up and were yelling at each other. While officers tended to the rest of the crowd, Ahmad Carr punched defendant in the back of the head. Officer Wilson brandished his pepper spray and ordered decedent to leave the area. The three officers advised the disorderly crowd that they could take out warrants if they wished and instructed them to leave and go their separate ways.

As the crowd began to disperse, Officer Cain observed decedent walking southbound on North 30th Street in the northbound lane of the road about four to six feet from the curb. Defendant walked in the opposite direction and headed northbound up North 30th Street. According to Officer Cain, decedent was walking slowly down the road when a red automobile struck him from behind. Officers Cain,

Shea, and Wilson observed the incident. Officers Cain and Shea estimated the vehicle was traveling between thirty and forty miles per hour in a twenty-five-mile-per-hour zone when it struck decedent. All three officers stated the vehicle did not swerve, did not brake, and did not slow down. Instead, the vehicle continued southbound on North 30th Street. Decedent was treated for a lethal brain injury until 3 March 1999 when doctors pronounced him brain dead. An autopsy later revealed decedent died as a result of blunt trauma to the head that produced massive skull fractures and bruising and swelling of the brain.

Officers Janice Bates and Amy Ward of the Wilmington Police Department testified they observed a red automobile stopped at the intersection of North 30th Street and Princess Place Drive. When the officers pulled in behind the vehicle, defendant and his wife stepped out of the car and approached the patrol car. While the officers detained the visibly upset couple, defendant stated, "I did it, I hit him. She had nothing to do with it."

Officer Thomas Witowski testified defendant appeared "upset" and "angry" when he first arrived at the Wilmington Police Department on the night of 2 March 1999. Officers Witkowski and Gronau advised defendant of his rights, and he agreed to answer any questions, giving both an oral and a written statement. In his written statement, defendant admitted that

> I then get in my car with my wife and leave the scene. [Decedent] gets in the middle of the street in front of my car. The police already have done nothing; and [decedent] already made a threat in front of them, and walks away, so I hit him and keep going. I wasn't going to stop to get jumped or get my car messed up. I then stopped at the light for the police.

At trial defendant testified on his own behalf. Defendant stated that on the evening of 2 March 1999, he, his wife, stepmother, and stepdaughters drove to Creekwood after receiving phone calls from his sister, Benee Cotton. Defendant's sister told defendant that someone assaulted two of his sisters, Pauline and Janese, and broke the car windows out of his sister Kathy's car. Defendant testified that, when he reached the area, he located Pauline among a crowd of people standing in the street. When defendant approached his sister, decedent emerged from behind the crowd and told defendant, "I'm the one who hit your sister." He then stated that if anybody wanted to do anything, "[t]hey've got to deal with me." Defendant recalled

handing his eyeglasses to Pauline before at least ten people, including decedent, attacked him physically, ripped his shirt off, and dragged him across the street. Defendant stated that, when officers arrived, decedent and the others ended their physical assault, but that decedent continued to intimidate and threaten him with words and gestures.

Defendant felt the situation was getting out of control when he and his wife finally left. Defendant was "upset" and "angry" while driving away from the crowded area. Defendant stated that he could not avoid striking decedent when he jumped into the path of defendant's automobile. Defendant said that, although he was not speeding, he did not have enough time to stop or swerve to avoid decedent. Defendant testified he did not know if decedent had a weapon, but thought decedent was trying to prevent him from leaving. Defendant stated he did not stop because "it was a hostile situation from beginning to end," and he thought if he stopped, his life or his wife's life could be threatened. Defendant eventually stopped at the intersection of North 30th Street and Princess Place Drive where he was apprehended by Officers Ward and Bates.

Defendant assigns as error the trial court's denial of his motion for nonsuit and the trial court's refusal to instruct the jury on self-defense. For the reasons set forth herein, we affirm the judgment of the trial court.

[1] Defendant's first assignment of error challenges the trial court's denial of his motion for nonsuit as to the charges of second-degree murder and the lesser included offense of voluntary manslaughter. "A motion to dismiss and a motion for nonsuit are equivalent." *State v. Lindsay*, 45 N.C. App. 514, 515, 263 S.E.2d 364, 365 (1980). In ruling upon defendant's motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, 301 N.C. 709, 712, 272 S.E.2d 859, 860 (1981). " 'The question for the court is whether substantial evidence—direct, circumstantial, or both—supports each element of the offense charged and defendant's perpetration of that offense.' " *State v. McCullers*, 341 N.C. 19, 29, 460 S.E.2d 163, 168 (1995) (quoting *State v. Abraham*, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994) (quoting *State v. Rannels*, 333 N.C. 644, 659, 430 S.E.2d 254, 262 (1993))). The term "substantial evidence" simply means that the evidence must be existing and real, not just seeming or imaginary, and adequate to

support a conclusion. *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992). "Whether evidence presented constitutes substantial evidence is a question of law for the court." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991).

Defendant argues there was insufficient evidence to show that he intentionally struck decedent with his automobile to satisfy the requisite element of intent in both second-degree murder and voluntary manslaughter. As a result, defendant contends he is entitled to a new trial in which the jury should consider only the offense of involuntary manslaughter. We disagree. "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963). Manslaughter is a lesser included offense of second-degree murder. *State v. Holcomb*, 295 N.C. 608, 613, 247 S.E.2d 888, 891 (1978). "Voluntary manslaughter is defined as 'the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation.' " *State v. McNeil*, 350 N.C. 657, 690, 518 S.E.2d 486, 506 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000) (quoting *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981)). Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor. *State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986).

"Neither second degree murder nor voluntary manslaughter has as an essential element an intent to kill." *State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980). " '[T]he expression, *intentional killing*, is not used in the sense that a specific intent *to kill* must be admitted or established.' " *State v. Phillips*, 264 N.C. 508, 515, 142 S.E.2d 337, 342 (1965) (emphasis in original) (quoting *State v. Gordon*, 241 N.C. 356, 359, 85 S.E.2d 322, 323 (1954)). Intentional killing refers to the fact that the *act* which resulted in death is intentionally committed and is an assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. *Ray*, 299 N.C. at 158, 261 S.E.2d at 794.

Intent is a mental attitude which can rarely be proven by direct evidence, and must ordinarily be proven by circumstances from which it can be inferred. *State v. Hugenberg*, 34 N.C. App. 91, 95, 237 S.E.2d 327, 331, *disc. review denied*, 293 N.C. 591, 238 S.E.2d 151 (1977). In the instant case, the State produced substantial evidence that defendant intentionally struck decedent with his automobile to

satisfy the requisite element of intent in both second-degree murder and voluntary manslaughter. Officers Cain, Shea, and Wilson each testified that defendant was operating his vehicle at an excessive rate of speed on North 30th Street prior to striking decedent. Officers Cain and Shea testified that defendant made no attempt to swerve into the other lane to avoid hitting decedent. All three officers testified that defendant's vehicle did not brake or slow down either before it struck decedent or after the collision occurred. All three officers testified defendant's vehicle continued on North 30th Street after striking decedent until it was stopped at the intersection of North 30th Street and Princess Place Drive by another officer.

Decedent's actions prior to the collision, defendant's statements to police following the collision, and the nature of the assault committed by defendant provide further evidence that defendant intentionally struck decedent with his automobile. Officers Cain and Wilson testified that decedent was walking southbound on North 30th Street in the northbound lane several feet from the curb before he was struck from behind by defendant's vehicle. Both officers testified that decedent made no sudden movements toward the car prior to being struck. Following the collision, when defendant was apprehended at the intersection of North 30th Street and Princess Place Drive, defendant proclaimed to Officer Bates, "I did it, I hit him." In his written statement to police, defendant stated, "I hit him and [kept] going" because "I wasn't going to stop to get jumped or get my car messed up." Clearly, defendant used his vehicle as a deadly weapon and directly caused decedent's death by striking decedent from behind. The very nature of defendant's actions gives rise to the presumption that defendant intentionally struck decedent with his vehicle. Such an act can never be involuntary manslaughter because involuntary manslaughter involves commission of an act, whether intentional or not, which is *not* a felony nor likely to result in death or great bodily harm. *Ray*, 299 N.C. at 158, 261 S.E.2d at 794.

We conclude that the witnesses' testimony, defendant's written statement made to police following the collision, and the nature of the assault itself, when considered in the light most favorable to the State, constitutes sufficient evidence to adequately support the conclusion that defendant intentionally struck decedent with his vehicle. Defendant's first assignment of error is overruled.

[2] Defendant's second assignment of error challenges the trial court's refusal to instruct the jury on self-defense. "The right to kill in

self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from *imminent* death or great bodily harm at his hands." *State v. Norman*, 324 N.C. 253, 259, 378 S.E.2d 8, 12 (1989) (emphasis in original).

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). An imperfect right of self-defense is available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty without murderous intent, and (2) might have used excessive force. *State v. Mize*, 316 N.C. 48, 52, 340 S.E.2d 439, 441-42 (1986). "Although the culpability of a defendant who kills in the exercise of *imperfect* self-defense is reduced, such a defendant is *not justified* in the killing so as to be entitled to acquittal, but is guilty at least of voluntary manslaughter." *Norman*, 324 N.C. at 259-60, 378 S.E.2d at 12 (emphasis in original).

Defendant argues the jury should have received an instruction on self-defense because defendant feared for his own safety and the safety of his wife, and acted in self-defense when he drove through the angry crowd at Creekwood and struck decedent with his car. We disagree. The trial court has broad discretion in presenting issues to the jury. *State v. Flippin*, 280 N.C. 682, 687, 186 S.E.2d 917, 920 (1972). If no evidence exists in the record from which the jury could

find that defendant reasonably believed it necessary to kill to protect himself from death or great bodily harm, then defendant is not entitled to an instruction on self-defense. *State v. Hughes*, 82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986).

In determining whether a self-defense instruction should have been given, the facts must be interpreted in the light most favorable to defendant. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993). Assuming *arguendo* that defendant in fact formed the belief that it was necessary to kill decedent in order to protect himself and his wife, no basis exists for defendant to assert that his belief was reasonable. The actual physical confrontation that evening between defendant and decedent had ended, and defendant and his wife had retreated to the safety of their car in order to leave Creekwood. The crowd was disorderly and unruly, but defendant presented no evidence that showed the crowd itself posed any real, immediate threat to defendant or his wife inside their vehicle. In fact, defendant could have left Creekwood in another direction to avoid the crowd entirely, but instead made a U-turn on North 30th Street to drive southbound and leave in the direction of Princess Place Drive.

Any fear held by defendant of death or great bodily harm, at the time the killing took place, was entirely unreasonable under the circumstances. The State's evidence tended to show defendant struck decedent from behind as decedent was walking southbound on North 30th Street. Defendant's own written statement to police specifically described decedent as being "in the middle of the street" in front of defendant's car prior to the collision. At trial, defendant claimed decedent jumped from the crowd into the path of his car to prevent defendant from leaving. Even if decedent did in fact jump in front of defendant's vehicle, defendant testified he heard no gunshots prior to striking decedent, and observed no weapon in decedent's hands. According to testimony by Officers Cain and Wilson, decedent made no movement toward defendant's vehicle prior to being struck. No evidence presented by the State or defendant indicated that decedent posed any real, immediate threat to defendant or his wife inside their vehicle.

We conclude that the evidence taken in the light most favorable to defendant fails to support a finding that defendant formed a reasonable belief that it was necessary to kill decedent to protect himself or his wife from death or great bodily harm. Defendant cannot claim that at the time of the killing any real or reasonably apparent

necessity existed for defendant to protect himself or his wife from any threat of imminent death or great bodily harm at the hands of decedent. Defendant's second assignment of error is overruled.

For the foregoing reasons, we reject defendant's assignments of error and affirm the judgment of the trial court.

No error.

Judges WALKER and THOMAS concur.

VIVIAN HALL RAY, PLAINTIFF v. LEWIS HAULING AND EXCAVATING, INC. AND ALLEN EDWARD PETTY, DEFENDANTS

No. COA00-1009

(Filed 17 July 2001)

Immunity— emergency management workers—private contractor

The trial court properly denied summary judgment for defendants in a negligence action involving a dump truck assisting in hurricane clean-up efforts where defendants contended that they were entitled to governmental immunity under N.C.G.S. § 166A-14 as emergency management workers, but there was a genuine issue of fact as to the relationship between the defendants and the State of North Carolina, any political subdivision thereof, and the Army Corps of Engineers. There were also genuine issues of fact as to the claim of immunity under N.C.G.S. § 166A-15 in that defendants did not present evidence to suggest that they were sheltering, protecting, safeguarding, or aiding persons, as that statute requires.

Appeal by defendants from order entered 1 May 2000 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 14 May 2001.

David R. Cockman for plaintiff-appellee.

Cranfill, Sumner & Hartzog, LLP, by Edward C. LeCarpentier, III, for defendant-appellants.

TYSON, Judge.

Lewis Hauling and Excavating, Inc. ("Lewis Hauling") and Alan Edward Petty ("Petty") (collectively "defendants") appeal the trial court's denial of their motion for summary judgment. We affirm the trial court's order.

A. Facts

On 15 September 1996, defendant Petty was driving a 1996 Mack dump truck owned by his employer defendant Lewis Hauling. Vivian Hall Ray ("plaintiff") was also driving her car when she and Petty collided as Petty was making a left hand turn. According to Petty, he had unloaded his dump truck and was en route to get another load when the accident occurred. Plaintiff and Petty disagree about who is at fault.

At the time of the accident, Lewis Hauling, a Florida Corporation, was under contract with Siboney Corporation of West Palm Beach, Florida to provide its dump trucks and employee operators to assist in clean-up efforts in the aftermath of Hurricane Fran.

Hurricane Fran passed through Raleigh on 4 and 5 September 1996. On 5 September 1996, the Governor of the State of North Carolina issued a Proclamation of State of Emergency pursuant to G.S. § 14-288.15 and G.S. § 166A-6.

Plaintiff filed her complaint on or about 14 April 1997 alleging that defendant, Petty, was negligent and that plaintiff suffered resulting injuries. On or about 14 May 1997, defendants answered. Defendants denied negligence and asserted plaintiff's contributory negligence as a defense. After discovery, defendants moved for summary judgment on 22 October 1999. On or about 1 May 2000, defendants' motion was denied. Defendants appeal.

B. Issue

The only issue on appeal is whether the trial court erred in not granting summary judgment in favor of defendants.

C. Defendants' Contentions

Defendants argue that the trial court erred as a matter of law in denying defendants' motion for summary judgment regarding plaintiff's claim for relief alleging negligence. Defendants contend that

they are statutorily entitled to governmental immunity pursuant to G.S. 166A-14 and G.S. 166A-15. We are unable to decide as a matter of law whether defendants are entitled to statutory immunity. We hold defendants, as movants for summary judgement, have failed to proffer sufficient evidence to carry their burden of proving that there is no genuine issue of material fact.

Although not raised by defendants as an issue, we note initially that this appeal is from an interlocutory order which is generally not appealable. *Tise v. Yates Const. Co., Inc.*, 122 N.C. App. 582, 584, 471 S.E.2d 102, 105 (1996), *affirmed as modified and remanded*, 345 N.C. 456, 480 S.E.2d 677 (1997) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). However, interlocutory orders have been held to be properly appealable in cases where defendant alleges governmental immunity. *Id.* A defense of governmental immunity affords its possessor the privilege of not having to answer a civil claim. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 543 S.E.2d 901 (2001); *Corum v. University of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *affirmed in part, reversed in part, and remanded*, 330 N.C. 558, 418 S.E.2d 664 (1992). Defendants' appeal is properly before us.

Defendants claim the trial court erred in not granting to them the statutory governmental immunity afforded under the North Carolina Emergency Management Act ("EMA") as a defense against plaintiff's claim of negligence. *See* N.C. Gen. Stat. Article 1 of Chapter 166A. Defendants argue that they were engaged in "recovery" efforts following Hurricane Fran which were covered by the immunity provisions of the EMA. Defendants claim that defendant, Petty, was an "emergency management worker" ("EMW") performing "emergency management services" on behalf of the Army Corps of Engineer ("Army Corps"). "Emergency management worker" is defined in G.S. § 166A-14(d). The phrase "emergency management services" is used in G.S. § 166A-14(e), but it is not defined. "Emergency Management" is defined as "[t]hose measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effect of any type of disaster, which include the never-ending preparedness cycle of prevention, mitigation, warning, movement, shelter, emergency assistance and recovery." N.C. Gen. Stat. § 166A-4(1) (1995). EMW's are accorded qualified immunity while performing the governmental functions as set out in the EMA. N.C. Gen. Stat. § 166A-14 (1995).

D. Summary Judgment

A motion for summary judgment should not be granted if there are genuine issues of material fact. Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1967). "Such evidence must be viewed in the light most favorable to the non-moving party with all reasonable inferences also drawn in favor of the non-movant." *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 448-49, 481 S.E.2d 349, 353 (1997) (citing *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974)).

" 'Irrespective of who has the burden of proof at trial . . ., upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact . . . and that he is entitled to judgment as a matter of law.' " *Whitley* at 206, 210 S.E.2d at 291 (quoting *First Federal Savings & Loan Assoc. v. Branch Banking & Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972)). "The burden does not shift to the non-moving party unless the movant proffers sufficient evidence to " 'negative[ ] [the non-movant's] claim . . . in its entirety.' " *Id.*

Our Supreme Court has maintained that "on a motion for summary judgment the burden of proving that there is no genuine issue as to any material fact is on the movant, and if he fails to carry that burden, summary judgment is not proper, whether or not the nonmoving party responds." *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 27, 423 S.E.2d 444, 457 (citing *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980)). We analyze defendants' contentions in light of the evidence presented to the trial judge who denied summary judgment.

E. N.C. Gen. Stat. § 166A-14

Defendants contend that they are entitled to immunity afforded "emergency management workers" under G.S. § 166A-14. In defendants' brief they claim that defendant Petty was engaged in "debris removal" which constituted emergency management services "pursuant to a request of the Governor of North Carolina for Federal assistance." More particularly defendants contend that Lewis Hauling was a subcontractor of the Army Corps' emergency management

operations in the Raleigh, North Carolina area following Hurricane Fran.

G.S. § 166A-14(a) declares that "[a]ll functions hereunder and all other activities relating to emergency management are hereby declared to be governmental functions." The section then goes on to provide qualified immunity to certain entities and individuals named in the Article.

> Neither the State nor any political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker complying with or reasonably attempting to comply with this Article . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any such activity.

N.C. Gen. Stat. § 166A-14(a) (emphasis added).

G.S. § 166A-14(d) defines an emergency management worker as:

> any full or part-time paid, volunteer or auxiliary employee of this State or other states, territories, possessions or the District of Columbia, of the federal government or any neighboring country or of any political subdivision thereof or of any agency or organization performing emergency management services at any place in this State government or any political subdivision thereof or any agency or organization performing emergency management services at any place in this State, subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof.

N.C. Gen. Stat. § 166A-14(d) (emphasis added).

Defendants argue that defendant Petty falls squarely under the definition of an EMW. In Petty's affidavit, he claims that on the day of the accident he was en route after having dumped a load of debris and was heading back to the neighborhood where he was assisting a crew with debris removal left over from Hurricane Fran. Although 10 days had elapsed since Hurricane Fran passed through Raleigh, defendants argue that since (1) there was a state of emergency, (2) they had subcontracted with the Siboney Corporation which was allegedly assisting the Army Corps, and (3) they were hauling debris to and from the dump, the immunity provisions of the EMA applied to them. Defendants offer no evidence, however, that they were working "subject to the order or control of or pursuant to a request of the State

Government or any political subdivision thereof," which is part of the definition of an EMW. *See* N.C. Gen. Stat. § 166A-14(d). Defendants' only evidence in the record which mentions their affiliation with the recovery efforts is contained in two affidavits, one from each of the two defendants.

Roger V. Lewis' (President and majority shareholder of corporate defendant) affidavit states that "my company was under contract with Siboney Corporation of West Palm Beach, Florida, to provide our company's dump trucks and our employee operators to assist the United States Army Corp of Engineers with emergency management operations . . . ." Lewis further explains that the Army Corps provided him with instructions through a contact person, who would later provide daily instructions to his crew every morning located somewhere in Raleigh.

Defendant Petty, in his affidavit, also claims that he "would receive instructions for that day's work from a representative" of the Army Corps, and that on 15 September 1996, he "received . . . instructions for the day from a representative . . ." of the Army Corps. No evidence exists in the record regarding the name of the "contact" or "representative" from the Army Corps.

The record also contains an affidavit prepared and filed in a non-related case approximately nine months prior to the signing of defendants' affidavits. In that affidavit the Secretary of the North Carolina Department of Crime Control and Public Safety, Richard H. Moore ("Secretary Moore"), never mentions the Army Corps, Siboney Corporation, or defendants, when discussing the North Carolina Department of Transportation's ("DOT") role in Hurricane Fran's clean-up efforts. Affiant Secretary Moore explains that "employees of the North Carolina Department of Transportation, pursuant to the North Carolina Emergency Operation Plan, performed various activities related to emergency management during this state of emergency, including the removal of debris from State rights-of-way and roadways." He also explains that "the employees of the North Carolina Department of Transportation assisting in the clean-up of Hurricane Fran at the time and place set forth in Plaintiff's affidavit were emergency management workers, pursuant to N.C. Gen. Stat. § 166A-14(d)." Nowhere in the record do defendants claim to be employees of the DOT, nor any other state agency, nor any political subdivision of the State. When Secretary Moore mentions "at the time and place set forth in Plaintiff's affidavit" in his affidavit, he is not referring to the plaintiff in this case, nor do we know what

time or date to which he is referring. Secretary Moore's affidavit simply stated that DOT employees were "emergency management workers."

Defendants offer the "Proclamation of State of Emergency by the Governor of the State of North Carolina" which was issued 5 September 1996, as further evidence to support their position. Defendants also mention in their brief that

> [t]he President's declaration of a major disaster pursuant to the Stafford Act enabled the United States government through the Federal Emergency Management Agency and related federal governmental entities to provide Federal assistance to the State of North Carolina, as requested by Governor Hunt. *See Federal Register*, September 23, 1996, Volume 61, No. 185 (President's Major Disaster Declaration).

Defendants provided in the record Exhibit 3 which consists of 47 pages of the North Carolina Emergency Operations Plan ("Plan"). In the Plan, emergency management operations and activities are outlined. "Each county in North Carolina is responsible for Emergency Management in its jurisdictional boundaries and will conduct emergency operations according to their plans and procedures." Once a disaster is beyond the capabilities of the counties, any "requests for State and/or Federal assistance will be made through the appropriate State Area Office . . . ." At the state level, all debris removal activities are coordinated by "Public Works and Engineering," utilizing the "Department of Crime Control and Public Safety" as its primary agency. Various additional agencies provide support.

The Plan gives the DOT the lead role and primary responsibility for debris removal. If and when further assistance is necessary from the federal government, the Plan states that the "Department of Defense (DOD) has designated the United States Army Corps of Engineers (USACE) as the primary agency for . . . Public Works and Engineering." Also, six federal agencies are listed to provide assistance in debris removal, including the Army Corps.

Defendants argue in their brief that since the Governor and the President declared a state of emergency and that the Plan provides for federal assistance which may or may not include the Army Corps, and that defendants were in Raleigh removing debris under a contract with the Siboney Corporation, that this conclusively establishes that they were "subject to the order or control of or pursuant

to a request of the State government or any political subdivision thereof." We disagree.

The bare assertion, supported only by two affidavits of defendants, that defendants were subcontractors of a Florida Corporation under contract to provide assistance to the Army Corps, and reference to the Plan is insufficient evidence to support the fact claimed. Furthermore, there is no evidence in the record that the Army Corps was in Raleigh during the aftermath of Hurricane Fran. As such, the evidence presented is insufficient to hold, as a matter of law, that defendants were entitled to summary judgment.

Secretary Moore's affidavit simply says that the "employees of the North Carolina Department of Transportation assisting in the clean-up of Hurricane Fran . . . were emergency management workers . . . ." There is no indication in Secretary Moore's affidavit that the Army Corps was in Raleigh or when DOT employees were working.

There remains a genuine issue of fact as to the relationship between the defendants and the State of North Carolina, any political subdivision thereof, and the Army Corps. An emergency management worker, as defined in the statute, must be "subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof." N.C. Gen. Stat. 166A-14(d). Defendants have failed to meet their burden of producing sufficient evidence to conclusively place them under the protection of G.S. § 166A-14.

F. N.C. Gen. Stat. § 166A-15

Defendants also contend that G.S. § 166A-15 provides them with additional immunity. In defendants' brief they contend that G.S. § 166A-15 "calls for an additional immunity for private entities providing personal property to aid in emergency management operations." Defendants then cite the statute without any further discussion.

The Statute entitled "No private liability" provides that

> [a]ny person, firm or corporation owning or controlling real or personal property who, voluntarily or involuntarily, knowingly or unknowingly, with or without compensation, grants a license or privilege or otherwise permits or allows the designation or use of the whole or any part or parts of such real or personal property for the purpose of sheltering, protecting, safeguarding or aiding in any way persons shall, together with his successors in interest,

> if any, not be civilly liable for the death of or injury to any person or the loss of or damage to the property of any persons where such death, injury, loss or damage resulted from, through or because of the use of the said real or personal property for any of the above purposes.

N.C. Gen. Stat. § 166A-15 (1977) (emphasis added).

Defendants have not presented evidence in the record to suggest that they were "sheltering, protecting, safeguarding or aiding in any way persons." *Id.* Defendant Petty's affidavit states that the accident occurred "on Litchford Road while I was returning to the aforementioned neighborhood from unloading a truckload of debris." He further explains that "[a]t the time of the accident, I was attempting to turn left across the southbound lane . . . into the neighborhood to return to the crew with whom I was assisting in our debris removal efforts." Genuine issues of fact remain as to defendants' efforts in "sheltering, protecting, safeguarding or aiding in any way persons." *Id.* The trial court properly denied summary judgment because genuine issues of material facts remain.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

JEROME R. BOSTICK, EMPLOYEE, PLAINTIFF v. KINSTON-NEUSE CORPORATION, EMPLOYER, SELF-INSURED/KEY RISK MANAGEMENT SERVICES, CARRIER, DEFENDANTS

No. COA00-729

(Filed 17 July 2001)

1. Workers' Compensation— disability—Form 21 presumption—not rebutted by unsuitable jobs

A workers' compensation defendant did not rebut the Form 21 presumption of disability where plaintiff returned to work with defendant and then worked for his brother's ambulance company, but defendant presented no evidence that a suitable job existed for plaintiff and that he was capable of getting such a job. There was testimony that other employees were instructed to help

plaintiff with manual tasks when he returned to work with defendant, assistance not normally provided for a person holding plaintiff's job, there was testimony that plaintiff's work as an EMT exceeded his physical restrictions and that he could not do the work because of his lifting restrictions, and plaintiff's brother testified that he would not have given anyone else the part time position filing, answering the telephone, and working as a dispatcher in which plaintiff was on his own schedule and stopped working if his arm started to bother him.

2. Workers' Compensation— cause of injury—conflicting medical testimony

The trial court erred in a workers' compensation action by finding that plaintiff's left tennis elbow was not caused or aggravated by his compensable right tennis elbow. The Commission chose to give greater weight to the testimony of a doctor who did not state an opinion as to the cause of this plaintiff's left elbow condition and who stated that he would defer to the doctor to whom plaintiff's treatment was transferred on issues which arose after the transfer. That doctor testified that the left elbow condition was the result of compensation for the right elbow condition.

3. Workers' Compensation— unilateral stoppage of payments—penalty

The 10% penalty for an unpaid installment of a workers' compensation award was due where defendants never sought permission from the Commission to terminate compensation under a Form 21 Agreement.

4. Workers' Compensation— attorney fees—unilateral stoppage of payments

The Industrial Commission was required to address the issue of whether attorney fees were due in a workers' compensation action where defendant did not present evidence to rebut the presumption of disability or to explain why it stopped benefits.

5. Workers' Compensation— computation of average weekly wage—outside employment

The Industrial Commission did not err in a workers' compensation action by not including plaintiff's National Guard salary when computing his average weekly wage. A claimant's average weekly wage is computed using only the wages received in the employment in which he was injured.

Appeal by plaintiff from Opinion and Award entered 13 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 April 2001.

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

Lewis & Roberts, P.L.L.C., by Winston L. Page, Jr., for defendant-appellees.

HUDSON, Judge.

Plaintiff appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission) denying his request for temporary total disability benefits and determining that his left elbow problems are not causally related to his compensable right elbow problems. We determine that in this case the Commission did not properly apply the presumption of plaintiff's ongoing disability, which arose from a Form 21 agreement to pay compensation for "necessary weeks." Furthermore, its conclusion that plaintiff's left elbow problems are not related to his right elbow injury is not supported by findings of fact which are supported by competent evidence in the record. Therefore, we reverse and remand the case.

In its Opinion and Award, the Commission made findings as follows: Plaintiff began working for defendant-employer in November 1991 as a hydraulic brake press operator. This position consisted of lifting pieces of metal with an electronic hoist, manually adjusting the piece of metal placed on the press, and programming the press so the metal was shaped into forks for the electric pallet trucks which defendant-employer manufactures.

In June 1994, plaintiff began experiencing right elbow discomfort. He sought treatment from Dr. Richard Huberman, who diagnosed lateral epicondylitis, or what is commonly referred to as tennis elbow. When conservative treatment failed, Dr. Huberman performed a right lateral release on 7 December 1994 and allowed plaintiff to return to light duty work on 19 January 1995 with the restriction of no heavy lifting.

On 14 December 1994, the parties entered into a Form 21 agreement with respect to the right elbow which specified that compensation was to continue for "necessary weeks." The Commission approved this form on 10 January 1995, and defendant paid plaintiff

temporary total disability benefits from 7 December 1994 to 18 January 1995.

On 19 January 1995, plaintiff returned to work with defendant-employer. Defendant accommodated plaintiff's restrictions by significantly modifying his position so that he was only required to program the computer and not move heavy pieces of metal. Plaintiff stopped working for defendant on 24 January 1995. He then enrolled in a program to received his emergency medical technician (EMT) certificate and received certification on 11 February 1995. He went to work for his brother's company, Better Health Ambulance Service, on 12 February 1995, as a full-time EMT.

Plaintiff visited Dr. Huberman on 25 September 1995 with complaints of increased pain in his right elbow. Dr. Huberman referred plaintiff to another doctor in his practice, Dr. Andrew Siekanowicz, for soft tissue pain.

Dr. Siekanowicz first saw plaintiff on 19 October 1995; he diagnosed plaintiff with right salvage tennis elbow and prescribed one month of conservative treatment. When this failed, he performed salvage tennis elbow surgery on 5 December 1995. Defendant paid plaintiff temporary total disability compensation from 7 December 1995 to 24 April 1996. Plaintiff returned to work with his brother's ambulance service on 26 April 1996 in a part-time capacity, earning diminished wages. Defendant paid plaintiff partial disability compensation from 25 April 1996 through 19 May 1996 for the difference in his average weekly wages before injury and what he made with his brother's company.

On 24 January 1996, Dr. Siekanowicz diagnosed plaintiff with left tennis elbow. Dr. Siekanowicz testified that plaintiff's right tennis elbow caused his left tennis elbow, in that he was forced to overuse his left arm as a result of the right arm injury. The Commission found that, in the opinion of Dr. Huberman, plaintiff's left elbow problems are not causally related to his compensable right elbow problems, and also found that plaintiff's left elbow symptoms are not the type typically associated with overuse.

Dr. Siekanowicz referred plaintiff to Dr. Nirschl, a doctor in Maryland, when it became apparent that the surgery on the right elbow had failed. On 20 May 1996, Dr. Nirschl performed another salvage tennis elbow procedure. Defendant paid plaintiff temporary total disability benefits from 20 May 1996 to 23 June 1996. Plaintiff

returned to work in June 1996 at his brother's ambulance business earning diminished wages. Defendant paid him temporary partial disability benefits from 24 June 1996 to 9 February 1997. We note the record is silent as to why defendant stopped paying benefits at that time, and, at oral argument before this Court, counsel for defendant was unable to give an explanation for the 9 February 1997 termination. At the time of the hearing before the Deputy Commissioner on 25 August 1997, plaintiff was still employed by his brother in a part-time capacity, working primarily as an ambulance dispatcher.

The Commission determined that plaintiff had not reached maximum medical improvement with respect to his admittedly compensable right elbow. It therefore could not determine whether plaintiff was entitled to benefits for permanent disability. It found that plaintiff was due additional temporary partial disability benefits from 9 February 1997 and continuing for a period not to exceed 300 weeks from his date of injury in accordance with N.C.G.S. § 97-30 (1999). The Commission awarded no benefits based upon the left tennis elbow. Also, it declined plaintiff's request to include the salary he earned by working in the National Guard in computing his average weekly wages and instead used only his salary with defendant-employer. Finally, the Commission concluded that defendants had defended the case upon reasonable grounds and that plaintiff was not entitled to attorney's fees or penalties. Plaintiff appealed the Commission's decision to this Court.

[1] Plaintiff first contends the Commission erred in denying him temporary total disability benefits from 7 December 1994 onward. He argues that defendants never rebutted the presumption of disability which arose from the Form 21 agreement in which defendant agreed to pay total disability from 7 December 1994 for "necessary weeks." We agree.

North Carolina "case law has consistently held that once a Form 21 agreement is entered into by the parties and approved by the Commission, a presumption of disability attaches in favor of the employee." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). This presumption has its origins in the fact that payment is being made pursuant to an award of the Commission. *See* N.C.G.S. § 97-18(b) (1999); N.C.G.S. § 97-82(b) (1999); Workers' Compensation Rule 404(1); *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588 (1971); *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E.2d 109 (1951); *Watson v. Winston-Salem Transit*

Authority, 92 N.C. App. 473, 374 S.E.2d 483 (1988). After the presumption attaches, the burden shifts to the employer "to show not only that suitable jobs are available, but that plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). A job is suitable if the plaintiff is capable of performing it "considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994).

In this case, the Commission found as fact that after the parties entered into a Form 21 agreement and payments had begun, plaintiff returned to work with defendant-employer in a modified job. "*[C]apacity to earn* is the benchmark test of disability, so mere proof of a return to work is insufficient to rebut the Form 21 presumption." *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997) (emphasis in original). Furthermore,

> [i]f the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market.

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

Four of defendant's employees testified that plaintiff was not required to perform any manual labor in the job to which he returned. Rather, other employees were instructed to help plaintiff with any manual tasks, and plaintiff was limited to operating the computer. Supervisor Darrell Griffin testified that normally there was no such assistance provided for a person holding plaintiff's job. Defendant presented no evidence that the modified position created for plaintiff was one normally available in the competitive job market, as required by the Supreme Court in *Peoples*, *id.*, and *Saums*, 346 N.C. at 765, 487 S.E.2d at 750. Thus, plaintiff's presumption of disability was not rebutted by his return to work for defendant-employer.

The Commission found that plaintiff thereafter went to work for his brother in an EMT position. Although it is not explicitly stated in the opinion, the Commission appears to have perceived that his taking this job rebutted the presumption of total disability. However, there is no evidence in the record that the EMT job constituted "suitable" employment or that he would have been hired in the competitive job market by anyone other than his brother to perform the job, given his physical limitations.

Plaintiff testified that he asked his brother to hire him for the job as a favor until he could recover from his surgery. Dr. Huberman testified that he witnessed plaintiff performing certain tasks of the job and did not understand why plaintiff was doing it, because it was "as bad on his elbow" as his job with defendant-employer had been. Plaintiff's brother testified that although plaintiff wanted to try to work as an EMT, it was "quickly proved that he could not do it because of the lifting requirements." In conclusion, defendant did not present any evidence that the EMT job was suitable for plaintiff or that he would be able to get such a job in a competitive market, given his physical restrictions. In fact, defendants repeatedly admit in their brief to this Court that the EMT job exceeded plaintiff's physical restrictions. As such, plaintiff's attempt to work as an EMT did not rebut the presumption of disability.

After plaintiff's second surgery in December 1995, he returned to work for his brother in a part-time position performing various duties such as filing, answering the telephone, running errands, and working as a dispatcher. At that point, he had a lifting restriction of no more than two pounds. His brother stated that plaintiff was on his own schedule and if his arm started to bother him, he stopped work. He further testified that he would not give anyone other than his brother such a job. Again, defendant presented no evidence that such a job was available in the competitive market. Plaintiff, on the other hand, presented the testimony of a vocational rehabilitation expert that it was not so available.

In conclusion, in spite of the fact that defendants hired two vocational rehabilitation counselors to work with plaintiff, defendants presented no evidence that a suitable job existed for plaintiff and that he was capable of getting such a job. Therefore, on the evidence presented, we are compelled to conclude that defendants have failed to rebut the presumption of disability and that plaintiff is entitled to continuing temporary total disability compensation from 7 December 1994 onward. Plaintiff has stipulated in his brief and at oral argument

that he is willing to deduct from his compensation due the amounts he has earned working for defendant-employer and his brother.

[2] Plaintiff next contends the Commission erred in finding that his left tennis elbow was not caused or aggravated by his compensable right tennis elbow. *See Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379, 323 S.E.2d 29, 30 (1984) (workers entitled to be compensated for all disability caused by the compensable injury), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985). " '[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.' " *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 598, 532 S.E.2d 207, 210-11 (2000) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). Thus, the Commission was required to rely in this case on expert testimony to determine whether plaintiff's right tennis elbow caused or aggravated his left tennis elbow such that the latter became a compensable injury as well.

Dr. Siekanowicz testified that plaintiff's left tennis elbow is "a direct result of the fact that he had to over-use the left upper extremity to compensate for the right upper extremity." However, the Commission determined that plaintiff's left elbow injury was not related to the right, and found as fact:

> Greater weight is given to the opinion of Dr. Huberman over that of Dr. Siekanowicz on the issue of whether plaintiff's left elbow problems are causally related to plaintiff's compensable right elbow problems. In the Opinion of Dr. Huberman plaintiff's left elbow problems are not causally related to his compensable right elbow problems or the result of over-use of his left arm.

An analysis of Dr. Huberman's testimony reveals that he was not explicitly asked to state an opinion, nor did he, as to the cause of *this* plaintiff's left elbow condition. Dr. Siekanowicz was the only witness who did express an opinion regarding the cause of plaintiff's left elbow condition, which arose several months after Dr. Huberman had ceased treating plaintiff. Significantly, Dr. Huberman testified that he would defer to Dr. Siekanowicz on issues which arose after plaintiff's treatment was transferred. Thus, the Commission's finding

giving greater weight to Dr. Huberman on the issue of the causation of plaintiff's left elbow condition is not supported by competent evidence. *See Penland v. Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (findings not supported by competent evidence must be set aside).

[3] Plaintiff next argues that he is due a 10% penalty under G.S. § 97-18(g), which provides that "[i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof . . . ." In this case, the approved Form 21 constituted an award of the Commission, *see* G.S. § 97-82(b); Workers' Compensation Rule 503, and defendants never sought permission from the Commission to terminate compensation, *see* G.S. § 97-18(b); Workers' Compensation Rule 404. Because the provisions of G.S. § 97-18(g) are mandatory ("there *shall* be added"), we are compelled to conclude that a 10% penalty is due. *See Kisiah*, 124 N.C. App. at 83, 476 S.E.2d at 440 (defendant ceased paying on a Form 21 award without seeking permission of the Commission; penalties under G.S. § 97-18(g) due).

[4] Plaintiff also contends he is due attorney's fees under N.C.G.S. § 97-88.1 (1999) for defendant's unreasonable defense of the claim. Defendant did not present evidence to explain why it stopped benefits or to rebut the presumption of disability. Upon remand, the Commission should address the issue of whether attorney's fees are due under G.S. § 97-88.1.

[5] Plaintiff finally contends the Commission erred in refusing to include his salary from the National Guard in computing his average weekly wages. The Supreme Court in *McAninch v. Buncombe County Schools*, 347 N.C. 126, 132-34, 489 S.E.2d 375, 379-80 (1997), recently reiterated its holding in *Barnhardt v. Cab Co.*, 266 N.C. 419, 429, 146 S.E.2d 479, 486 (1966), *overruled on other grounds by Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 198, 347 S.E.2d 814, 818 (1986), that a claimant's average weekly wages are to be computed using the wages received in the employment in which he was injured only. Thus, the Commission did not commit error in declining to include plaintiff's salary from the National Guard in computing his average weekly wages.

In conclusion, we reverse the Opinion and Award of the Commission and remand for findings and conclusions consistent with this opinion.

Reversed and remanded.

Judges WYNN and JOHN concur.

JOANNE C. WILLIAMS, PLAINTIFF v. MIA McCOY, DEFENDANT

No. COA00-626

(Filed 17 July 2001)

1. **Evidence— relevancy—automobile accident—date attorney retained**

The trial court did not err in an automobile negligence action by allowing defendant to ask plaintiff on cross-examination when she had retained an attorney. *Thompson v. James*, 80 N.C. App. 535, indicates that inquiry concerning when a plaintiff hired an attorney is admissible to impeach a litigious plaintiff and is relevant to rebut the existence and extent of plaintiff's injuries. Although there was no evidence that this plaintiff was litigious, the extent of her injuries was a major issue at trial.

2. **Evidence— cross-examination—explanation of answer denied—reference to insurance claims adjustor**

The trial court abused its discretion in an automobile negligence action by not permitting plaintiff to explain her answer where she had been asked whether she had hired an attorney before visiting her doctor, and she would have testified that she hired the attorney after an encounter with defendant's claims adjuster. Plaintiff's explanation was offered for a purpose other than to prove the existence of liability insurance and did not violate N.C.G.S. § 8C-1, Rule 411; furthermore, the prejudicial effect of the testimony was not outweighed by the probative value because the extent of plaintiff's injuries was a major issue and defendant's apparent trial strategy was to characterize plaintiff as blatantly seeking profit.

Appeal by plaintiff from judgment entered 23 March 2000 by Judge Timothy L. Patti in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 March 2001.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith, for plaintiff-appellant.

Steven J. Colombo, P.A., by Steven J. Colombo, Kenneth M. Gondek, and Marc H. Amin, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Joanne C. Williams ("plaintiff") appeals from a judgment entered pursuant to a jury's verdict finding Mia McCoy ("defendant") negligent and awarding plaintiff $3,000.00 in damages. Based upon our review of the record and arguments of counsel, we reverse the judgment and remand for a new trial on all issues.

Plaintiff filed an action against defendant claiming personal injury resulting from a 1997 automobile accident between the two litigants. Based upon a pre-trial motion by defendant, the trial court instructed plaintiff not to testify "that there was liability insurance, reference any conversations or contact with liability insurance adjusters, etcetera[,] pursuant to [North Carolina Rule of Evidence] 411." Plaintiff objected to the court's pre-trial ruling. Plaintiff informed the court that she first hired an attorney "after meeting [defendant's] claims[']] adjuster." Plaintiff contended that restricting her testimony pursuant to Rule 411 was prejudicial, arguing that she would not be allowed to explain why she hired an attorney if defendant so inquired. The court reserved ruling based upon plaintiff's objections until such time as the question was raised at trial.

Pertinent to the issues presented on appeal, plaintiff testified concerning the facts surrounding the alleged automobile accident. Plaintiff further testified that she visited and was subsequently released from the emergency room immediately following the accident. According to plaintiff, at the urging of her husband, she visited a chiropractor four days after being released from the emergency room. Plaintiff explained that she did not visit the doctor sooner because he was unavailable. Plaintiff further testified that in two prior work-related accidents she had injured her knee, and that following the collision with defendant, she experienced difficulty walking and a "clicking" sensation in her knee, which she had not previously noticed.

On cross-examination, defense counsel questioned plaintiff extensively concerning the timing of her visit to the chiropractor, the symptoms she related to the emergency room staff, and why she did

not return to the emergency room although her condition worsened. At some point in plaintiff's testimony, defense counsel inquired, "Would you agree that you retained your attorney prior to going to the chiropractor?" Plaintiff objected to the defense's inquiry, but the court overruled the objection and ordered plaintiff to answer. Plaintiff then responded, "No." Defense counsel further inquired, "You dispute that[,]" to which plaintiff answered, "No, in fact, I was told not to talk about insurance." Again, the attorney inquired, "I asked you a question and that is did you retain your attorney prior to going to the chiropractor during which time you said your condition—," and plaintiff responded, "I don't remember."

Following the aforementioned exchange, the court excused the jury and reiterated to plaintiff that she was not to testify concerning insurance. Plaintiff's attorney requested permission to allow plaintiff to explain why she hired an attorney, arguing that defense counsel was attempting to prejudice plaintiff by suggesting that she was litigious. Plaintiff's attorney explained that defense counsel was "building his whole case" around plaintiff's alleged litigious nature. Plaintiff's attorney then quoted the following from defense counsel's opening statement: "We're going to show you that she's here for profit and that she stated it by hiring an attorney before she went to see a doctor." According to plaintiff's attorney, "that [was defendant counsel's] whole theme. He led her into that. As a matter of fact, you hired a lawyer before you went to a chiropractor."

The court subsequently allowed plaintiff to explain her answer on *voir dire*, outside the presence of the jury. Plaintiff offered the following explanation as to why she hired an attorney:

> [Defendant's claims' adjuster] came to my house. And he tried to persuade me to take some money. And he told me that because I had had an injury in '76 that I was wasting my time and that I needed money and let them settle with me so that I can get medical help.

The court again refused to allow plaintiff's testimony and further instructed plaintiff that if she mentioned "insurance" again, he would declare a mistrial and hold her in contempt of court.

Following the presentation of evidence, arguments from counsel, and jury instructions, the jury returned its verdict, finding defendant negligent and awarding plaintiff $3,000.00 in damages. The court denied a subsequent motion by plaintiff for a new trial and entered

judgment based upon the jury's verdict, taxing the cost of the action to plaintiff. From this judgment, plaintiff appeals.

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[1] By her first assignment of error, plaintiff argues that the court erred in failing to sustain her objection to defense counsel's inquiry concerning the date upon which she retained an attorney.

As a preliminary issue, we note that the attorney-client privilege is not violated when an attorney questions the plaintiff concerning whether she had communications with an attorney on a particular date, as long as such questioning does not probe the substance of the client's conversation with her attorney. *State v. Tate*, 294 N.C. 189, 192-93, 239 S.E.2d 821, 824-25 (1978); *Blackmon v. Bumgardner*, 135 N.C. App. 125, 141, 519 S.E.2d 335, 344-45 (1999). As defense counsel's inquiry did not concern the substance of plaintiff's conversation with her attorney, the only question that remains is whether the date plaintiff hired her attorney was relevant. We believe that it was.

Relevant evidence is "[any] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999). The aforementioned "standard gives the [trial court] great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted).

This Court has previously indicated that inquiry into when a plaintiff hired an attorney could be relevant, given certain limited circumstances. *See Thompson v. James*, 80 N.C. App. 535, 342 S.E.2d 577 (1986). In *Thompson v. James*, the defendant sought to introduce evidence that the plaintiff visited an attorney prior to visiting a doctor and that he had filed two other lawsuits within a relatively short time of filing the one at issue in *Thompson*. This Court found that the aforementioned evidence, solicited with objection, "was relevant to an issue being tried . . . and it was also admissible for the purpose of impeaching plaintiff's credibility and showing his bias as a witness." *Id.* at 536, 342 S.E.2d at 578.

Plaintiff contends that *Thompson* did not permit the challenged inquiry by the defense. Plaintiff argues that because the *Thompson* court also found the admission of the evidence in question harmless,

that portion of the *Thompson* decision concerning the date of hire question was *dicta* and therefore has no import. We disagree.

We recognize that the *Thompson* court found, based upon the plaintiff's failure to object to like evidence during the trial and other evidence bearing on plaintiff's credibility, that the admission of the evidence was harmless. However, we find that this conclusion was stated in the alternative, while the essence of the *Thompson* court's decision was that evidence concerning when a litigant seeks legal counsel can, in some instances, be admissible. Speaking to this issue, the Court stated:

> An important issue in the case was the extent of plaintiff's injury and even if he had one, and contacting his lawyer before he did his doctor could indicate that his injury was not as severe as he claimed; it could also indicate, along with the other evidence discussed below, that he has an unduly litigious nature, a proper ground for impeachment, we believe, in a case based on circumstances that suggest exaggeration.

Id. (citation omitted).

Plaintiff further argues that even if *Thompson* is applicable to the present case, evidence concerning the date she hired an attorney was still inadmissible, because there was no evidence to otherwise support defendant's characterization of her as litigious. According to plaintiff, defendant's inquiry amounted to no more than a "cold question" intended only to infer that she was litigious in nature. With plaintiff's contentions, we again disagree.

Plaintiff's argument misapprehends the law. *Thompson* indicates that inquiry concerning when plaintiff hired an attorney is admissible to impeach a litigious plaintiff *and* is relevant to rebut the existence and extent of plaintiff's injuries from the accident, if evidence exists to support the inquiry on either basis. Although there was indeed no evidence that plaintiff was litigious, in that she had a tendency to file lawsuits, the extent of her injuries was a major issue at trial. In fact, the majority of plaintiff's testimony during both direct and cross-examination concerned the extent of her injuries—the injuries which she reported to the emergency room personnel, the injuries she reported to the chiropractor, what caused her to wait four days before going to the chiropractor, and why she did not return to the emergency room when her symptoms worsened. There was also a question concerning a preexisting injury to plaintiff's knee, which she claimed to have reinjured in the accident. Just prior to the question

concerning when she sought legal advice, plaintiff testified that her "condition worsened from the date of the accident" and that she had "not been the same," although she did not revisit the emergency room and instead waited until, as she claimed, the chiropractor was available. Furthermore, during the pre-trial proceedings, defense counsel specifically informed the court that the date of hire question would be posed to discredit the severity of plaintiff's injuries, not to impeach her as litigious.

As there was a question concerning the extent of plaintiff's injury at trial, we conclude, in accordance with *Thompson*, that the challenged inquiry was relevant, and therefore, the court did not err in overruling objections to its admission at trial. *Compare Corwin v. Dickey*, 91 N.C. App. 725, 373 S.E.2d 149 (1988) (granting new trial in negligence action because attorney's comments concerning plaintiff's religious beliefs and criticizing the legal system were blatant attempts to degrade plaintiff where no evidence existed to support comments). Plaintiff's first assignment of error is consequently overruled.

[2] By her next assignment of error, plaintiff contends that the trial court erred in not permitting her to explain her answer when asked whether she hired an attorney prior to visiting the doctor. Plaintiff argues that her explanation was admissible for a purpose other than to prove the existence of liability insurance and that the court abused its discretion in not admitting it as such. With plaintiff's arguments, we agree.

Rule 411 of our Rules of Evidence provides: "Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully." N.C. Gen. Stat. § 8C-1, Rule 411 (1999). Rule 411 represents a narrow exception providing for the exclusion of otherwise admissible and relevant evidence. *See e.g., Medlin v. Fyco, Inc.*, 139 N.C. App. 534, 539-40, 534 S.E.2d 622, 626 (2000) ("where the reference to insurance is incidental and conveys, at most, merely the idea that coverage exists, 'a mistrial would seem *rarely, if ever*, to be justified' "), *disc. review denied*, 353 N.C. 377, 547 S.E.2d 12 (2001). *See generally* 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence, § 108, p. 333 (5th ed. 1998). As such, the Rule does not absolutely bar the admission of evidence concerning liability when that evidence is "offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Id.* The exceptions listed in the Rule are nonexclusive, *see* Commentary to N.C.R. Evid. 411, as Rule 411 *only* excludes insurance evidence "as an independent fact,

i.e., solely on the issue of negligent or wrongful conduct" but not if it "is offered to achieve a collateral purpose." *Carrier v. Starnes*, 120 N.C. App. 513, 516, 463 S.E.2d 393, 395 (1995) (citations omitted).

In reviewing whether to admit or exclude evidence under Rule 411, the trial court must consider the mandate of North Carolina Rule of Evidence 403. *See Warren v. Jackson*, 125 N.C. App. 96, 479 S.E.2d 278 (1997). Rule 403 specifies, in pertinent part, that 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 . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (1999). The Rule 403 balancing test falls within the exclusive purview of the trial court, and therefore the court's decisions under Rule 403 will not be disturbed on appeal absent an abuse of discretion. *Warren*, 125 N.C. App. at 99, 479 S.E.2d at 280. An abuse of discretion occurs when the court's decision "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (citation omitted).

It is clear to this Court that Rule 411 did not bar plaintiff's explanation as to why she hired an attorney, in light of the circumstances presented by the instant case. A review of the transcript reveals that based upon pre-trial discovery, defense counsel knew plaintiff would testify that her motivation for hiring an attorney was a negative encounter with defendant's insurance adjuster. It appears that during opening statements, defense counsel then argued that plaintiff hired an attorney prior to seeing the doctor. Plaintiff's explanation as to defense counsel's subsequent question did not bear directly on defendant's liability or wrongful conduct, but, as a collateral issue, simply explained the somewhat confusing answer solicited by the defense. We therefore find that plaintiff's examination should not have been excluded per Rule 411.

Concerning Rule 403, our review of the transcript reveals that the court did not consider or balance the risk of unfair prejudice to defendant's case with the above-noted probative value of plaintiff's explanation. Pursuant to a pre-trial motion, the court ruled there was to be no reference to insurance and reserved ruling on whether plaintiff's explanation was admissible. When the issue arose, the court allowed plaintiff to give *voir dire* testimony concerning her explanation but instructed her, without reconsidering its prior ruling, that any mention of insurance would result in a mistrial and even contempt of court.

Certainly, we recognize, as pointed out by defendant, that had plaintiff been allowed to explain why she hired an attorney, it may have had some prejudicial effect on defendant. However, this prejudice does not outweigh the probative value of plaintiff's testimony and the prejudice she suffered in not being allowed to explain her answer. This is true especially in light of the clear implication that plaintiff only visited her doctor after seeking an attorney's advice, the fact that the extent of plaintiff's injuries was a major issue at trial, and the apparent trial strategy by defendant to characterize plaintiff as blatantly seeking profit. In fact, we wholeheartedly agree with plaintiff: "Without [] being allowed to explain herself, the total weight of [defendant's] attack . . . fell on [plaintiff] and affected the verdict. The [trial court's] denying her explanation allowed the jury to assume the worst, that she had an improper motive in hiring an attorney, was litigious, and therefore lacked credibility."

Furthermore, in assessing the prejudice to defendant which may have resulted from plaintiff's testimony, we note the realities of what the jury already assumes about defendants in motor vehicle cases. The jurors, who more than likely drive automobiles, would also more than "likely [] know that in all probability there is insurance, that the matter has been investigated by the insurer's claim agent or attorney, and that insurer has employed the trial counsel." Broun, *supra* at 333. More importantly, having taken *voir dire* testimony of plaintiff's explanation, the court could have further limited any prejudice to defendant by restricting the import of plaintiff's testimony and giving a limiting instruction, if so requested. *See* N.C. Gen. Stat. § 8C-1, Rule 105 (1999) ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Because none of the aforementioned was considered by the trial court, we find its decision to exclude plaintiff's explanation unsupported by reason. We therefore conclude that the trial court abused its discretion in failing to admit plaintiff's explanatory testimony, and considering the obvious prejudice suffered by plaintiff, the court's abuse of discretion constituted reversible error.

As we determine plaintiff is entitled to a new trial based on the aforementioned reasoning, we find it unnecessary to address plaintiff's remaining arguments. Accordingly, the judgment of the trial court is reversed, and we remand the case for a new trial.

Reversed and remanded.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. GARRY LEWIS BECKHAM

No. COA00-951

(Filed 17 July 2001)

1. Evidence— prior crimes or acts—sexual acts—remoteness—intent and absence of accident

The trial court did not abuse its discretion in a first-degree statutory rape and taking indecent liberties case by admitting the testimony of two of the State's witnesses concerning defendant's prior sexual acts with minor females some twelve and fourteen years prior to these incidents, because: (1) the evidence was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show defendant's intent and the absence of any alleged accident; (2) the lapse of time in this case since the prior sexual acts does not sufficiently diminish the striking similarities between the acts and goes to the weight of the evidence rather than to its admissibility; and (3) the trial court concluded defendant's prior sexual acts were not so remote in time as to be more prejudicial than probative under N.C.G.S. § 8C-1, Rule 403.

2. Evidence— prior crimes or acts—sexual acts—common intent, scheme and design, and opportunity

The trial court did not abuse its discretion in a first-degree statutory rape and taking indecent liberties case by admitting the testimony of two of the victims concerning defendant's prior sexual acts, because: (1) the testimony was relevant to show common intent, scheme and design, and opportunity insofar as they involved incidents of a sexual nature with children; and (2) the statements by both children indicated the incidents occurred no more than two years prior to the incident in April 1998.

3. Criminal Law— mental capacity of defendant—sufficiency of evidence

The trial court did not err in a first-degree statutory rape and taking indecent liberties case by allegedly failing to take appro-

priate measures sua sponte to evaluate defendant's mental state and capacity under N.C.G.S. § 15A-1002(a), because there was insufficient evidence before the trial court indicating defendant's mental incompetence.

4. Constitutional Law— effective assistance of counsel—failure to move for severance of charges—failure to take measures regarding defendant's mental state and capacity

A defendant was not denied the effective assistance of counsel based on his counsel's alleged failure to move for a severance of the indecent liberties and rape charges and failure to take appropriate measures regarding defendant's mental state and capacity to proceed, because: (1) defendant has failed to show how he was prejudiced when the charges had a transactional connection; and (2) there was insufficient evidence at trial of defendant's incompetency.

Appeal by defendant from judgments entered 30 September 1999 by Judge Timothy S. Kincaid in Superior Court, Alexander County. Heard in the Court of Appeals 23 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Sarah Ann Lannom, for the State.

Homesley, Jones, Gaines, Homesley & Dudley, by L. Ragan Dudley, for the defendant-appellant.

WYNN, Judge.

Defendant appeals from his convictions for two counts of taking indecent liberties with a child under N.C. Gen. Stat. § 14-202.1 (1999), and one count of first degree statutory rape of a female child under thirteen years of age under N.C. Gen. Stat. § 14-27.2(a)(1) (1999). We find no prejudicial error.

The evidence presented by the State tends to show that while his friends, a husband and wife, left town for a wedding, defendant stayed at their residence with their two minor children, and with an acquaintance of theirs, a thirteen-year old female friend.

One evening while defendant and the children watched a movie, defendant masturbated in front of the children. Later that evening, after the children had gone to bed, defendant allegedly raped the thirteen-year old female friend. Following indictment and trial, defendant was convicted of two counts of taking indecent liberties

with each of his friends' children, and the statutory rape of the thirteen-year old female friend.

[1] Defendant appeals from these convictions arguing first that the trial court committed reversible error by admitting the testimony of two of the State's witnesses. At trial, the State called two female witnesses to testify regarding certain prior acts of the defendant under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). Upon defendant's objection, the trial court conducted *voir dire* examinations of the proposed witnesses and heard arguments from counsel. The trial court then overruled defendant's objections and allowed both witnesses to testify before the jury.

The first female witness testified on *voir dire* that she had been good friends with defendant's daughter when they were in elementary school. She would visit defendant's daughter and often stayed overnight at defendant's house. She testified that defendant would frequently expose his genitals and play with his penis in front of her and his daughter. She recalled that defendant exposed himself and masturbated in front of her in 1983 or 1984.

In her *voir dire* testimony, the second female witness testified she was also a good childhood friend of defendant's daughter and stayed overnight at defendant's house on occasion. She testified that defendant frequently exposed himself to the children, and on one occasion in May 1986, defendant entered the room where she and his daughter were sleeping, sat on the edge of her bed, picked up her hand and began "playing with himself."

Evidence of other bad acts is inadmissible under Rule 404(b) if its sole purpose is "to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b). Thus, even if evidence tends to show a defendant's propensity to commit bad acts, such evidence is nonetheless admissible under Rule 404(b) if it is relevant for some other purpose, such as to show, for example, opportunity, intent, knowledge, identity, or absence of mistake or accident. *See id.* The State contends that the challenged evidence was relevant to show defendant's intent and the absence of any alleged accident. "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991); *see* N.C. Gen. Stat. § 8C-1, Rule 403 (1999).

The gravamen of the offense of taking indecent liberties under N.C. Gen. Stat. § 14-202.1(a)(1) is the defendant's purpose in undertaking the prohibited act. *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990); N.C. Gen. Stat. § 14-202.1(a)(1) (providing that the prohibited acts must have been undertaken, or attempted, "for the purpose of arousing or gratifying sexual desire"). A defendant's purpose in performing an act, like intent, is a mental attitude, and is rarely demonstrable by direct evidence; ordinarily it must be inferred. *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988), *overruled on other grounds*, *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000); *West*, 103 N.C. App. at 9, 404 S.E.2d at 197. As prior similar acts are admissible to show intent, so may they be admitted to show a defendant's purpose under N.C. Gen. Stat. § 14-202.1(a)(1). *See West*, 103 N.C. App. at 9, 404 S.E.2d at 197. Thus, the evidence of prior sexual acts by defendant was offered for a proper purpose under Rule 404(b).

Defendant contends, however, that the testimony by the two female witnesses in this case referred to incidents that were too remote and thus ran afoul of the balancing test in Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403; *see West*. The first female witness's testimony concerned alleged prior acts of defendant occurring in 1983 or 1984, at least fourteen years earlier than the acts occurring in April 1998 for which defendant was on trial. The second female witness's testimony concerned acts occurring some twelve years prior to the alleged incidents in April 1998.

While the period of elapsed time since the prior sexual acts is an important part of the Rule 403 balancing process, and the passage of time may slowly erode the commonalities between the prior acts and the acts currently charged, the lapse of time in this case does not sufficiently diminish the striking similarities between the acts. *See State v. Roberson*, 93 N.C. App. 83, 85, 376 S.E.2d 486, 487-88, *disc. review denied*, 324 N.C. 435, 379 S.E.2d 247 (1989) (involving nearly five-year lapse of time between sexual acts); *State v. Frazier*, 121 N.C. App. 1, 464 S.E.2d 490 (1995), *aff'd*, 344 N.C. 611, 476 S.E.2d 297 (1996); *State v. Blackwell*, 133 N.C. App. 31, 514 S.E.2d 116, *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999). Furthermore, "remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident." *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). Accordingly, we conclude that the lapse of time between the defendant's sexual acts in the instant case goes to the weight of the evidence, not to its admissibility. *See id.*

Nonetheless, defendant, relying heavily upon *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988) and *State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994), contends that this Court and our Supreme Court have consistently ruled "that the trial courts of North Carolina [must] make specific and meaningful findings regarding remoteness." In *Jacob*, this Court stated that "[t]he trial court [in *Jones*, 322 N.C. 585, 369 S.E.2d 822] failed to make specific findings indicating the significance of the remoteness factor, and the omission was found to be error." *Jacob*, 113 N.C. App. at 610, 439 S.E.2d at 815. In contrast, the transcript in the case at bar clearly indicates that the trial court carefully considered the remoteness factor, concluding that defendant's prior sexual acts were "not so remote in time as to be more prejudicial than probative for the purpose of proving . . . absence of mistake or intent." As the transcript evidences the trial court's careful consideration of the remoteness factor, defendant's argument is without merit.

Defendant also contends that the testimony of the two female witnesses, while it may have been admissible in connection with the indecent liberties charges, was inadmissible under Rule 403 with respect to the rape charge as it was not sufficiently similar for its probative value to outweigh any prejudice. We disagree.

In ruling on the admissibility of the testimony of the two female witnesses, the trial court recognized that their testimony was not corroborative of or similar to the testimony offered by the thirteen-year old alleged victim in this case relating to the rape charge, "insofar as actual penetration is concerned." We note that defendant did not oppose the State's motion to join the cases for trial and voiced no objection to the trial court's limiting instructions following the testimony by the two female witnesses. We, therefore, conclude that the trial court did not abuse its discretion in admitting the testimony by the two female witnesses regarding defendant's prior sexual acts. *See Hipps*, 348 N.C. at 405-06, 501 S.E.2d at 642 ("[t]he determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion").

[2] Defendant next contends that the trial court erred by admitting testimony by his friends' two children—a minor male and female—regarding prior acts of defendant. Both children testified that defendant frequently "played with himself" and masturbated in their

presence, often when their mother, who worked nights, was asleep and their father was out working. Furthermore, the two children testified that defendant had asked them on occasion to touch his penis and told them not to say anything of these incidents or they would get in trouble and he would go to jail. One of the children stated during *voir dire* examination that he did not remember when defendant began masturbating in front of him but was unwavering in his testimony that defendant had done so numerous times.

Defendant argues that these prior acts were in no way similar to the alleged rape of the thirteen-year old alleged female victim, and "were only relevant to the indecent liberties charges." He argues further that these prior acts, when viewed as a whole, were not sufficiently similar and were too remote in time, such that their probativity did not outweigh their prejudice to defendant under Rule 403. The trial court concluded that the testimony was relevant and admissible as to the rape charge as well as the indecent liberties charges "to show common intent, scheme and design" and opportunity insofar as they involved incidents of a sexual nature with children. Defendant emphasizes that the two children of his friends could not remember the precise dates and times when defendant performed the prior acts. However, statements by both children indicated that the incidents to which they were testifying occurred no more than two years prior to the incident in April 1998. Under the circumstances, we conclude that the trial court did not abuse its discretion in permitting the testimony by the two children as to defendant's prior sexual acts in their presence.

[3] Next, defendant asserts that the trial court erred by failing to take appropriate measures *sua sponte* to evaluate defendant's mental state and capacity. Defendant also argues that the trial court erred in denying his motion for appropriate relief, which raised this same argument. We find no error.

N.C. Gen. Stat. § 15A-1001 (1999) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

Under N.C. Gen. Stat. § 15A-1002(a) (1999), the question of a defendant's capacity to proceed *may* be raised on motion by the trial court.

In *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983), our Supreme Court recognized that "circumstances *could* exist where the trial court has a constitutional duty to make such an inquiry." *Id.* at 235-36, 306 S.E.2d at 112 (emphasis added) (citing *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977)).

However, *Young* stated that " '[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' " 291 N.C. at 568, 231 S.E.2d at 581 (quoting *Crenshaw v. Wolff*, 504 F.2d 377 (8th Cir. 1974), *cert. denied*, 420 U.S. 966, 43 L. Ed. 2d 445 (1975)). Upon careful review of the record, we conclude that there was insufficient evidence before the trial court in the instant case indicating defendant's mental incompetence, and the trial court was, therefore, under no constitutional duty to institute a competency hearing *sua sponte* under G.S. § 15A-1002(a). We conclude further that the trial court committed no error in denying defendant's motion for appropriate relief on this basis.

[4] Defendant next contends that he was denied the effective assistance of counsel, based on his trial counsel's failure to move for a severance of the indecent liberties and rape charges, and his failure to take appropriate measures regarding defendant's mental state and capacity to proceed. We disagree.

A defendant's constitutionally-guaranteed right to counsel includes the right to the effective assistance of counsel. *See State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713 (2000). To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's assistance was deficient under the circumstances, and that such deficiencies prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985); *Grooms*, 353 N.C. at 64-65, 540 S.E.2d at 722-23.

Defendant has failed to satisfy this test in the instant case. Assuming *arguendo* that defendant's counsel erred by failing to oppose the State's motion to join the charges against defendant for trial or by failing to move for a severance of the charges under N.C. Gen. Stat. § 15A-927 (1999), defendant has failed to show that he was prejudiced thereby. N.C. Gen. Stat. § 15A-926 (1999) permits the joinder of offenses within the discretion of the trial court, and such joinder will only be disturbed on appeal where defendant demonstrates that joinder denied him a fair trial. *See State v. Wilson*, 108 N.C. App.

575, 424 S.E.2d 454, *appeal dismissed, disc. review denied*, 333 N.C. 541, 429 S.E.2d 562 (1993).

The trial court's consolidation of charges with a transactional connection will only be disturbed upon a showing of an abuse of discretion. *See State v. Monk*, 132 N.C. App. 248, 511 S.E.2d 332, *appeal dismissed, disc. review denied*, 350 N.C. 845, 539 S.E.2d 1 (1999). Our courts have previously held in various circumstances that it was not error for the trial court to consolidate multiple sexual offense charges against a defendant where such offenses were transactionally connected. *See State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988) (holding that trial court's consolidation for trial of four sexual offenses allegedly occurring in two episodes a week apart was not error); *State v. Bruce*, 90 N.C. App. 547, 369 S.E.2d 95, *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988) (trial court's consolidation of four sexual offenses for trial was not error where all charges involved acts of sexual abuse by defendant under similar circumstances); *see also Monk*, 132 N.C. App. at 254-55, 511 S.E.2d at 336.

"A defendant is not prejudiced by the joinder of two crimes unless the charges are 'so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant.' " *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (citations omitted). We cannot conclude in the instant case that the two counts of taking indecent liberties and the single count of statutory rape were sufficiently separate and distinct circumstantially to render their consolidation prejudicial to defendant. Furthermore, as it was not error for the trial court to consolidate the charges, we cannot find error in defendant's counsel's decision not to argue for the severance of such charges. This assignment of error is without merit.

As to defendant's argument that he was denied the effective assistance of counsel by his counsel's failure to demand a hearing on defendant's competency, we note, as above, that there was insufficient evidence at trial of defendant's incompetency. Indeed, defendant's counsel testified at the hearing on defendant's motion for appropriate relief that defendant was very intelligent, comprehended the charges and proceedings against him, and effectively assisted counsel in defending him. *See* N.C. Gen. Stat. § 15A-1001. Defendant has therefore failed to show that his counsel was deficient in failing to demand a competency hearing. *See id.* Defendant's remaining assignments of error are without merit.

No error.

Judges CAMPBELL and BIGGS concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD WAMPLER

No. COA00-724

(Filed 17 July 2001)

1. Assault— intent to kill—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the part of the assault charge "with intent to kill," because the evidence reveals that defendant took a bat made substantially heavier with steel pipe and swung it at the victim's head causing serious injury, defendant waited for a while outside of the victim's residence, defendant attacked the victim at night under conditions where he was most vulnerable, and defendant believed the victim was carrying a bag of money and was planning to steal that money.

2. Criminal Law— jury request for trial testimony—discretion of trial court

The trial court did not abuse its discretion in an assault case by denying the jury's request to review trial testimony under N.C.G.S. § 15A-1233(a) after jury deliberations had begun regarding the time frame defendant was at a store until the time of the crime, because: (1) in the absence of the transcript, the trial court would have had to give evidence which in effect would be giving its own recollection of the testimony; and (2) the jury's question regarding time frame from the store does not relate to any element of assault with intent to kill inflicting serious injury under N.C.G.S. § 14-32(a).

3. Sentencing— assault—aggravating range—serious injury

The trial court did not err in an assault case by sentencing defendant under the aggravating range of sentences, because: (1) the victim's injuries went beyond the "serious injury" necessary to convict defendant of the offense; and (2) the trial court properly found that defendant was a Level II offender based on his

prior record and that the aggravating factor of the victim suffering from a serious injury that is permanent and debilitating outweighed the mitigating factor of defendant's positive employment history.

Appeal by defendant from judgment entered 12 January 2000 by Judge David Q. LaBarre in Superior Court, Caswell County. Heard in the Court of Appeals 16 May 2001.

Attorney General Roy A. Cooper, by Assistant Attorney General Sharon Patrick-Wilson, for the State.

Theresa K. Pressley, for the defendant-appellant.

WYNN, Judge.

The defendant in this case appeals from his conviction of the class C felony of assault with a deadly weapon inflicting serious injury with intent to kill. We find no error in his trial.

The State's evidence tended to show that on 10 March 1999 at approximately 10:30 p.m., Avis Southerland walked up the pathway to his home carrying a paper bag that contained a piece of pie; however, he testified that he carried cash from time to time in a paper bag.

Mr. Southerland noticed movement and turned to see defendant running towards him wielding a bat. The defendant struck him on the top of the head and on his wrist with the bat. Mr. Southerland wrestled defendant to the ground and attempted to grab defendant's throat; but, defendant bit his finger and continued to chew it. The two men fell onto a boulder and defendant released Mr. Southerland's finger. Mr. Southerland kicked defendant in the ribs, and struck defendant several times with the bat. Shortly thereafter, Mr. Southerland yelled for his wife to call the police.

The police officers arrived; defendant was taken to the hospital by ambulance; and Mr. Southerland was taken to the hospital by EMS personnel in a private vehicle. As a result of the incident, Mr. Southerland's head was sewn with liquid stitch and his arm was put in a cast. His arm did not heal properly, and he had to have more surgery including a steel plate and five screws. Mr. Southerland's finger is permanently injured and will not bend properly.

Officer Scott Halbrook, who was at the scene, testified that defendant was laying on the ground bleeding when he arrived and Mr.

Southerland was also bleeding. Mr. Southerland told Officer Holbrook about the bat which Officer Holbrook determined contained a steel pipe. Officer Holbrook also testified that defendant had a mask made out of ladies' pantyhose. He advised defendant of his rights, and defendant chose to remain silent.

The defendant testified at trial that he lived close to Mr. Southerland and he was self-employed and did construction work. He knew Mr. Southerland as a passing acquaintance. On the night of the attack, defendant left his house after dinner to go back to work at 9:00 or 10:00 p.m. He stopped at the Express Mart to get a drink and a pack of cigarettes. He also testified that he was addicted to painkillers and ran into a man that sold them at the gas station. The defendant admitted that he was the perpetrator of this crime but that due to the illegal drugs he could not recall the evening of 10 March 1999. Following his conviction on the charged offense, the trial court sentenced defendant in the aggravated range of sentencing, as a prior record Level II offender with two prior points, to a minimum sentence of 125 months to a maximum of 159 months.

The issues on appeal are whether the trial court erroneously (I) denied defendant's motion at the close of all the evidence to dismiss the part of the assault charge, "with intent to kill"; (II) failed to address a question by the jury; and (III) sentenced defendant in the aggravated range of sentencing. For the reasons stated below, we conclude that defendant received a fair trial, free from prejudicial error.

[1] First, defendant contends the trial court committed reversible error by denying his motion at the close of all the evidence to dismiss the part of the assault charge, "with intent to kill." We disagree.

In reviewing the trial court's denial of a defendant's motion to dismiss, "we must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial." *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996) (emphasis omitted). "If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even

though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979).

The elements of the charge of assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(a) are: (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. *See State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). "Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator." *Id.* (quoting *State v. Barts*, 316 N.C. 666, 686, 343 S.E.2d 828, 841 (1986).

The defendant argues that the evidence does not support the conclusion that he intended to kill Mr. Southerland. "Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972), *appeal after remand*, 18 N.C. App. 547, 197 S.E.2d 248 (1973). However, "[a]n intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *Id.*; *see also State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982).

There is ample evidence in the record from which a jury could reasonably infer that the defendant intended to kill Mr. Southerland. The record shows that defendant took a bat made substantially heavier with steel pipe and swung it at Mr. Southerland's head causing serious injury; defendant waited for quite awhile outside of Mr. Southerland's residence, as evidenced by the numerous cigarette butts found on the ground by defendant's car; and he attacked Mr. Southerland at night under conditions where he was most vulnerable. Moreover, there was evidence defendant believed that Mr. Southerland was carrying a bag of money and that he was planning to steal that money.

This evidence was sufficient to allow a reasonable jury to find that the defendant committed each of the elements of assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. Therefore, this assignment of error is without merit.

[2] Next, defendant contends that the trial court committed reversible error by not addressing a question from the jury. We disagree.

The trial began on 24 January 2000 and due to severe weather it was recessed until 27 January 2000. And because of the illness of the court reporter from the first trial session, a different court reporter was present at the second trial session. At the conclusion of the evidence and closing arguments, the jurors asked the trial court a question regarding the time frame from when defendant was at the Express Mart until the time of the crime. The trial court informed the jury that:

> Not only is the Court unable to produce that testimony inasmuch as part of that testimony was taken by a different court reporter, the Court is unwilling in its discretion to give you a mere portion of the testimony as requested and can only invite you and other members of the jury to try as best you are able to rely on your own recollection of what was said.

After returning to the deliberation room, the jury came back six minutes later with their verdict.

N.C. Gen. Stat. § 15A-1233 (a) (1999) which governs the trial court's duty regarding jury requests to review trial testimony provides that:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

"It is a well-established rule in North Carolina that the decision whether to grant or refuse a request by the jury for a restatement of the evidence after jury deliberations have begun lies within the discretion of the trial court." *State v. Van Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997). "It is within the court's discretion to determine whether, under the facts of a particular case, the transcript should be available for reexamination and rehearing by the jury." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). The defendant

has the burden to show that the trial court's action was so arbitrary that it could not have been the result of a reasoned decision. *See State v. Weddington*, 329 N.C. 202, 404 S.E.2d 671 (1991); *State v. Herring*, 322 N.C. 733, 370 S.E.2d 363 (1988).

In this case, we find the trial court acted properly in the use of its discretion in refusing to answer the jury's question. In the absence of the transcript, the trial court would have had to give evidence, which in effect would be giving its own recollection of the testimony. Moreover, the jury's question regarding time frame from the Express Mart does not relate to any element of assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(a): (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, and (5) not resulting in death. *See* N.C. Gen. Stat. § 14-32 (a) (1999). Time is not a factor in any of the above elements. Thus the answer to the jury's question would have had no impact on the verdict. The trial judge correctly stated that his denial of the request was within his discretion; and he informed the jurors of the importance of relying on their own recollection. *See State v. Burgin*, 313 N.C. 404, 416, 329 S.E.2d 653, 661 (1985). This assignment of error is without merit.

[3] In his final argument, defendant contends that the trial court erred by sentencing him under the aggravated range of sentences. The defendant specifically argues that the aggravating factor was improperly applied because it involved evidence used to prove the element of the offense. We disagree.

At the sentencing hearing, defendant recalled Chaplain Jones who asked the trial court for mercy because of defendant's drug problems. The defendant's daughter also asked for mercy and told the trial court that defendant had been employed since his release from jail and had tried to get his life together. The defendant expressed his remorse to the trial court and to Mr. Southerland. The defendant asked for a mitigated range, and the State asked for an aggravated range. The trial court found defendant's positive employment history in being gainfully employed as a mitigating factor and found as an aggravating factor that the victim suffered from a serious injury that is permanent and debilitating. *See* N.C. Gen. Stat. §§ 15A-1340.16 (e)(17) and (d)(19) (1999). The trial court found that the aggravating factor outweighed the mitigating factor.

The defendant argues that the trial court violated N.C. Gen. Stat. §15A-1340.3(a)(1), which states that "[e]vidence necessary to prove

an element of the offense may not be used to prove any factor in aggravation [.]" *See* N.C. Gen. Stat. § 15A-1340.3(a)(1) (1999). Our Courts have held that long term effects or extended effects that arise from the victim's injuries may be properly used as an aggravating factor. *See State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994); *State v. Crisp*, 126 N.C. App. 30, 483 S.E.2d 462 (1997).

N.C. Gen. Stat. § 14-32-4 defines serious bodily injury "as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." *See* N.C. Gen. Stat. § 14-32-4 (1999). In the present case, the victim's injuries went beyond the "serious injury" necessary to convict defendant of the offense. Mr. Southerland received several serious injuries including a broken wrist, chewed fingers, and a gash in the head. The aggravating factors that he suffered included permanent disfigurement of his fingers, surgery, loss of use and impairment. Moreover, the victim cannot bend his fingers and will always have a steel plate and screws in his hand.

"A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *State v. Parker*, 315 N.C. 249, 258 337 S.E.2d 497, 502 (1985), *appeal after remand*, 319 N.C. 444, 355 S.E.2d 489 (1987). "The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *State v. Parker*, 315 N.C. at 258-59, 337 S.E.2d at 502-03 (citations omitted). A trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion. *See State v. Daniels*, 319 N.C. 452, 355 S.E.2d 136 (1987).

In this case, we find that the trial court correctly found that defendant was a Level II offender because of his prior record, and that the aggravating factor outweighed the mitigating factor. Since there is no evidence of an abuse of discretion, we reject this assignment of error. *See id.*

For the foregoing reasons, we find that defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BIGGS concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. SHAQUANA FEATHERSON, DEFENDANT

No. COA00-471

(Filed 17 July 2001)

1. Evidence— hearsay—prior statements—impeachment

The trial court did not err in a prosecution for the robbery of a Bojangles by admitting alleged hearsay statements from codefendants where the codefendants' pretrial statements implicated defendant, their testimony at trial exonerated defendant, and the court instructed the jury that the statements were to be considered as impeaching rather than as substantive evidence. Furthermore, other evidence to the same effect was elicited on cross-examination by defendant or was admitted without an objection, a motion to strike, or a request for limiting instructions and there was no prejudice.

2. Robbery— armed—sufficiency of evidence—statements by codefendants

The trial court did not err in an armed robbery and conspiracy to commit armed robbery prosecution by denying defendant's motions to dismiss where statements by codefendants (held above to be properly admitted) were sufficient standing alone to support defendant's convictions.

3. Kidnapping— second-degree—restraint and removal—integral part of robbery

The trial court erred by denying a motion to dismiss a second-degree kidnapping charge in an action arising from an armed robbery prosecution where the restraint and removal of the victim were an inherent and integral part of the robbery.

Appeal by defendant from judgment entered 3 November 1999 by Judge B. Craig Ellis in Columbus County Superior Court. Heard in the Court of Appeals 20 April 2001.

Attorney General Michael F. Easley, by Associate Attorney General Vandana Shah, for the State.

Webb & Webb, by John Webb, for the defendant.

SMITH, Judge.

In December 1998, defendant was 20 years old, single with two children, and living with her boyfriend, Jeffrey Lester. During this time, she was employed as a cashier at a Bojangles' restaurant in Whiteville, North Carolina.

On 12 December 1998, at about 4:30 p.m., defendant and her boyfriend Lester went to the residence of their mutual friend, Alphonso McDonald. Defendant and Lester spent the night at McDonald's residence. Sometime during that evening, the three discussed robbing the restaurant where defendant was employed.

The next morning (13 December 1998), Lester and McDonald drove defendant to her employment, dropped her off in the parking lot at approximately 6:30 a.m. and drove away. Lester and McDonald drove to a gas station near the restaurant and parked the car behind several trash dumpsters.

Defendant went to the rear door of the restaurant and rang the door buzzer. Defendant had been previously instructed not to use this door. The restaurant manager, Theresa Pittman, and employee Kathy Huggins were inside. Defendant waited for Pittman or Huggins to open the rear door, and when neither appeared, defendant again rang the buzzer. This time Pittman responded.

Pittman went to the door, saw defendant, turned off the alarm and opened the door. Lester and McDonald came from behind defendant, pushed her inside and entered behind her. Both men were wearing masks and McDonald was carrying a nine-millimeter assault rifle. McDonald told defendant, Pittman, and Huggins they were being robbed.

Lester forced defendant and Huggins to the floor and then loosely bound them together using duct tape. McDonald forced Pittman to the office and ordered her to open the safe. Usually, the safe only contained one bag of money for deposit, but on this occasion, the safe contained three deposit bags.

When Pittman opened the safe, McDonald grabbed the three deposit bags and fled the office. McDonald and Lester then ran out

the rear door. When the two men left, Pittman discovered that defendant and Huggins had already freed themselves. Huggins called the police.

Defendant was charged with robbery with a dangerous weapon, first-degree kidnapping, and conspiracy to commit armed robbery by true bills of indictment, respectively, dated 22 February 1999, 29 May 1999, and 28 June 1999. On 1 November 1999, defendant's case came on for a jury trial, and subsequently verdicts of guilty were returned as to each of the three indictments.

After considering the mitigating and aggravating factors, and based on defendant's having a prior record Level I, the trial court sentenced defendant to the following presumptive active sentences: 1) a term of 64-86 months for robbery with a firearm—with credit for 281 days spent in confinement prior to judgment, 2) 25-39 months for second-degree kidnapping, and 3) 25-39 months for conspiracy to commit robbery with a firearm. All sentences run consecutively.

Defendant gave timely notice of appeal. By order dated 22 November 1999, the trial court relieved the Office of the Appellate Defender of its duties and appointed attorney John Webb to represent defendant.

On appeal, defendant makes two arguments. First, that the trial court erred in admitting hearsay statements of McDonald and Lester in evidence regarding defendant's involvement in the crimes charged. Second, defendant argues that the trial court erred in denying her motions to dismiss, arguing that absent the hearsay evidence, the remaining evidence was insufficient for the jury to find defendant guilty.

We find no error as to the convictions of robbery with a firearm and conspiracy to commit robbery with a firearm. However, we reverse the conviction of second-degree kidnapping of Huggins.

I. ADMISSION OF EVIDENCE REGARDING DEFENDANT'S INVOLVEMENT IN ROBBERY WITH A FIREARM AND CONSPIRACY TO COMMIT ROBBERY WITH A FIREARM.

[1] Defendant first argues that the trial court erroneously admitted considerable hearsay evidence against her. Specifically, she argues that the trial court erred in: 1) admitting in evidence the prior written statements of the two codefendants; 2) allowing the State to elicit testimony from the codefendants that they told police following their

arrest that defendant was involved in the crimes; and 3) allowing the police officers to testify that the codefendants had implicated defendant in their statements.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1999). In the instant case, the alleged hearsay evidence was not admitted for its truth. Instead, the evidence was admitted for impeachment. *See State v. Hunt*, 324 N.C. 343, 350, 378 S.E.2d 754, 758 (1989) (allowing prior inconsistent statements in evidence when "the witness's testimony was extensive and vital to the government's case, that the party calling the witness was genuinely surprised by his reversal, or that the trial court followed the introduction of the statement with an effective limiting instruction.") *Id.* (citations omitted). Immediately following their arrest, Lester and McDonald made statements to the police that implicated defendant in the crimes. At trial, their testimony exonerated defendant from any participation in the crimes charged. The codefendants' prior statements were admissible in evidence to attack the codefendant's credibility. The trial court instructed the jury that the statements were to be considered as impeaching, not substantive evidence. We conclude that the statements were properly admitted.

While impeachment would be a valid theory of admissibility in this case, it is not necessary to address the issue. The trial transcript reveals statements made by codefendants were also properly admitted as substantive evidence.

"Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985). In McDonald's direct examination, he testified to what he told Detective Benton without objection or timely motion to strike. Defendant objected to the State's attempt to read McDonald's written statement to McDonald, and the objection was sustained. The State then asked McDonald what he told the Detective, and no timely objection was made. Defendant thus waived his right to assign as error the admission of McDonald's written statement. "It is well settled that exception to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection." *Gaddy v. Bank*, 25 N.C.

App. 169, 173, 212 S.E.2d 561, 564 (1975). This evidence was admitted without any limitation.

Defendant assigns error on the direct examination of Investigator Coleman to the admission in evidence of the statement made to the Investigator by Lester following Lester's arrest. However, during cross-examination of Investigator Coleman, defendant elicited substantially the same statement. The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination "the witness was asked substantially the same question and gave the same answer." *Hamilton v. Lumber Co.*, 160 N.C. 48, 52, 75 S.E.2d 1087, 1089 (1912).

Consequently, even if the written statements and testimony of codefendants had been improperly admitted, other evidence to the same effect was admitted without objection, motion to strike, request for limiting instruction or were elicited on cross-examination by defendant and may not be claimed to be prejudicial.

II. DENIAL OF DEFENDANT'S MOTIONS TO DISMISS THE ARMED ROBBERY AND CONSPIRACY CHARGES

[2] Next, defendant argues that the trial court erred in denying her motion to dismiss made at the end of the State's case and at the end of all evidence, since without the improperly admitted hearsay statements, there is not sufficient evidence of defendant's guilt.

Our Supreme Court has held that, when a trial court considers a motion to dismiss for insufficiency of evidence,

> [t]he 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)) and *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975).

When the defendant moves for dismissal, the court must determine if there is substantial evidence of each essential element of the crime charged (or of a lesser included offense), and evidence that defendant committed the offense. *State v. Earnhardt*, 307 N.C. 62,

65-66, 296 S.E.2d 649, 651-52 (1982). If the aforementioned evidence exists, "the motion to dismiss is properly denied." *Id.* at 66, 296 S.E.2d at 652.

After considering the elements of armed robbery and conspiracy to commit armed robbery, we hold that the trial court properly denied defendant's motion to dismiss as to those charges. The alleged hearsay evidence was either properly admitted, or admitted without objection. This evidence includes statements by codefendants which implicate defendant in the crimes. This evidence, standing alone, constitutes sufficient evidence to deny defendant's motion to dismiss. Accordingly, on the armed robbery and conspiracy to commit armed robbery charges, there was no error in denying defendant's motion to dismiss.

III. DENIAL OF DEFENDANT'S MOTION TO DISMISS THE KIDNAPPING CHARGE

[3] Based on the record here, we hold that the trial court erred in denying the motion to dismiss the second-degree kidnapping charge and submitting the offense of second-degree kidnapping to the jury. Though not specifically raised or argued on appeal, the denial of the motion to dismiss the kidnapping charge which is the subject of an assignment of error did present this issue to the trial tribunal. In the exercise of our supervisory jurisdiction pursuant to N.C.G.S. § 7A-32(c) and to prevent a manifest injustice pursuant to N.C.R. App. P. 2, we address this issue.

In the case at bar, Lester and McDonald entered the restaurant through the back door after pushing defendant inside. Employee Huggins was already in the room when defendant was pushed inside. McDonald told defendant, Pittman, and Huggins that they were being robbed. Lester ordered Huggins to come to him. Huggins and defendant were forced to the floor, while Lester taped them together in such a manner as to allow them to escape quickly. As Lester taped Huggins and defendant, McDonald forced Pittman to open the office safe. When Pittman opened the safe, McDonald grabbed the deposit bags, and he and McDonald ran out of the back door leaving Pittman in the office. When the two men left, Pittman discovered that defendant and Huggins had already freed themselves. Huggins then called the police.

Based on these facts, the restraint and movement of Huggins was an inherent and integral part of the armed robbery. This restraint and movement was not sufficient to sustain a conviction for second-

degree kidnapping. *See State v. Little*, 133 N.C. App. 601, 606, 515 S.E.2d 752, 756, *disc. review denied*, 351 N.C. 115, 540 S.E.2d 741 (1999) (holding that the pertinent issue is "whether the removal involved is integral to the commission of the underlying offense"); *State v. Thompson*, 129 N.C. App. 13, 15, 497 S.E.2d 126, 127 (1998) (stating that a conviction for kidnapping is prohibited if the "removal of the victim from one place to another is not an act separate and distinct from any other act which is an inherent and inevitable part of the commission of another convicted offense"). Huggins was already in the same room as the robbers when she was bound to defendant. Huggins was exposed to no "greater danger than that inherent in the armed robbery itself, nor [was she] subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). Thus, we find error in defendant's conviction for second-degree kidnapping of Huggins.

In summary, we hold that defendant's conviction of armed robbery and conspiracy to commit armed robbery were without error. As to the offense of second-degree kidnapping, we conclude that the trial court erred in denying the motion to dismiss, and therefore defendant's conviction for that offense must be reversed.

No error in case Nos. 99 CRS 1037 and 5168. Case No. 99 CRS 4295 is reversed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

CITY OF NEW BERN, A MUNICIPAL CORPORATION, PLAINTIFF v. CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT

No. COA00-632

(Filed 17 July 2001)

Utilities— competing electric companies—two buildings—premises—separate metering

The trial court did not err by granting partial summary judgment in favor of plaintiff city ordering defendant electric company to cease supplying electric service to the new building of the Havelock Animal Hospital when plaintiff originally supplied the

electric service to the old building, and by granting plaintiff a permanent injunction barring defendant from providing electric service to the hospital, because: (1) the hospital's two buildings located on contiguous tracts of land used by one electric consumer for commercial purposes means there is one premises as defined under N.C.G.S. § 160A-331(3); (2) neither the construction of a second building, nor the subsequent demolition of the original building, serve to change this fact; and (3) the separate metering exception under the statute does not alter this conclusion based on the facts of this case since the only reason the buildings were separately metered is that the hospital requested that defendant provide electric service to its new building.

Appeal by defendant from judgment entered 29 February 2000 by Judge James E. Ragan, III, in Craven County Superior Court. Heard in the Court of Appeals 29 March 2001.

Poyner & Spruill, L.L.P., by John R. Jolly, Jr., and Nancy Bentson Essex, for plaintiff-appellee.

Taylor & Taylor, by Nelson W. Taylor, III, for defendant-appellant.

BIGGS, Judge.

This appeal arises from a dispute between competing electric companies over the right to provide electric service to the Havelock Animal Hospital, in Havelock, North Carolina. The pertinent facts are as follows: The plaintiff, City of New Bern (New Bern), is a municipal corporation in Craven County. It owns and operates a municipal electric distribution system, serving customers both in New Bern, and beyond its corporate limits. Havelock, a municipal corporation about sixteen miles from New Bern, does not have a municipal electric system. New Bern has served customers in Havelock since the 1950's. Defendant, Carteret-Craven Electric Membership Corporation (Carteret), is an electric membership cooperative that also serves customers in Havelock.

In 1956, New Bern began providing electric service to a veterinary clinic located at 415 Miller Boulevard, Havelock. In the late 1970's, the veterinary practice was incorporated as Havelock Animal Hospital (the hospital). It also created a partnership, Havelock Animal Clinic, for the purpose of owning the land on which their business was situated. In 1986 the clinic purchased 413 Miller Boulevard, the lot that

adjoined 415 Miller Boulevard. Almost ten years later, in 1995, the veterinary practice began construction of a new building for the Havelock Animal Hospital.

The new animal hospital building was located almost entirely on the newer part of their property, acquired in 1986 and previously numbered 413 Miller. Despite the construction of the second building, the hospital's address has remained 415 Miller. During the construction of its new facility, the animal hospital continued to operate out of its original building, to which New Bern continued to provide electric service. However, after construction began, the hospital asked Carteret to provide electric service for their new building. Carteret began supplying electric power to the new building in March, 1996, after the hospital had moved in X-ray equipment. Construction of the new building was completed six months later, in September, 1996. At that time, all of the animal hospital's services were moved to the new building, and in late September, 1996, the hospital asked New Bern to discontinue electric service to the original building. In February, 1997, the hospital demolished their older building.

In January, 1999, New Bern brought this action against Carteret, alleging that the defendant has violated New Bern's statutory right to continue providing electric service to Havelock Animal Hospital. The complaint requested a permanent injunction to prevent Carteret from supplying electricity to the hospital, and also asked for damages in the amount that plaintiff had lost since the hospital changed providers of electric power. Carteret's answer asserted a statutory right to supply electric service to the new animal hospital building. On 16 December 1999 the plaintiff moved for summary judgment, and the motion was heard on 29 February 2000. Following the hearing, the trial court granted partial summary judgment for New Bern. It ordered Carteret to cease supplying electric service to 415 Miller Boulevard, and ruled that New Bern was entitled to a permanent injunction barring Carteret from providing electric service to the hospital, and to an unspecified amount in damages. The court certified the case for immediate appeal, and postponed consideration of the amount of damages pending this Court's ruling. Carteret gave notice of appeal on 16 March 2000. On 8 May 2000 the trial judge ordered a stay in the execution of judgment.

Carteret's appeal does not assert that unanswered questions of material fact make summary judgment improper. Rather, defendant challenges the trial court's legal conclusion that plaintiff has the

exclusive right to provide electric service to Havelock Animal Hospital in this situation. For the reasons that follow, we find that on the facts of this case, the original supplier of electric service, New Bern, has retained an exclusive right to continue providing service to the animal hospital.

The resolution of this dispute requires an examination of several statutes. Carteret was established pursuant to N.C.G.S. Chapter 117, "Electrification," and is authorized under N.C.G.S. § 117-18 (1999) to contract for the sale of electric service. New Bern is a municipal electric company, authorized by N.C.G.S. § 160A-312 (1999) to operate an electric distribution system within the city limits, and to serve customers "outside its corporate limits, within reasonable limitations[.]" Havelock Animal Hospital is located in the municipality of Havelock, and not within any area assigned to a specific franchise. Therefore, both Carteret and New Bern are generally authorized to serve customers in Havelock, subject to particular exceptions.

N.C.G.S. Chapter 62, Part 2 "Electric Service in Urban Areas," §§ 160A-331 and 160A-332 (1999), govern the provision of electric service within a municipality, such as Havelock. N.C.G.S. § 160A-332(a)states that:

> The suppliers of electric service inside the corporate limits of any city in which a secondary supplier was furnishing electric service on the determination date . . . shall have rights and be subject to restrictions as follows: (1) The secondary supplier shall have the right to serve all premises being served by it, or to which any of its facilities are attached, on the determination date.
>
> . . . .
>
> (3) Any premises initially requiring electric service after the determination date which are located wholly within 300 feet of a secondary supplier's lines and wholly within 300 feet of another secondary supplier's lines, . . . may be served by the secondary supplier which the consumer chooses[.]

In the instant case, the parties agree that they both are "secondary suppliers," as defined by G.S. § 160A-331(5). They further agree that the applicable "determination date" is April 20, 1965, as set out in G.S. § 160A-331(1b). Finally, both Carteret and New Bern agree that the animal hospital lies "wholly within 300 feet" of the lines of both companies. However, the parties disagree as to whether the new building

is a "premises [already] being served by [New Bern], or is a "premises initially requiring electric service."

"Premises" is statutorily defined as follows:

> 'Premises' means the building, structure, or facility to which electricity is being or is to be furnished. Two or more buildings, structures, or facilities that are located on one tract or contiguous tracts of land and are used by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one 'premises,' except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one 'premises' if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility.

N.C.G.S. § 160A-331(3) (1999). (N.C.G.S. § 62-110.2, "Electric Service Areas Outside of Municipalities," § 62-110.2(a)(1), uses the same definition of 'premises' for rural areas, so appellate cases interpreting the definition of 'premises' are equally applicable regardless of whether they deal with an area in a municipality.) In the instant case, we find that the hospital buildings comprised "two or more buildings . . . located on contiguous tracts of land and . . . used by one electric consumer for commercial . . . purposes," and thus are one premises. The defendant has argued that each building is a separate premises, because they were "separately metered." However, both buildings were part of the animal hospital, with the same owners and employees, and even the same address. The only reason they were separately metered is that the hospital requested that Carteret provide electric service to its new building. In this situation, the 'separate metering' is simply an artifact of the very dispute that we are attempting to resolve. Our conclusion in this regard would be different if the animal hospital, following construction of a second building, had leased one of its buildings to, *e.g.*, a pet supply store, kennel, or other tenant. In that event, the separate metering would reflect the underlying reality that there were two separate enterprises, each responsible for its own electric charges.

The parties have presented arguments on whether or not the second animal hospital building was a "replacement" premises. In any ordinary sense of the word, the new building clearly was a 'replacement' for the older one. However, we do not find this to be dispositive of the issue. Of greater significance is the fact that both buildings

were part of the Havelock Animal Hospital, and thus were used by "one electric consumer for commercial . . . purposes." In this view we find support from prior appellate decisions. In *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969), the facts were these: Acme, a manufacturing concern, bought a 36 acre tract in Robeson County. At the time of purchase, Lumbee River Electric Membership Corporation had lines on the property, because it had provided electric service to a tenant house and two signs located on the tract. When Acme constructed its manufacturing facilities, it contracted with CP&L to provide electric service. Lumbee brought suit against CP&L, alleging that it had the right to extend the line that had served the old tenant house, in order to provide electric service to Acme's plant. The trial court dismissed the complaint, and this Court affirmed. On appeal, the North Carolina Supreme Court addressed the issue of whether Acme's facility was a "premises being served by [Lumbee]," by virtue of the lines already on the tract of land, or was instead a "premises initially requiring electric service." The Court noted that "premises" are defined as "the building, structure, or facility" requiring electric service, and concluded that:

> it is the plant of Acme, and not the tract upon which it is located, which constitutes the 'premises' here involved[.] . . . Thus [the statute] does not confer upon Lumbee the right to serve the Acme plant by reason of Lumbee's former service to the residence and the electric signs previously located on this tract.

Utilities Comm., 275 N.C. at 259, 166 S.E.2d at 669-70. *See also City of Concord v. Duke Power Co.*, 346 N.C. 211, 485 S.E.2d 278 (1997) (vacant lot that is annexed does not constitute a 'premises' in meaning of statute); *Crescent Electric Membership Corp. v. Duke Power*, 126 N.C. App. 344, 485 S.E.2d 312 (1997) (the various buildings and structures comprising a water treatment plant all are one 'premises' under statutory definition).

"When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977); *Peele* v. *Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973). We find that G.S. § 160A-331(3) 'clearly and unambiguously' defines premises, and further find that both buildings that Havelock Animal Hospital constructed on its contiguous tracts of land constituted one premises. Thus, the hospital was "a premises being served by" New Bern.

Neither the construction of a second building, nor the subsequent demolition of the original building, serve to change this fact. Nor, on the facts of this case and for the reasons stated herein, does the "separate metering exception" outlined in the statute alter our conclusion. Therefore, New Bern retained the exclusive right to provide electric service to the hospital, and the trial court's grant of summary judgment was proper.

Accordingly, we affirm the trial court.

Affirmed.

Judges MARTIN and JOHN concur.

ANNIE MITCHELL REID AND JAMES DONALD REID, PLAINTIFFS v. TOWN OF MADISON AND RICHARD KEITH TUCKER, INDIVIDUALLY AND IN OFFICIAL CAPACITY AS EMPLOYEE OF DEFENDANT TOWN OF MADISON, DEFENDANTS

No. COA00-960

(Filed 17 July 2001)

1. Appeal and Error— appealability—denial of motion to dismiss—defense of res judicata

An appeal was properly before the Court of Appeals where defendants raised the defense of res judicata in a motion to dismiss and the trial court's denial of that motion created the possibility of an inconsistent verdict.

2. Appeal and Error— voluntary dismissal—filed after notice of appeal

The trial court erred by denying defendants' motion to dismiss an action against a town and its employee where defendants filed a motion for judgment on the pleadings in the original action; that motion was denied and defendants filed a notice of appeal; plaintiffs then filed a purported voluntary dismissal without prejudice; defendants continued with their appeal without opposition and obtained a reversal of the denial of their motion to dismiss; it is not clear whether further action was taken in the trial court in that case; plaintiffs filed a new complaint which contained the same substance but which attempted to correct the pleading defects identified in the appeal; defendants moved to

dismiss based upon res judicata; and that order was denied by the trial court. Once defendants perfected their appeal, plaintiffs were obligated to take the necessary steps to present their argument to the appellate court; they cannot simply ignore and seek to avoid an appeal on the grounds that they filed a notice of voluntary dismissal after the notice of appeal was filed. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, does not stand for the proposition that the filing of a Rule 41(a)(1) voluntary dismissal strips the Court of Appeals of its authority to docket or to consider an appeal.

Appeal by defendants from order entered 20 June 2000 by Judge A. Moses Massey in Superior Court, Rockingham County. Heard in the Court of Appeals 23 May 2001.

Clark Bloss & McIver, PLLC, by John F. Bloss, for the plaintiffs-appellees.

McCall Doughton & Blancato, PLLC, by William A. Blancato, for the defendants-appellants.

WYNN, Judge.

[1] The facts in this case are set out in this Court's opinion in *Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000), and are not in dispute. On the basis of that opinion, defendants appeal the trial court's denial of their motion to dismiss the plaintiffs' complaint in the instant case on grounds of *res judicata*. The denial of a motion to dismiss based on *res judicata* may affect a substantial right so as to permit immediate appeal where there exists the possibility of inconsistent verdicts if the case should proceed to trial. *See Wilson v. Watson*, 136 N.C. App. 500, 524 S.E.2d 812 (2000); *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993). In the case *sub judice*, defendants raised the defense of *res judicata* in their motion to dismiss, and that the trial court's denial of that motion created the possibility of an inconsistent verdict if the case proceeds to trial. *See id.* Therefore, defendants' appeal is properly before this Court.

[2] Plaintiffs' complaint in the original action (98 CVS 1558) named "Town of Madison" and "Richard Keith Tucker" as defendants. The caption of the complaint did not distinguish whether Tucker was being sued in his official or individual capacity; however, the complaint alleged that, on the relevant occasion, Tucker was an employee of the Town of Madison, "acting within the scope of his employment,"

and "carrying on the business or duties of his employer[.]" Defendants filed an answer asserting defenses of governmental immunity and public official's immunity; they later filed a Rule 12(c) motion for judgment on the pleadings on grounds that plaintiffs' claims were barred by governmental immunity, which motion was denied.

On 1 April 1999, defendants filed notice of appeal to this Court from the trial court's denial of their Rule 12(c) motion to dismiss on grounds of governmental immunity. Following the notice of appeal to this Court, plaintiffs apparently filed in the trial court on 14 April 1999 a purported voluntary dismissal of the action without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1999).

Notwithstanding plaintiffs' purported Rule 41(a) dismissal of their claim, defendants prosecuted their appeal to this Court, resulting in a reversal of the trial court's denial of defendants' motion to dismiss on sovereign immunity grounds. *Reid v. Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000), (holding that the plaintiffs "failed to allege the waiver of liability [by the Town of Madison] through the purchase of insurance . . . [and] the trial court should have dismissed plaintiffs' claim against the Town of Madison on the basis of governmental immunity"). In that opinion, this Court also held that because plaintiffs failed to indicate in the caption, allegations, or prayer for relief, whether they were suing defendant Tucker in his official or individual capacity, the complaint was treated as a suit against defendant Tucker in his official capacity. Accordingly, Tucker was deemed immune from such suit, and "the trial court should have granted defendants' motion for judgment on the pleadings as to Defendant Tucker." *Id.* at 172, 527 S.E.2d at 90. It was noted, however, "that if the plaintiffs had sued [defendant Tucker] individually, the result might have been different." *Id.*

It is not clear from the record whether any further action was taken in the trial court with respect to matter 98 CVS 1558. It is noteworthy that plaintiffs neither filed a brief, moved to dismiss, nor appeared in any other fashion in opposition to defendants' appeal to this Court in 98 CVS 1558. Additionally, plaintiffs sought no review by our Supreme Court of this Court's decision.

Over three weeks after the filing of this Court's opinion in *Reid*, on 14 April 2000, plaintiffs filed a new complaint (00 CVS 698) wherein they made attempts to correct the pleading defects identified in the prior *Reid* opinion. This new complaint arose out of the same

occurrence in 1995 and was filed against the Town of Madison, and against Tucker, both "[i]ndividually and in [his] official capacity as [an] employee of Defendant Town of Madison," as appears in the caption thereof. The substance of this complaint (consisting of the claims and relief sought) is virtually identical to the complaint filed in 98 CVS 1558, with the exception that plaintiffs allege additionally that "Defendant Madison has waived any governmental or sovereign immunity or any other immunity to the extent it has purchased insurance for such negligent acts noted herein and above." Defendants responded by filing a Rule 12(b)(6) motion to dismiss on grounds that plaintiffs' claims are barred by *res judicata* as well as governmental immunity. This motion was denied by order of the trial court filed on 20 June 2000, and defendants appealed.

Defendants contend that this Court's opinion in *Reid*, 137 N.C. App. 168, 527 S.E.2d 87, is *res judicata* as to the claims raised in 98 CVS 1558, thereby precluding the same claims in plaintiffs' newly filed action in 00 CVS 698. Plaintiffs, on the other hand, contend that 98 CVS 1558 was voluntarily dismissed without prejudice on 14 April 1999, prior to the perfection of defendants' appeal, and that the appeal, and this Court's opinion in *Reid*, was therefore a nullity and without any binding legal effect. The narrow issue with which we are presented is whether plaintiffs' filing of a notice of voluntary dismissal without prejudice under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) effectively nullified defendants' notice of appeal and stripped this Court of its power to hear defendants' appeal in 98 CVS 1558. We conclude that it did not.

N.C. Gen. Stat. § 1-294 provides that the perfection of an appeal stays all further proceedings in the trial court with respect to matters embraced in the appeal. N.C. Gen. Stat. § 1-294 (1999). For purposes of G.S. § 1-294, an appeal is perfected when it is docketed in the appellate division. *See, e.g., Swilling v. Swilling*, 329 N.C. 219, 404 S.E.2d 837 (1991). However, for purposes of the stay imposed by G.S. § 1-294, the proper perfection of an appeal relates back to the time notice of appeal was given. *See id.* In the instant case, therefore, the stay imposed by G.S. § 1-294 would have taken effect as of 1 April 1999, upon defendants filing the notice of appeal in the Superior Court and subsequent perfection thereof in this Court.

The plaintiffs argue, however, that their voluntary dismissal of 98 CVS 1558 on 14 April 1999 left nothing in the trial court to which the perfection of the appeal in the appellate division could relate back.

According to the plaintiffs, our Supreme Court's opinion in *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), resolved any doubt whether a proceeding in a case may relate back to a date prior to the filing of a voluntary dismissal.

In *Brisson*, a case arising out of a medical malpractice action, the plaintiffs' complaint failed to meet the certification requirement of N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (1999). The defendants filed a motion to dismiss based in part on the failure to include the Rule 9(j)(1) certification. The plaintiffs subsequently filed a motion to amend their complaint and moved alternatively to voluntarily dismiss their complaint without prejudice pursuant to Rule 41(a)(1). The plaintiffs' motion to amend was denied, and ruling was reserved on the defendants' motion to dismiss. The plaintiffs then voluntarily dismissed their claims against defendants pursuant to Rule 41(a)(1).

Later, the plaintiffs filed a new complaint containing the required Rule 9(j)(1) certification, and the defendants answered, asserting that the plaintiffs' claims were barred by the applicable statutes of limitation and repose. As our Supreme Court stated:

> The only issue for us to review on appeal is whether plaintiffs' voluntary dismissal pursuant to N.C. R. Civ. P. 41(a)(1) effectively extended the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification.

Brisson, 351 N.C. at 593, 528 S.E.2d at 570. Nonetheless, plaintiffs in the instant case rely upon language in *Brisson* stating:

> [P]laintiffs' motion to amend, which was denied, is neither dispositive nor relevant to the outcome of this case. Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once plaintiffs took their voluntary dismissal . . . . It is well settled that "[a] Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d)[,] which authorizes the court to enter specific orders apportioning and taxing costs." *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996). " '[T]he effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced.' " *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965) (quoting 17 Am. Jur. *Dismissal, Discontinuance, & Nonsuit* § 89, at 161 (1938)). After

> a plaintiff takes a Rule 41(a) dismissal, "[t]here is nothing the defendant can do to fan the ashes of that action into life [,] and the court has no role to play." *Universidad Central Del Caribe, Inc. v. Liaison Comm. on Med. Educ.*, 760 F.2d 14, 18 n. 4 (1st Cir. 1985).

Id. Plaintiffs contend that this language in *Brisson* rendered defendants' purported perfection of their appeal ineffectual following plaintiffs' voluntary dismissal. We disagree.

In addition to the obvious fact that the above-quoted language in *Brisson* was not the basis of the Court's holding therein, we note that the quoted portion of the opinion concerns the effect of a voluntary notice of dismissal on further proceedings in the *trial court*. In the instant case, we are concerned with the effect, if any, a notice of voluntary dismissal under Rule 41(a)(1) has upon a properly noticed and, subsequently, properly perfected appeal to this Court. Contrary to the plaintiffs' assertions, *Brisson* does not stand for the proposition that the filing of a Rule 41(a)(1) voluntary dismissal strips this Court of its authority to docket an appeal or consider the merits thereof. Furthermore, plaintiffs do not cite any authority supporting such a proposition, and we decline to so hold.

It is axiomatic that this Court is bound by its prior decisions, and that inferior courts must generally follow the mandates of an appellate court. *See Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 493 S.E.2d 460 (1997); *Condellone v. Condellone*, 137 N.C. App. 547, 528 S.E.2d 639, *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). Pursuant to the first *Reid* opinion, the trial court should have dismissed plaintiffs' claims against the Town of Madison and granted defendants' motion for judgment on the pleadings as to defendant Tucker in 98 CVS 1558. Similarly, the trial court in 00 CVS 698 should have granted defendants' motion to dismiss all claims on grounds of *res judicata* based upon *Reid*. Plaintiffs cannot simply ignore and seek to avoid a proceeding appeal on grounds that they filed a notice of voluntary dismissal of the action *after* the notice of appeal has been filed. Plaintiffs were fully aware that defendants' appeal in 98 CVS 1558 was proceeding, yet they failed to file a brief, file a motion to dismiss the appeal, or take any other action whatsoever to preserve the argument now before this Court. Once defendants perfected their appeal, plaintiffs were obligated to take the necessary steps to present their argument to this Court for consideration. Furthermore, plaintiffs neglected to properly challenge this Court's decision in *Reid* by seeking a review thereof by our Supreme

Court. Plaintiffs' challenge to the legitimacy of that ruling is without merit.

Accordingly, the trial court's 20 June 2000 order denying defendants' motion to dismiss in 00 CVS 698 is reversed, and the matter remanded for action consistent with this opinion.

Reversed.

Judges CAMPBELL and BIGGS concur.

STATE OF NORTH CAROLINA v. JERVE BENJAMIN HAMILTON

No. COA00-926

(Filed 17 July 2001)

1. **Drugs— maintaining a dwelling to sell controlled substances—sufficiency of evidence**

   The trial court erred by not dismissing a charge of maintaining a dwelling to keep or sell controlled substances where the facts could not be distinguished from *State v. Bowens*, 140 N.C. App 217, in which testimony that defendant was present in the dwelling on several occasions and that he lived at the address in question was not sufficient to support the conclusion that he kept or maintained the dwelling.

2. **Drugs— cocaine—constructive possession—defendant not in dwelling**

   The trial court erred by not dismissing a charge of possession of crack cocaine with intent to sell or deliver where the evidence might have raised a strong suspicion of constructive possession, but defendant was not in the apartment when the crack was found and the evidence did not lead to the conclusion that he had exclusive use of the apartment, maintained the apartment as a residence, or had any apparent interest in the apartment or the crack cocaine.

Appeal by defendant from judgment entered 24 March 1999 by Judge E. Lynn Johnson in Superior Court, Wake County. Heard in the Court of Appeals 21 May 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

John T. Hall, for defendant-appellant.

McGEE, Judge.

Jerve Benjamin Hamilton (defendant) appeals from a judgment entered following a jury verdict finding him guilty of intentionally maintaining a dwelling used for the purpose of unlawfully keeping and selling controlled substances and of possession with intent to sell or deliver cocaine. Defendant was given a suspended sentence of a minimum of eight months and a maximum of ten months and placed on supervised probation for a term of thirty-six months.

In early April 1998, Detective Ken Huff (Huff) of the Raleigh Police Department began a surveillance of 211 Ashe Avenue, Apartment 16. During that time, Huff observed defendant coming and going from the apartment on several occasions during the day and night. Huff further determined that the apartment was leased to Tenesha Blanks (Blanks), defendant's girlfriend, and that three vehicles registered to Blanks were regularly parked in front of the residence. Two of the vehicles, a motorcycle and one car, were used regularly by defendant.

Based on information received from an informant, Huff obtained a warrant to search 211 Ashe Avenue, Apartment 16 for illegal drugs on 30 April 1998. Huff also gathered information that a murder suspect might be inside the apartment. Detective B.G. Young (Young) began surveillance shortly before 1:00 p.m. and within ten minutes, he observed defendant exiting the apartment. Young called for uniformed officers, who stopped defendant as he was leaving the apartment complex and took him to the police station. After defendant's departure, Young observed Blanks leave the apartment, a woman approach the apartment and speak to someone at the door and then depart, and a man enter the apartment.

Approximately thirty minutes after defendant was detained, Huff arrived at 211 Ashe Avenue, Apartment 16 to execute the search warrant. Three men were found in the apartment at the time of the search. During the search, Huff seized 23.3 grams of crack cocaine hidden behind a pedestal sink in the bathroom; 3.2 grams of marijuana in two clear zip-lock bags, one bag in plain view on a coffee table and one bag hidden beneath a chair cushion; digital scales in

plain view on the coffee table; ten small bags with marijuana residue; a .45 caliber Ruger pistol; .45 caliber bullets; a black ammunition magazine for a MAC-10 automatic pistol; several cell phones; a pager; and a book entitled, "Counterfeit ID Made Easy." After executing the search, Huff returned to the police station and formally arrested and charged defendant. He seized $1,771 in cash from defendant's person and a traffic citation with defendant's name on it listing defendant's address as "211 Ashe Street." However, at trial, Huff testified that he could not remember if the citation came from the person of defendant or the apartment.

At the close of the State's evidence and again before sentencing, defendant moved to dismiss the charges against him. The trial court denied the motions. Defendant presented no evidence at trial.

I.

[1] Defendant argues on appeal that the trial court erred in denying his motion to dismiss the charge of intentionally maintaining a dwelling to keep and sell controlled substances because the State presented insufficient evidence to support the charge. The State concedes in its brief that under *State v. Bowens*, 140 N.C. App. 217, 535 S.E.2d 870 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001), the facts in the case before us cannot be distinguished from the facts in *Bowens*. Our Court held in *Bowens* that the defendant's motion to dismiss the charge of maintaining a dwelling to keep or sell controlled substances should have been granted because there was

> no evidence Defendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling. Testimony Defendant was present at the dwelling on several occasions and testimony he lived "[a]t 1108 Carolina Street" cannot alone support a conclusion Defendant kept or maintained the dwelling.

Id. at 222, 535 S.E.2d at 873. We agree the facts in *Bowens* cannot be distinguished from the facts in this case, and we therefore hold that the trial court erred in failing to dismiss the charge of maintaining a dwelling to keep or sell controlled substances against defendant.

II.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver cocaine. We agree.

Our Supreme Court has stated that:

> In determining whether to grant a defendant's motion to dismiss, the trial court must consider all the evidence admitted in the light most favorable to the State and decide whether there is substantial evidence of each element of the offense charged and that the defendant committed it. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . If the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. . . . This is true even though the suspicion so aroused by the evidence is strong.' "

State v. McLaurin, 320 N.C. 143, 146-47, 357 S.E.2d 636, 638 (1987) (citations omitted).

The State must present substantial evidence of defendant's possession of a controlled substance and of defendant's intent to sell or deliver that substance. *See* N.C. Gen. Stat. § 90-95(a)(1) (1999); *State v. Carr*, 122 N.C. App. 369, 470 S.E.2d 70 (1996). We first consider whether the State presented substantial evidence of defendant's possession of cocaine. Possession of a controlled substance may be either actual or constructive.

> [If the] defendant was not present when law enforcement officers discovered the [controlled substance], the State [must] rely on the doctrine of constructive possession to prove that the [controlled substance] belonged to [the] defendant. A person has constructive possession of a controlled substance when "he has both the power and intent to control its disposition or use." However, if . . . the defendant does not have exclusive control of the premises in which the controlled substance[] [was] found, "there must be evidence of other incriminating circumstances to support constructive possession."

State v. Morgan, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993) (citations omitted).

The State cites *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989) and *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984) for its position that there was substantial evidence defendant constructively possessed the crack cocaine. In each case, however, the defendant was present in the dwelling and in close proximity to a controlled substance during the search. The present case is dis-

tinguishable in that defendant was not at the apartment when the search occurred.

Our prior case law has required that in order to show constructive possession by a defendant not present when a controlled substance was discovered, the State must present evidence that the defendant had exclusive use of the premises, maintained the premises as a residence, or had some apparent proprietary interest in the premises or the controlled substance. In *State v. Williams*, 307 N.C. 452, 456, 298 S.E.2d 372, 375 (1983), although the defendant was absent during the search, he "was seen in the yard [of] the residence . . . on . . . four occasions within two weeks of the [search that located the heroin;] bills addressed to [the] defendant . . . were found [at the residence;] . . . [and] [t]he mailbox in front of the house bore [the defendant's] name[.]"

In *State v. Morgan*, 111 N.C. App. 662, 432 S.E.2d 877 (1993), while searching the back bedroom and bathroom of an apartment, police found a bag of clothing, $2,600 cash including marked bills from a sale to an undercover officer, a traffic citation and a warrant for arrest with the defendant's name on them, and cocaine. In *Morgan*, testimony established that the defendant had a key to the apartment, was the only person to use the back bedroom and bathroom, and the cocaine belonged to no other occupant of the apartment.

In *State v. Peek*, 89 N.C. App. 123, 126, 365 S.E.2d 320, 323 (1988),

> evidence showed that a telephone bill and other pieces of mail, addressed to [the] defendant . . . were found in [a] bedroom; that [the] defendant's minor son appeared at the house during the . . . search . . . that [the] defendant was arrested inside the house ten days later; and that contraband was found in four different rooms, some of it in plain view and some of it hidden.

See also State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974) (marijuana found in a drawer beneath male clothing and in pocket of a man's coat in an apartment where only the defendant and his wife lived and wife was only person present at time of search); *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971) (heroin found in room near papers with the defendant's name on them and residence's public utilities listed in the defendant's name); *State v. Graham*, 90 N.C. App. 564, 369 S.E.2d 615 (1988) (cocaine found in bedroom along with letter addressed to the defendant; parents testified the defendant kept

clothes in bedroom and used room on occasion; the defendant admitted moving bags of cocaine from a closet to a box); *cf. State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (evidence that the defendant resided at a residence where drug paraphernalia was found in drawers and in plain view was insufficient to show constructive possession of the paraphernalia because her control of the premises "was patently nonexclusive" in that the defendant had not been seen "entering or leaving [the house] the day of the search" while her husband and another man had both been seen doing so and "[n]o other incriminating circumstances were . . . apparent . . . that might [have] suffice[d] to carry the case to the jury[.]").

When the evidence presented lacks incriminating circumstances showing defendant's exclusive use of the premises, maintenance of the premises as a residence, or some apparent proprietary interest in the premises or the controlled substance, our Supreme Court has held that the trial court should dismiss the charge of possession of the controlled substance. In *State v. Minor*, 290 N.C. 68, 224 S.E.2d 180 (1976), the defendant was arrested for possession of a marijuana field. The evidence in the case taken in the light most favorable to the State showed:

> (1) that [the] defendant . . . had been a visitor at an abandoned house leased or controlled by [the] co-defendant . . . (2) that the marijuana field was 100 feet . . . from the house . . . (3) that the marijuana field was accessible by three different routes; (4) that on the date of [the defendant's] arrest he was on the front seat of a[n]. . . automobile owned and operated by [the co-defendant], where some wilted marijuana leaves were found on the . . . rear floorboard and . . . in the trunk.

Id. at 74-75, 224 S.E.2d at 185. Our Supreme Court held that "[t]he most the State [had] shown [was] that [the] defendant had been in an area where he could have committed the crimes charged." *Id.* at 75, 224 S.E.2d at 185.

In the case before us, the evidence taken in the light most favorable to the State showed that: 211 Ashe Avenue, Apartment 16 was leased to Blanks, defendant's girlfriend; during the month prior to the search, the police had often observed defendant at the apartment; approximately thirty minutes before the search, defendant exited the apartment, was stopped by uniformed officers, and was taken to the police station; and soon thereafter, Blanks left the apartment, another woman approached the apartment and was seen speaking to some-

one at the door, and a man entered the apartment. The apartment was then searched, and three adult men were located in the apartment. The 23.3 grams of crack cocaine was hidden behind a pedestal sink in the bathroom and was seized by the police, along with other items. A subsequent search of defendant's person at the police station revealed $1,771 in cash. Finally, a traffic citation with defendant's address listed as "211 Ashe Street" was seized either from the apartment or the person of defendant.

Although the evidence may raise a strong suspicion that defendant constructively possessed the crack cocaine, this evidence does not lead to the conclusion that defendant had exclusive use of the apartment, maintained the apartment as a residence, or had any apparent proprietary interest in the apartment or the crack cocaine. *See McLaurin*, 320 N.C. at 146-47, 357 S.E.2d at 638-39. Evidence that raises only a strong suspicion without producing any incriminating circumstances does not reach the level of substantial evidence necessary for the denial of a motion to dismiss. *Id.* Just as in *Minor*, "[t]he most the [S]tate showed was that defendant had been in an area where he could have committed the crime[] charged." *Minor*, 290 N.C. at 75, 224 S.E.2d at 185. Since substantial evidence of possession was not presented by the State, we need not consider whether the State presented substantial evidence of intent to sell or deliver. We conclude that the trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine.

We conclude that the trial court erred in not dismissing both charges against defendant. We have reviewed defendant's remaining assignment of error on appeal and find it to be without merit. The judgments and convictions against defendant are reversed.

Reversed.

Chief Judge EAGLES and Judge TYSON concur.

STATE OF NORTH CAROLINA v. RONALD LEE ROACH, DEFENDANT

No. COA00-687

(Filed 17 July 2001)

Motor Vehicles— driving while impaired—Intoxilyzer test results—appreciably impaired prong

The trial court erred in a driving while impaired case by admitting the Intoxilyzer test results, because: (1) a proper foundation was not laid before admitting evidence as to the outcome of the chemical analysis test when the arresting officer did not testify at trial that he possessed a permit issued by the Department of Health and Human Services as required by N.C.G.S. § 20-139.1; and (2) even though there was sufficient evidence to convict defendant under the appreciably impaired prong of the driving while impaired statute under N.C.G.S. § 20-138.1(a)(1), it is not possible to tell whether the jury found defendant guilty based on his blood alcohol concentration level or due to the appreciable impairment of his faculties.

Appeal by defendant from judgment entered 2 February 2000 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 May 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General, Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Ledford & Murray, P.C., by Joseph L. Ledford, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Ronald Lee Roach ("defendant") was stopped at a driver's license check point on the morning of 27 June 1998 by Trooper James R. Pickard, III, ("Trooper Pickard" or "trooper"), a member of the North Carolina Highway Patrol. Trooper Pickard asked defendant to produce his driver's license and registration card as required for the license check. While defendant was acquiring the license and registration, however, Trooper Pickard noticed that defendant's eyes appeared bloodshot and glassy and that a "strong odor" of alcohol was emanating from defendant's automobile. Trooper Pickard asked defendant to pull his car over to the side of the road and to get out of the car. Defendant followed the instructions, after which Trooper

Pickard asked defendant if he had been drinking alcohol. Defendant answered that he had been drinking, but he did not indicate the quantity of alcohol he had consumed. Trooper Pickard next instructed defendant to sit in the front seat of the patrol car. Defendant complied with the instruction and the trooper again detected a "strong odor" of alcohol on defendant's breath. Consequently, in order to gauge defendant's level of inebriation, Trooper Pickard asked defendant to recite the alphabet. Defendant recited the alphabet properly until the end when, according to Trooper Pickard, defendant finished by saying "X Y R N Z." Trooper Pickard also noted that defendant's speech was "mumbled." Trooper Pickard opined that defendant was unfit to drive an automobile because he was appreciably impaired, so he arrested defendant for driving while impaired and transported him to the Charlotte/Mecklenburg Intake Center. After Trooper Pickard read defendant his legal rights, the trooper administered the Intoxilyzer test to defendant. The Intoxilyzer test registered a .09 blood alcohol percentage reading.

At trial, Trooper Pickard was called to the stand to testify on behalf of the State. Before the trooper testified as to the results of the Intoxilyzer test, defendant objected. The trial court excused the jury and overruled the objection. Thereafter the jury reentered the court room and heard Trooper Pickard testify as to his training on the Intoxilyzer 5000. After being asked the results of the Intoxilyzer test, defendant again objected and was overruled, and Trooper Pickard testified that defendant's Intoxilyzer reading was .09.

Defendant moved to dismiss the case at the conclusion of the State's evidence. This motion was denied. Defense counsel then moved to dismiss the appreciable impairment standard under the statute, which motion was also denied. Subsequently, defendant was found guilty of driving while impaired pursuant to N.C. Gen. Stat. section 20-138.1. Defendant appeals this conviction.

The dispositive issue on appeal is whether the trial court erred by admitting the Intoxilyzer test results into evidence. For the reasons stated below, we conclude that the trial court committed prejudicial error and defendant is entitled to a new trial.

Defendant argues that the trial court erred in admitting into evidence the Intoxilyzer results over the defendant's objection, on the basis that the State failed to lay a sufficient foundation for the introduction of the results. We agree.

An Intoxilyzer test is a chemical analysis administered to determine a defendant's blood alcohol content. *State v. Summers*, 132 N.C. App. 636, 513 S.E.2d 575 (1999). A person administering a chemical analysis test must be qualified to administer the test in order to testify as to the results. *State v. Caviness*, 7 N.C. App. 541, 173 S.E.2d 12 (1970). It is not sufficient for the State to establish that the test administrator possesses a license to conduct the test. *Id.* Instead, the State is required to show that the test administrator possesses a permit issued by the appropriate agency, *id.*, and that the officer possessed such permit at the time of the administration of the test. *State v. Franks*, 87 N.C. App. 265, 360 S.E.2d 473 (1987).

Our statutes specifically set out the Department of Health and Human Services as the only agency authorized to issue a valid permit.

> Approval of Valid Test Methods; Licensing Chemical Analysts.—A chemical analysis, to be valid, shall be performed in accordance with the provisions of this section. The chemical analysis shall be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Health and Human Services for that type of chemical analysis. The Commission for Health Services may adopt rules approving satisfactory methods or techniques for performing chemical analyses, and the Department of Health and Human Services may ascertain the qualifications and competence of individuals to conduct particular chemical analyses. The Department may issue permits to conduct chemical analyses to individuals it finds qualified subject to periodic renewal, termination, and revocation of the permit in the Department's discretion.

N.C. Gen. Stat. § 20-139.1(b) (1999).

The State admits that Trooper Pickard did not testify at trial that he possessed a permit issued by the Department of Health and Human Services, but urges us to overrule the *Franks* holding as "too narrow and unduly formalistic for today's world." We cannot overrule *Franks*. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). Because so much weight and deference is given to a chemical analysis test, it is

necessary that a proper foundation be laid before admitting evidence as to the outcome of a chemical analysis test in a driving while impaired case.

"Except as provided in this subsection, a chemical analysis is not valid in any case in which it is performed by an arresting officer or by a charging officer." N.C. Gen. Stat. § 20-139.1(b1). This rule aids both in actual fairness as well as the appearance of fairness to the defendant. *State v. Jordan*, 35 N.C. App. 652, 242 S.E.2d 192 (1978). It is prejudicial error for the court to allow the arresting officer who administered a chemical analysis to testify as to the results of that analysis, even when there was other sufficient evidence in the record to support a guilty verdict. *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966). The notable exception to N.C. Gen. Stat. section 20-139.1(b1) is that:

> A chemical analysis of the breath may be performed by an arresting officer or by a charging officer when both of the following apply:
>
> (1) The officer possesses a current permit issued by the Department of Health and Human Services for the type of chemical analysis.
>
> (2) The officer performs the chemical analysis by using an automated instrument that prints the results of the analysis.

N.C. Gen. Stat. § 20-139.1(b1).

Trooper Pickard was the arresting officer in the case *sub judice*. A proper foundation was not laid to show whether Officer Pickard "possesse[d] a current permit issued by the Department of Health and Human Services." *Id.* The chemical analysis, then, can not fall under the aforementioned exception. Instead, the general rule applies that "a chemical analysis is not valid in any case in which it is performed by an arresting officer or by a charging officer." N.C. Gen. Stat. § 20-139.1(b1). Consequently, the admission of such evidence was error.

The State argues that even if it were error to admit the chemical analysis test results, there was sufficient evidence to convict defendant under the appreciably impaired prong of the driving while impaired statute. N.C. Gen. Stat. § 20-138.1(a)(1) (1999). The driving while impaired statute, N.C. Gen. Stat. section 20-138.1, provides that:

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C. Gen. Stat. § 20-138.1(a).

It is negligence *per se* and a clear violation of the criminal law for a person to operate a motor vehicle with a blood alcohol concentration of .08 or greater. *See e.g. Vance Trucking Co. v. Phillips*, 66 N.C. App. 269, 311 S.E.2d 318 (1984). However, driving while impaired may be proven under 20-138.1(a)(1) where the blood alcohol concentration is unknown or less than .08. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985). Being "[u]nder the influence of an impairing substance" is defined as "[t]he state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48)(b) (1999).

There is no dispute that the following testimony by Trooper Pickard was presented to the jury: Trooper Pickard detected a "strong odor of alcohol" on defendant; he noticed that defendant's eyes were bloodshot and glassy; he stated that defendant "mumbled" his words and did not accurately recite the alphabet; and Trooper Pickard testified that defendant admitted that he had been drinking. While a showing of a slight effect on defendant's faculties is insufficient for a conviction of driving while impaired, *State v. Hairr*, 244 N.C. 506, 94 S.E.2d 472 (1956), one need not be "drunk" to be found guilty. *State v. Felts*, 5 N.C. App. 499, 168 S.E.2d 483 (1969). Rather, a "noticeable," "perceptible," "obvious," "detectable" or "apparent" impairment may be sufficient to find appreciable impairment of mental and/or physical faculties. *State v. Combs*, 13 N.C. App. 195, 185 S.E.2d 8 (1971). There was sufficient evidence from which the jury could convict defendant under the appreciably impaired prong of the driving while impaired statute. N.C. Gen. Stat. § 20-138.1(a)(1). However, the jury was given only two options on the verdict sheet, to find defendant "guilty of driving while impaired" or to find defendant "not guilty." Consequently, it is not possible to tell whether the jury found defendant guilty based on his blood alcohol concentration level or due to the appreciable impairment of his faculties. The jury was not permitted to

find defendant guilty pursuant to N.C. Gen. Stat. § 20-138.1(a)(2), because the chemical analysis test was improperly admitted. Because the jury may have based their decision on the chemical analysis test results, we reverse the conviction and remand for a new trial.

Based on our decision to reverse defendant's conviction and remand for a new trial, we need not reach defendant's remaining assignment of error.

Reversed and remanded for new trial.

Judges GREENE and JOHN concur.

BARBARA RUSSOS, PLAINTIFF v. WHEATON INDUSTRIES, EMPLOYER-DEFENDANT, AND/OR NATIONAL UNION FIRE INSURANCE COMPANY, CARRIER-DEFENDANT, (AMERICAN INTERNATIONAL ADJUSTMENT CO., INC., SERVICING AGENT)

No. COA00-1014

(Filed 17 July 2001)

Workers' Compensation— temporary total disability—maximum medical improvement

The full Industrial Commission did not err by awarding plaintiff employee ongoing temporary total disability even though plaintiff reached maximum medical improvement and had been released to return to work with restrictions, because: (1) a finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not rebut the ongoing presumption of disability created by the Form 21 agreement between the parties; and (2) plaintiff's presumption of disability continued since defendant employer failed to provide a job within plaintiff's restrictions and terminated plaintiff from her employment.

Appeal by defendants from opinion and award entered 28 April 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 May 2001.

Young Moore and Henderson, P.A., by J.D. Prather and Dawn M. Dillon for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendant-appellants.

MARTIN, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff benefits for ongoing temporary total disability. Briefly summarized, the record discloses that on 15 November 1989, plaintiff sustained a compensable injury to her shoulder and back in the course and scope of her employment with Wheaton Industries (defendant-employer), a manufacturer of plastic bottles. As a result of this injury, plaintiff received temporary total disability compensation from 30 January 1990 until 12 November 1990 pursuant to a Form 21, "Agreement for Compensation for Disability" approved by the Commission on 4 May 1990. On 13 November 1990, the Commission approved defendants' Industrial Commission Form 24 application to terminate benefits.

On 26 October 1993, a deputy commissioner filed an opinion and award following a hearing requested by plaintiff to dispute the termination of her benefits. The deputy commissioner concluded that plaintiff was not entitled to receive additional temporary total disability payments but awarded her benefits for permanent partial disability pursuant to G.S. § 97-31(23). On appeal, the Full Commission reversed the deputy commissioner's decision and granted plaintiff continuing temporary total disability until she completed a paralegal training program; she was also awarded compensation for a five percent permanent partial disability to her back. Defendants appealed to this Court, which vacated the award of temporary total disability, and remanded the case to the Commission for findings as to plaintiff's ability or inability to earn the same wages she was receiving at the time of her injury. The Court also vacated the Commission's award of simultaneous compensation for temporary total disability and for permanent partial disability. *Russos v. Wheaton Industries*, 123 N.C. App. 354, 473 S.E.2d 693 (unpublished, COA94-1345, filed 16 July 1996).

Upon remand, the Commission issued an opinion and award on 28 April 2000. The Commission made the following relevant findings regarding plaintiff's disability:

6. . . . as a result of her compensable injury on November 15, 1989, by June 1, 1990, plaintiff reached maximum medical improvement and was capable at that time of returning to full time work with restrictions of no lifting greater than 10 to 15 pounds and avoidance of pushing, pulling and reaching activities with her arms, especially with her left arm.

7. Defendant-employer, however, had no jobs available on June 1, 1990 within these restrictions. As a result, plaintiff's employment with defendant-employer was terminated. Defendants continued to pay temporary total disability compensation to plaintiff following her termination, through November 12, 1990, when defendants' Form 24 was approved by the Commission.

8. In the fall of 1990, plaintiff enrolled in the paralegal program at Durham Tech. This was a reasonable attempt at rehabilitation given the totality of the circumstances surrounding the case.

9. As a result of her compensable injury on November 15, 1989, plaintiff was disabled and unable to earn wages which she received at the time of her injury in the same or any other employment.

10. As a result of her compensable injury on November 15, 1989, plaintiff has a five percent permanent functional impairment to the back.

Based on these findings, the Commission awarded plaintiff ongoing temporary total disability "continuing until further Order of the Commission." Defendants appeal.

Defendants contend the Full Commission erred in awarding plaintiff ongoing temporary total disability. They argue she was no longer disabled within the meaning of G.S. § 97-2(9) because she had reached maximum medical improvement, had been released to return to work, albeit with restrictions, but chose instead to pursue an educational goal. We affirm the Commission's award.

When reviewing an opinion and award of the Industrial Commission, findings of fact " 'are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (citing *Jones v. Myrtle Desk Co.*, 264 N.C. 401,

141 S.E.2d 632 (1965)). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citation omitted). We review the Commission's conclusions of law, however, *de novo*. *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 499 S.E.2d 470, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998).

An employee is entitled to compensation if she is disabled as a result of a work-related injury. *Rhinehart v. Market*, 271 N.C. 586, 157 S.E.2d 1 (1967). "Disability" is defined as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). Although the employee has the initial burden of establishing a disability, "our case law has consistently held that once a Form 21 agreement is entered into by the parties and approved by the Commission, a presumption of disability attaches in favor of the employee." *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (citing *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137-38, 181 S.E.2d 588, 592 (1971); *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 76-77, 476 S.E.2d 434, 436-37 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997); *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 282-83, 458 S.E.2d 251, 256-57, *disc. review and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995); *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994)).

Defendants in the present case argue that plaintiff's presumption of disability ended on 1 June 1990, the date upon which plaintiff reached maximum medical improvement according to the Commission's findings. However, this Court has expressly held that,

> [a] finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden. "The maximum medical improvement finding is solely the prerequisite to determination of the amount of any permanent disability for purposes of G.S. 97-31."

Brown v. S & N Communications, Inc., 124 N.C. App. 320, 330, 477 S.E.2d 197, 203 (1996) (citing *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 476, 374 S.E.2d 483, 485 (1988)). In *Brown*, the Court went on to hold that the Commission erred "by mis-

taking a finding of maximum medical improvement for evidence sufficient to rebut the continuing presumption of disability." *Id.*

The North Carolina Supreme Court has stated repeatedly that the term "disability" is not simply a medical question, but includes an assessment of other vocational factors, including age, education, and training. *See, e.g., Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982); *Little v. Food Service*, 33 N.C. App. 742, 236 S.E.2d 801 (1977), *rev'd on other grounds*, 295 N.C. 527, 246 S.E.2d 743 (1978). Maximum medical improvement, which does not include these other aspects of disability as defined by the Workers' Compensation Act, therefore cannot by itself establish a resumption of wage earning capacity.

We are mindful, however, of other decisions by this Court, which intimate that an award of temporary total disability is improper after the date of maximum medical improvement. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). In *Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322, 331, 533 S.E.2d 284, 289 (2000), a panel of this Court held that "plaintiff's presumption of temporary total disability ended on 7 July 1995 when she reached maximum medical improvement, and plaintiff had the burden of proving she was entitled to permanent disability." In *Royce*, however, the plaintiff could not rely on the continuing presumption of disability created by the Form 21 because she had returned to work for the defendant at pre-injury wages subsequent to the filing of the Form 21. *Id.* Our review of the case law regarding this issue does not support the conclusion that a finding of maximum medical improvement serves to rebut the ongoing presumption of disability created by the Form 21 agreement between the parties. *See, e.g., Brown*, 124 N.C. App. 320, 477 S.E.2d 197; *Watson*, 92 N.C. App. 473, 374 S.E.2d 483. Rather, an employer can overcome the presumption of disability by providing evidence that:

> (1) suitable jobs are available for the employee;
>
> (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations;
>
> (3) and that the job would enable employee to earn some wages.

Franklin, 123 N.C. App. at 209, 472 S.E.2d at 388.

In the present case, following plaintiff's injury on 15 November 1989, the parties entered into a Form 21, "Agreement for Compensation for Disability." At this point, a presumption of disability was established for plaintiff. Thereafter, plaintiff never returned to work for defendant-employer or for any other employer. The Full Commission found that even though plaintiff reached maximum medical improvement by 1 June 1990, defendant-employer failed to provide a job within plaintiff's restrictions and terminated plaintiff from her employment. Plaintiff's presumption of disability, therefore, continued. After making findings regarding plaintiff's condition, the Commission ordered defendants to resume payment of total disability payments beginning 13 November 1990 and continuing "until further Order of the Commission." We hold, based on the existence of the Form 21, plaintiff maintained a continuing presumption of disability, and that the Industrial Commission did not err in awarding plaintiff ongoing temporary total disability.

Affirmed.

Judges HUNTER and HUDSON concur.

MARK WHITTAKER, PETITIONER v. FURNITURE FACTORY OUTLET SHOPS AND AUTO-OWNERS INSURANCE COMPANY, RESPONDENTS

No. COA00-777

(Filed 17 July 2001)

1. Jurisdiction— subject matter—raised by appellate court

The Court of Appeals dismissed for lack of subject matter jurisdiction a declaratory judgment action alleging that a furniture store's insurance policy covered a customized motorcycle used as display and stolen from the store. A challenge to subject matter jurisdiction may be made at any time and the issue may be raised by the appellate court on its own motion even when not raised by the parties.

2. Insurance— theft—owner of loaned property—no enforceable contract right—no subject matter jurisdiction

The owner of a stolen customized motorcycle did not have an enforceable contract right against an insurance company and the

court did not have subject matter jurisdiction where petitioner loaned the motorcycle to a furniture store for use as a display, it was stolen from the furniture store, petitioner filed a claim under the store's policy, and respondent denied the claim. Petitioner is not an interested person under N.C.G.S. § 1-254.

3. **Declaratory Judgments— insurance claim for theft—no judgment against insured—petitioner not a third party to contract**

The owner of a stolen customized motorcycle was not a third party to an insurance contract under N.C.G.S. § 1-254 where petitioner loaned the motorcycle to a furniture store for use as a display, it was stolen from the furniture store, petitioner's claim under the store's policy was denied, and petitioner filed this declaratory judgment action alleging that the loss was covered by the policy, and the furniture store was voluntarily dismissed from the action. The liability of the insured does not attach and plaintiff cannot establish a right to recover without a judgment against the furniture store.

4. **Parties— real party in interest—third-party claim under theft insurance—no judgment against policyholder**

Petitioner did not have standing to bring this action directly against respondent where he loaned a customized motorcycle to a furniture store as a display, the motorcycle was stolen, petitioner's claim under the furniture store's insurance policy was denied, and petitioner then filed this declaratory judgment action alleging that the loss was covered by the policy, and the furniture store was voluntarily dismissed from the action. Although N.C.G.S. § 1A-1, Rule 17(a) provides that every claim shall be prosecuted or defended in the name of the real party in interest, petitioner is required to have a legal right to enforce the claim in question and, without a judgment against the furniture store, petitioner does not have an enforceable contractual right under the insurance policy.

Respondent appeals from an order filed 4 April 2000 by the Honorable Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 April 2001.

DeVore, Acton & Stafford, PA, by Troy J. Stafford, for petitioner-appellee.

Dean & Gibson, L.L.P., by Rodney Dean and Colin E. Scott, for respondent-appellant.

TYSON, Judge.

I. Facts

Mark Whittaker ("petitioner") acquired a 1987 Harley Davidson motorcycle ("motorcycle") in 1994 for $12,000.00. The motorcycle was titled in his name. The motorcycle was registered with the Division of Motor Vehicles and driven on the public roads and highways until on or about Christmas Day of 1996. Petitioner's wife gave him a new Harley Davidson motorcycle for Christmas. After Christmas 1996, petitioner did not operate the 1987 motorcycle on the road and allowed the registration to expire in 1997. Registration for the motorcycle was never renewed. Instead, petitioner customized and restored the motorcycle at a cost of $8,133.35 and used it exclusively as a "show bike." During 1997 and 1998, the motorcycle was entered in at least three different motorcycle shows.

On or about 7 November 1998, petitioner loaned the motorcycle to Furniture Factory Outlet Shops ("Furniture Factory") to be used as a display in their Hickory, North Carolina store to help attract business. On or about 13 November 1998, the motorcycle was stolen from the premises of Furniture Factory and has not been recovered.

Auto-Owners Insurance Company ("respondent") issued an insurance policy to Furniture Factory, effective 25 May 1998. The policy provides Business Personal Property coverage for the Furniture Factory store. After the theft, petitioner made a claim for the loss of the motorcycle. Respondent denied the claim, citing an exclusionary clause to the policy within Section A subsection 2(a) which excludes "aircraft, automobiles, and other vehicles subject to motor vehicle registration."

On 25 March 1999, petitioner filed a verified petition for Declaratory Judgment against Furniture Factory and respondent alleging that the loss was covered under the policy. On 7 June 1999 respondent filed an Answer and Counterclaim citing the exclusionary clause in the policy. Furniture Factory filed a motion to dismiss on 27 March 2000. On 28 March 2000, petitioner filed a Notice of Voluntary Dismissal without prejudice as to Furniture Factory.

On 30 March 2000, the Honorable Timothy S. Kincaid heard the matter and on 4 April 2000 entered an order concluding that petitioner's motorcycle was not "subject to motor vehicle registration" and therefore was a loss covered by the insurance policy issued by respondent to Furniture Factory at a replacement value of $20,133.35. Respondent appeals.

B. Issues

Respondent brings three issues on appeal to this Court: (1) whether a motorcycle used as a show bike is "subject to motor vehicle registration" and therefore not covered under the insurance policy issued by respondent; (2) whether petitioner, as a third party to the insurance policy, is covered when petitioner's interpretation of the policy conflicts with that of parties to the contract, the insurer and the insured; and (3) whether petitioner is entitled to any recovery assuming petitioner's loss is found to be covered under the policy.

II. Subject Matter Jurisdiction

A. "Person Interested"

[1] Respondent argues that petitioner is a third party to its insurance policy with its insured, Furniture Factory and has no privity to the contract. Additionally, respondent argues that petitioner has not established legal liability on the part of Furniture Factory to petitioner. As a result, respondent requests for the case to be dismissed. We agree.

"A challenge to . . . subject matter jurisdiction may be made at any time." *In re Spivey*, 345 N.C. 404, 409, 480 S.E.2d 693, 695 (1997) (citing *Askew v. Leonard Tire Co.*, 264 N.C. 168, 171, 141 S.E.2d 280, 282 (1965)). The issue may be raised by the appellate court on its own motion, even when not raised by the parties. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *disc. review denied*, 296 N.C. 583, 254 S.E.2d 32 (1979) (citing *Jenkins v. Winecoff*, 267 N.C. 639, 148 S.E.2d 577 (1966)).

[2] N.C. Gen. Stat. § 1-253 *et seq.*, the Declaratory Judgment Act, provides: "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." Before a declaratory judgment action is cognizable, our case law requires that "an actual controversy between the parties [exists as a] jurisdictional prerequisite to an action." *Sharpe v. Park Newspapers*, 317 N.C. 579, 583,

347 S.E.2d 25, 29 (1986) (citing *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)). Additionally, parties cannot by agreement or stipulation, confer subject matter jurisdiction upon a court by consent. *McLaughlin v. Martin*, 92 N.C. App. 368, 370, 374 S.E.2d 455, 456 (1988) (citing *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969)).

N.C. Gen. Stat. § 1-254 sets forth the following criteria as to what persons are entitled to declaratory relief:

> Any *person interested* under a deed, will, written contract or other writings constituting a contract, or whose *rights*, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations . . .,

whether or not further relief is or could be claimed. N.C. Gen. Stat. § 1-254 (1999) (emphasis supplied). The provision "any person interested under a deed, will, written contract or other writings constituting a contract" has been interpreted by our Court to allow a party to a contract or a direct beneficiary to have standing under N.C. Gen. Stat. § 1-254 to file a declaratory judgment action under N.C. Gen. Stat. § 1-253. Parties with proper standing enable the court to have subject matter jurisdiction over the case in controversy. *See W&J Rives, Inc. v Kemper Ins. Group*, 92 N.C. App. 313, 320, 374 S.E.2d 430, 434 (1988); *Matter of Calhoun's Will*, 47 N.C. App. 472, 267 S.E.2d 385 (1980). "Absent an enforceable contract right, an action for declaratory relief to construe or apply a contract will not lie." *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 661, 507 S.E.2d 923, 926 (1998). There is an exception which allows a plaintiff to file a declaratory judgment action directly against the insured. A third party through underinsured motorist coverage has a direct benefit through subrogation to a contract. *See Church v. Allstate Ins. Co.*, 143 N.C. App. 527, —— S.E.2d —— (COA00-563) (15 May 2001). The reason for this exception is G.S. § 20-279.21(b)(4) which allows an underinsured motorist insurer, upon receipt of notice, to have "the right to appear in defense of the claim without being named as a party therein, and without being named as a party . . . [to] participate in the suit as fully as if it were a party." *Id.* In the present case, petitioner is not a "person interested . . . under a written contract or other writings constituting a contract." N.C. Gen. Stat. § 1-254 (1999).

B. "Rights, Status Or Other Legal Relations"

[3] The second way to achieve standing through N.C. Gen. Stat. § 1-254 is to be a third party who has "rights, status or other legal relations [that] are affected by statute, municipal ordinance, contract or franchise." N.C. Gen. Stat. § 1-254 (1983). When a person is a third party to a contract, "standing to seek a declaration as to the extent of coverage under an insurance policy requires that the party seeking relief have an enforceable contractual right under the insurance agreement." *Dement v. Nationwide Mutual Ins. Co.*, 142 N.C. App. 598, ——, 544 S.E.2d 797, 799 (2001) (citing *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 507 S.E.2d 923 (1998)).

To ascertain whether an "enforceable contractual right" exists, the court in *Dement* looked to the intent of the contracting parties. *Id.* at 799 (citing *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 696, 407 S.E.2d 178 (1991)). The court concluded that if the declaration is in an insurance policy that payment be made "on behalf of an insured," then the obligation of an insurer to pay a third party flows "primarily and directly to the insured." *Id.* at 801. In such a circumstance, "[b]ecause the benefit running to plaintiff by reason of the provision is merely incidental, he is without standing as a third party beneficiary to seek enforcement of the covenant or a declaratory judgment as to its terms." *Id.* at 801; *see Terrell*, 131 N.C. App. at 660, 507 S.E.2d at 926. The court in *Dement* concluded that an automobile accident victim could not bring an action directly against tort-feasor's liability insurer for a declaratory judgment because the accident victim's claim was merely incidental to the insurance policy, and plaintiff's claim against the insured tort-feasor had not been established as an enforceable contractual right. *Id.*

Also, in *McLaughlin v. Martin*, 92 N.C. App. 368, 369, 374 S.E.2d 455, 456 (1988), there was no case in controversy to meet the jurisdictional requirements for declaratory judgment under N.C. Gen. Stat. § 1-253. Plaintiff had not obtained a judgment determining the liability of the defendant's uninsured motorist coverage, and there was no assurance that they ever would do so. *Id.* at 369, 374 S.E.2d at 456. Without a judgment, plaintiff cannot establish a "right" to recover and liability of the insured does not attach. *Id.* at 369, 374 S.E.2d at 456.

C. Rule 17(a)

[4] G.S. § 1A-1, Rule 17(a) of the North Carolina Rules of Civil Procedure provides that every claim shall be prosecuted or defended

in the name of the real party in interest. *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18, 234 S.E.2d 206, 209 (1977). "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Id.* at 19, 234 S.E.2d at 209 (citing *White Hall Bldg. Corp. v. Profexray Division of Litton, Industries, Inc.*, 387 F. Supp. 1202 (E.D. Penn. 1974)). More specifically, a real party in interest is " . . . a party who is benefitted or injured by the judgment in the case." *Id.* at 18, 234 S.E.2d at 209 (quoting *Parnell v. Ins. Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965)).

In this case, respondent's policy that was issued to Furniture Factory contains "the Businessowners Specialty Property Coverage Form Section A(b)(2)." The policy provides coverage of the "property of others that is in your care, custody or control; but this property is not covered for more than the amount for which *you are legally liable* . . ." Petitioner has not established the legal liability of Furniture Factory for his loss. No "rights" of petitioner under N.C. Gen. Stat. § 1-254 exist to establish a case in controversy to meet the jurisdictional requirements for declaratory judgment under Sec. 1-253. As in *Dement*, the petitioner in this case is an incidental beneficiary to the insurance policy, and does not have a contractual "right" under N.C. Gen. Stat. § 1-253, and therefore, does not have standing. Additionally, under N.C. R. Civ. P. Rule 17(a), the petitioner is required to have a legal right to enforce the claim in question. Without a judgment against Furniture Factory, petitioner does not have an enforceable contractual right under the insurance policy. As a result, petitioner does not have standing to bring this action directly against respondent.

Accordingly, we dismiss this action for lack of subject matter jurisdiction. Our holding is without prejudice to petitioner to bring subsequent action against respondent in the event that petitioner establishes liability against Furniture Factory and reduces its claim to judgment.

Appeal dismissed.

Judges WALKER and HUNTER concur.

THE SHERWIN-WILLIAMS COMPANY, PLAINTIFF v. ASBN, INC., D/B/A FISHMARKET RESTAURANT, INC., FISHMARKET RESTAURANT, INC., NATHAN ALBERTY, BETTY D. ALBERTY, MARIA JANDERA, AND JOSEPH ZAHRADNICEK, DEFENDANTS

No. COA00-753

(Filed 17 July 2001)

Guaranty— commercial lease—holdover tenancy—lease amendment and extension—signing in capacity as corporate officer

The trial court did not err in an action seeking damages in connection with a lease of commercial property by affirming summary judgment in favor of defendant Betty Alberty, but it did err by affirming summary judgment in favor of Nathan Alberty, because although the lease amendment and extension executed more than two years after the original lease expired was a new lease which means the defendants' guaranty did not extend to the new lease, a genuine issue of fact existed as to whether defendant Nathan Alberty is estopped from denying the continuance of his personal guaranty based on his signing the lease amendment and extension in his capacity as a corporate officer of the lessee.

Appeal by plaintiff from judgment entered 30 March 2000 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 April 2001.

Robert D. Potter, Jr. for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Parmele P. Calame, for defendant-appellees Nathan and Betty D. Alberty.

WALKER, Judge.

Plaintiff initiated this action on 1 June 1999 seeking damages in connection with a lease of commercial property to defendant ASBN, Inc. d/b/a Fishmarket Restaurant (ASBN). Defendants Nathan Alberty and Betty Alberty moved for summary judgment and plaintiff filed a cross-motion for summary judgment against all defendants. After a hearing, the trial court granted plaintiff's motion for summary judgment against ASBN, defendant Jandera and defendant Zahrandnicek. However, the trial court denied plaintiff's motion for summary judg-

ment against the Albertys and instead granted the Albertys' motion for summary judgment.

The facts as presented at this stage of the proceedings show the following: On 24 September 1987, plaintiff leased commercial property on Morrison Boulevard in Charlotte to James Simmons who later assigned his interest to ASBN. Defendant Nathan Alberty is vice-president of ASBN. The lease was for a term of seven years, expiring on 30 December 1994. However, the lease provided both an option to renew at the agreement of both parties and a provision covering the contingency of a hold-over tenancy. The hold-over tenancy provision stated:

ARTICLE 19.

HOLD-OVER TENANCY

> In the event . . . Tenant remains in possession of the premises without written consent of Lessor, after the expiration of the term of this lease . . . such holding over shall, if the rent is accepted by Lessor for any period after expiration of the term, create a tenancy from year to year at the last annual rental payable hereunder and otherwise upon the terms and conditions of this Lease . . . .

The lease did not contain any language providing for the "extension" of the lease.

In connection with the signing of the lease, the Albertys each signed a personal guaranty assuring the full performance of the lease. The guaranties stated:

> The undersigned do(es) hereby waive all requirements of notice of the acceptance of this Guaranty and all requirements of notice of breach or non-performance by Tenant. The undersigned's obligation hereunder shall remain fully binding although Lessor may have waived one or more defaults by Tenant, extended the time of performance by Tenant, modified or amended the Lease . . . .

After the lease expired on 30 December 1994, ASBN continued to occupy the premises as a hold-over tenant. On 28 February 1997, plaintiff and ASBN entered into a "lease agreement and extension" which provided that it was retroactive to 1 January 1995 and was extended to 30 December 1999. Although neither of the Albertys executed a separate personal guaranty of the "lease agreement and

extension," Nathan Alberty signed in his capacity as vice-president of ASBN. ASBN defaulted on the lease after September 1998.

Plaintiff first contends that the trial court erred in granting summary judgment in favor of the Albertys because their obligation as guarantors under the original lease continued for the term of the "lease amendment and extension." Plaintiff asserts that the "lease amendment and extension" was merely an extension of the original lease. As such, the Albertys remained liable because their personal guaranty allows for the modification or amendment of the original lease. Alternatively, plaintiff argues that Nathan Alberty should be estopped from denying the continuance of his personal guaranty because he signed the "lease amendment and extension" in his capacity as vice-president of ASBN. The Albertys counter that their guaranty obligation ended with the expiration of the original lease and the "lease amendment and extension" constituted a new lease which they did not guarantee.

We must first address the question of whether a retroactive lease "extension" executed after the expiration of a lease term constitutes a continuation of the original lease or a new lease. In *O'Grady v. Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978), our Supreme Court held that if a new agreement is substituted without the assent of the guarantor, the guarantor's obligations are terminated. The Albertys urge that we follow the holding in *Westcor Co. Ltd. v. Pickering*, 164 Ariz. 521, 794 P.2d 154 (1990). There, the parties executed a three-year lease for which defendant was a guarantor. *Id.* at 521, 794 P.2d at 154. The lease included an option to renew; however, the option was not exercised prior to the expiration of the lease. *Id.* at 522, 794 P.2d at 155. Instead, the lessee continued to occupy the premises as a holdover tenant. *Id.* One month after the expiration of the lease, plaintiff and lessee executed a three-year "renewal," retroactive to the expiration of the original lease, on which the lessee later defaulted. *Id.* In holding the defendant was not obligated under the lease renewal, the Arizona court held that "a guaranty of the performance of a written lease for a specific term does not continue into a successive term . . . without the express terms to show that the lease was of a continuing nature." *Id.* at 523, 794 P.2d at 156. Further, the parties to the lease could not continue the guarantor's obligation by retroactively granting an "extension" of the option to renew after the expiration of the original lease. *Westcor* at 525, 794 P.2d at 158. Rather, the Arizona court found that "[a]n extension of time given after the lease term has expired is not actually an extension," but a new lease. *Id.* Although

the guaranty provision in *Westcor* did not stipulate the guarantor's continued liability in the event of the modification, alteration or renewal of the underlying lease, the Arizona court stated, "[E]ven if the guarantee covered renewal, the subsequent 'renewal' did not recreate any obligations on the part of the guarantor. The renewal was in fact a new lease contract." *Id.* at 524, 794 P.2d at 157.

Plaintiff argues that the case at bar is distinguishable from *Westcor* in that the original lease provided that the Albertys' obligation would remain even though "Lessor may have waived one or more defaults by the Tenant, extended the time of performance by Tenant, modified or amended the lease . . . ." This provision in the original lease only serves to bind the Albertys if limited modifications were made. This Court has found that guarantors may remain obligated where there is an extension of the term of an agreement; however, the guarantors must have unambiguously agreed to continue their liability in such an event. *See First Citizens Bank & Trust Co. v. McLamb*, 112 N.C. App. 645, 439 S.E.2d 166 (1993) (holding that guarantors remained liable despite extension of time to perform where the guaranty agreement provided they would "remain bound . . . notwithstanding any . . . renewal or extension.") Assuming *arguendo* that the "lease amendment and extension" was an extension of the original lease and not a new lease, we do not believe the Albertys' waiver of modifications to the lease is sufficiently broad as to unambiguously encompass a retroactive extension of the original lease term.

Furthermore, we find the reasoning of the Arizona Court, in finding the "renewal" was actually a new lease, to be persuasive. Here, ASBN did not exercise its option to renew the lease but continued to occupy the premises as a hold-over tenant. More than two years after the original lease expired, plaintiff and ASBN then executed the "lease amendment and extension," which provided it would be retroactive to 1 January 1995. However, the original lease was silent on whether it could be extended. Therefore, we conclude the "lease amendment and extension" executed more than two years after the original lease expired was a new lease. In the absence of a new guaranty by the Albertys, they cannot be held liable.

Although we have determined the Albertys' guaranty does not extend to the new lease, plaintiff alternatively argues that Nathan Alberty should be estopped from denying the continuance of his personal guaranty because he signed the "lease amendment and extension" in his capacity as vice-president of ASBN.

In *Devereux Properties, Inc. v. BBM&W, Inc.*, 114 N.C. App. 621, 442 S.E.2d 555 (1994), the guarantors to a lease argued that their liability had been discharged after the lease was amended. Although the guarantee agreement did not provide for continuing liability in the event of such modifications, the guarantors consented to the amendments in their capacity as corporate officers of the lessee. *Devereux* at 622, 442 S.E.2d at 556. This Court noted the general rule that "a material alteration of a contract between a principal debtor and creditor without the consent of the guarantor discharges the guarantor of his obligation." *Devereux* at 623, 442 S.E.2d at 556. However, this Court also held that "[a]n exception to these rules holds the guarantor responsible for any changes to which he has either expressly or impliedly consented." Devereaux at 624, 442 S.E.2d at 556. Further, "[c]onsent to an increase in liability may be implied from a guarantor's actions as a corporate officer." *Devereux* at 624, 442 S.E.2d at 557. In holding the guarantors were estopped from denying responsibility for the modifications, this Court explained that the guarantors "were not innocent parties; they were experienced businessmen who stood to benefit from the modifications. Having authorized the modifications and received their benefits, they cannot now be regarded as innocent third parties such as the law of guaranty is designed to protect." *Devereux* at 625, 442 S.E.2d at 557.

Likewise, Nathan Alberty, as vice-president of ASBN, could have benefitted from the new lease which allowed his business to continue in its present location. Based on our review of the record, we cannot conclude as a matter of law that Nathan Alberty is estopped from denying his personal guaranty continued under the new lease. This issue must be addressed and reviewed by the trial court.

The judgment of the trial court is affirmed as to Betty Alberty. The judgment is reversed as to Nathan Alberty.

Affirmed in part; reversed and remanded in part.

Judges HUNTER and TYSON concur.

SHEILA D. ROYAL, PLAINTIFF-APPELLEE v. JACK AMOS HARTLE AND WIFE, ANJA HARTLE, DEFENDANTS-APPELLANTS

No. COA00-897

(Filed 17 July 2001)

1. Judgments— consent judgment—motion to set aside—unauthorized action by attorney

The trial court did not abuse its discretion by denying defendants' Rule 60(b)(4) motion to stay and vacate a memorandum of consent order signed by a trial judge where defendants contended that their attorney had agreed to the settlement without their consent. A party seeking to set aside a consent judgment has the burden of overcoming the presumption that counsel had the authority to enter the judgment on behalf of the client; an affidavit from this attorney stating that he lacked that authority was properly excluded as not duly served and defendants did not overcome their burden of proof.

2. Civil Procedure— Rule 60 motion to set aside consent judgment—signed without client's consent—not gross negligence

The trial court did not abuse its discretion by refusing to vacate a consent judgment under N.C.G.S. § 1A-1, Rule 60(b)(6) where defendants contended that their attorney signed the judgment without their consent and that this amounted to gross negligence.

Appeal by defendants from judgment entered 6 June 2000 by Judge Jeannie R. Houston in Yadkin County District Court. Heard in the Court of Appeals 22 May 2001.

McElwee Firm, PLLC, by John M. Logsdon, for plaintiff-appellee.

Blanco Tackaberry Combs & Matamoros, P.A., by George E. Hollodick and Leigh Anne P. Miller, for defendants-appellants.

BRYANT, Judge.

Plaintiff brought this suit alleging that defendants had interfered with her access easements across defendants' property. The parties disagreed over the size and location of the access easements. At a

hearing on 13 December 1999, the trial court appointed surveyor John Overbey to locate and stake the described easements.

On 20 March 2000, prior to a scheduled hearing on plaintiff's motion for a preliminary injunction, plaintiff and her attorney met with Warren Kasper, attorney for the defendants, and reached an agreement by which plaintiff agreed to release one easement in exchange for defendants permitting the broadening of the other easement along an existing soil road from 25 to 30 feet and allowing the installation of utilities within this easement. Kasper, representing that he had authority to settle the dispute on behalf of the defendants, signed a memorandum of consent order along with plaintiff and her counsel. The order was then signed and entered by the Honorable Jeannie R. Houston.

Defendants contended they were unaware of the scheduled hearing and that they did not give Kasper authority to sign the consent order settling their case. On 12 April 2000, defendants, having learned that Kasper executed the consent order without their knowledge or consent, retained new counsel, and filed a motion to stay and vacate the memorandum of consent order pursuant to Rules 60(b)(4) and (6) of the North Carolina Rules of Civil Procedure.

Defendants offered affidavits signed by Jack Hartle, who denied that he had consented to the agreement entered into by Kasper, and by his mother, Ann Hartle, who stated that Kasper had offered to rescind the order. After reviewing the affidavits, the trial court concluded as a matter of law that the defendants had not met their burden of proof under either Rule 60(b)(4) or Rule 60(b)(6) and denied the defendant's motion to vacate the memorandum of consent order. From that order, defendants filed a notice of appeal on 8 June 2000.

On appeal, defendants contend the trial court erred in finding that the consent order was not void pursuant to Rule 60(b)(4); and in finding that necessary extraordinary circumstances did not exist to justify relief under Rule 60(b)(6). The findings of fact by the trial court are binding on appeal if supported by competent evidence. *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982). "The granting of [a Rule 60] motion is within the sound discretion of the trial court. (citations omitted). Appellate review is limited to a determination of whether the court abused its discretion . . . . (citation omitted)." *Id. See generally White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of dis-

cretion only upon a showing that its actions are manifestly unsupported by reason. . . . [A]nd will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision."). We find no abuse of discretion and affirm the trial court's holding.

I. Rule 60(b)(4)

[1] Rule 60(b)(4) provides that a party or his legal representative may be relieved from a final judgment, order, or proceeding if the judgment is void. N.C.G.S. § 1A-1, Rule 60(b)(4). A judgment may be declared void if the issuing court has no jurisdiction over the parties or subject matter of the action, or if the court has no authority to render the judgment entered. *Ottway Burton, P.A. v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992).

Without his client's consent, an attorney has no inherent authority to enter into a settlement agreement that is binding on his client. *Morgan v. Hood*, 211 N.C. 91, 93, 189 S.E. 115, 116 (1937). *See Howard v. Boyce*, 254 N.C. 255, 263, 118 S.E.2d 897, 903 (1961) ("An attorney has no inherent or imputed power or authority to compromise his client's cause or consent to a judgment which gives away the whole corpus of the controversy. (citation omitted). To compromise his client's cause or enter a consent judgment with respect thereto, an attorney must be so authorized."). Thus, the trial court's authority to enter the consent order hinges on whether the defendants' counsel had authority to sign the order.

Defendants in this case argue they did not authorize Kasper to enter into the consent judgment, and it should, therefore, be set aside as void. However, when counsel enters into a consent judgment on behalf of his client, he is presumed to have authority to do so, and the order is presumptively valid. *Greenhill v. Crabtree*, 45 N.C. App. 49, 52, 262 S.E.2d 315, 317, *rev. allowed*, 300 N.C. 196, 269 S.E.2d 617, *aff'd*, 301 N.C. 520, 271 S.E.2d 908 (1980). A party seeking to set aside the consent judgment has the burden of overcoming this presumption by proving to the satisfaction of the court that the attorney did not have the requisite authority. *Id.*

In North Carolina, whether a consent judgment should be set aside because it was entered without a party's authority, consent, or knowledge requires application of the following principles:

> (1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal

> or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities.

McGinnis v. Robinson, 43 N.C. App. 1, 10, 258 S.E.2d 84, 90 (1979) *quoting Standard Equipment Co. Inc., v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501-02 (1978).

Here, Kasper was the defendants' attorney and represented to the plaintiff and the trial court that he had the necessary authority to sign the consent order on behalf of the defendants. The only evidence properly before the trial court was the affidavits of Jack Hartle and Ann Hartle. Although Kasper submitted a signed affidavit stating he did not have consent to enter into the contested agreement, the trial court properly excluded it as evidence because the affidavit had not been duly served before trial. After reviewing the evidence, the trial court decided that defendants had not overcome their burden of proof as a matter of law. *Cf. Gentry*, 57 N.C. App. at 154, 290 S.E.2d at 780 (finding sufficient evidence to rebut the presumption of authority where both the plaintiff and his attorney entered affidavits denying that the attorney had the necessary consent). It appears defendants did not object at the hearing to the trial court's exclusion of the affidavit of Kasper, nor did they assign as error on appeal the affidavit's exclusion. Accordingly, we find that the trial court did not abuse its discretion in ruling that defendants did not overcome their burden of proof in this case.

II. Rule 60(b)(6)

[2] Defendants also contend that Kasper's action in signing the consent order without the proper authority amounts to gross negligence (or neglect) and that they should be relieved from the consent judgment pursuant to Rule 60(b)(6). Rule 60(b)(6) permits the trial court to set aside a judgment or order "for any reason justifying relief from the operation of the judgment." N.C.G.S. § 1A 1-1, Rule 60(b)(6).

This Court has held "[t]he setting aside of a judgment pursuant to . . . Rule 60(b)(6) should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. . . . In addition to these requirements, the movant must also show that he has a meritorious defense." *State ex rel. Environmental Management Comm'n v. House of Raeford Farms, Inc.*, 101 N.C.

App. 433, 448, 400 S.E.2d 107, 117 (1991), *reversed on other grounds*, *House of Raeford Farms, Inc. v. State ex rel. Environmental Management Comm'n*, 338 N.C. 262, 449 S.E.2d 453 (1994). Errors made by a party's counsel may serve as a basis for setting aside a judgment under Rule 60(b)(6) if the errors amount to gross neglect. *See Poston v. Morgan*, 83 N.C. App. 295, 300, 350 S.E.2d 108, 111 (1986) (stating because of attorneys' procedural blunders and gross neglect, plaintiffs never had a full hearing on the merits of their claims and plaintiffs' avenues of appeal were cut off therefore plaintiffs have shown a basis for relief under Rule 60(b)(5) and (6).

Gross neglect on the part of a party's counsel was found in *Poston*, where one attorney: 1) failed to perfect appeals in four different cases; 2) failed to file the record in two other cases; 3) failed to appear at scheduled hearings; and 4) made false representations as to the status of these cases—all of which resulted in his client's being deprived of all avenues of appeal. *Id.*

In the case *sub judice*, defendants failed to establish a meritorious defense or to provide evidence showing gross neglect on the part of Kasper. The only evidence defendants advance to support their Rule 60(b)(6) argument is that the consent order grants plaintiff a utility easement which she did not ask for in her initial complaint. However, this evidence is unpersuasive. We can find no evidence to support a finding of a meritorious defense or gross neglect as defendants did not show that Kasper committed errors amounting to gross neglect.

We hold that the trial court did not abuse its discretion in refusing to vacate the consent judgment under either Rule 60(b)(4) or Rule 60(b)(6).

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

PRIMER LONG, JR. v. STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF CHILD DEVELOPMENT

No. COA00-439

(Filed 17 July 2001)

Juveniles— child care provider—disqualification for criminal record—judicial review—APA inapplicable

The district court erred by partially transferring jurisdiction to the Office of Administrative Hearings to review the disqualification of petitioner as a child care provider under N.C.G.S. § 110-90.2(a)(2) on the basis of a criminal record, because: (1) N.C.G.S. § 110-90.2(d) provides an adequate judicial remedy described in N.C.G.S. § 150B-43 which removes this procedure from the North Carolina Administrative Procedure Act (APA); and (2) N.C.G.S. § 110-90.2(d)9 establishes that the district court is the proper forum for a challenge of the respective decision, and there is no authority for the trial court to utilize the APA or in any way transfer or delegate the jurisdiction so established.

Appeal by respondent from judgment entered 18 August 1999 by Judge Elaine M. O'Neal in Durham County District Court. Heard in the Court of Appeals 14 March 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Becky A. Beane for the State.

North Carolina Central University School of Law Legal Clinic by Grady Jessup for the Petitioner-Appellee.

THOMAS, Judge.

Respondent, the North Carolina Department of Health and Human Services, Division of Child Development, appeals from a partial transfer of jurisdiction from the trial court to the Office of Administrative Hearings. The action before the trial court concerned the disqualification of petitioner, Primer Long, Jr., as a child care provider. Respondent sets forth one assignment of error. For the reasons discussed herein, we reverse the trial court.

The facts are as follows: Petitioner was employed as a cook at Bright Horizons Children Center, a child care facility. In that position, he was a child care provider as defined by N.C. Gen. Stat.

§ 110-90.2(a)(2). Pursuant to section 110-90.2(b), petitioner was therefore subject to a mandatory criminal history investigation. He allegedly submitted the required information for the background check in November 1997, with the investigation uncovering a 1987 conviction for taking indecent liberties with a child. Respondent thereafter, under the authority of section 110-90.2(b), disqualified petitioner on or about January 1999 to serve as a child care provider. Petitioner then filed a "Petition for Judicial Review" in Durham County District Court on 1 March 1999, requesting the reversal of respondent's decision finding petitioner unfit to provide child day care services and to award back pay. Hearings were held by the trial court on 24 May 1999, 28 May 1999 and 19 July 1999.

No witnesses testified and no evidence was taken during the hearings regarding petitioner's fitness to serve as a child care provider. Instead, the trial court focused on arguments of counsel as to the applicable standard of review and whether the North Carolina Administrative Procedure Act (APA) applied.

In its order, the trial court found that the action was governed by the APA and directed petitioner's appeal to be conducted pursuant to the provisions of the APA instead of section 110-90.2. The trial court retained jurisdiction for the "limited purpose of ensuring the mandates of the court's order [were] carried out."

By respondent's only assignment of error, it argues the trial court erred by applying the provisions and procedures of the APA to the case *sub judice* instead of section 110-90.2. We agree.

The APA, found in Chapter 150B of the General Statutes, establishes a uniform system of adjudicatory procedures for state agencies. N.C. Gen. Stat. § 150B-1(a) (1999). Under section 150B-22, preference is given to settlement of a contested case by informal administrative means. If that is not achieved, either party may petition for a hearing before an administrative law judge pursuant to section 150B-23. Only after that hearing, after exhausting all administrative remedies, is a party aggrieved by the final decision in a contested case allowed to seek judicial review. Section 150B-43 provides that a petitioner who has exhausted all administrative remedies "is entitled to judicial review of the decision under [Article 4 of the APA], unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute." N.C. Gen. Stat. § 150B-43 (1999).

Where adequate procedures are not established by another statute, section 150B-45 requires the person seeking judicial review to file the action either in Wake County Superior Court or in the superior court where that person resides. N.C. Gen. Stat. § 150B-45 (1999). As a state agency not specifically excluded by the APA, respondent ordinarily falls within the purview of the act and must comply with its procedures. *See* N.C. Gen. Stat. § 150B-1(c) (1999). Accordingly, the initial inquiry must be whether there is adequate procedure for judicial review provided by another statute, or whether specifically, or by default, the procedure for administrative hearings under these facts applies. The test is objective, looking at the text of the statutes for direction.

It is the domain of the legislature, consistent with the state and federal constitutions, to determine which courts or administrative bodies have jurisdiction at different points in the appeal process. "The regulation of access to the courts is largely a legislative task and one that courts should hesitate to undertake. For this reason, implied rights of action are disfavored and will not be found in the absence of clear legislative intent." *Smith v. Reagan*, 844 F.2d 195, 201 (4th Cir. 1988), *cert. denied*, 488 U.S. 954, 102 L. Ed. 2d 379 (1988).

Section 110-90.2(d) requires respondent to provide notification in writing to the child care provider and the employer whether the person is qualified to provide child care based on the person's criminal history. N.C. Gen. Stat. § 110-90.2(d) (1999). It also requires respondent to notify the provider "of the procedure for completing or challenging the accuracy of the criminal history and the child care provider's right to contest the Department's determination in court." *Id.* Section 110-90.2(d) then specifically details the procedure and proper jurisdictional authority by stating, "[a] child care provider who disagrees with the Department's decision may file a civil action in the district court of the county of residence of the child care provider within 60 days after receiving written notification of disqualification." *Id.*

A sample "NOTICE" is included in section 110-90.2(c) with a requirement that one substantially similar be sent to the child care provider. Specifically, the sample notice states "[i]f you disagree with the determination of the North Carolina Department of Health and Human Services on your fitness to provide child care, you may file a civil lawsuit within 60 days after receiving written notification of disqualification in the district court in the county where you live." N.C. Gen. Stat. § 110-90.2(c) (1999). In the instant case, that is

the procedure followed by petitioner with respondent timely filing an answer.

Rather than ruling on the merits, however, the trial court delegated or transferred part of its jurisdiction. First, the court found as a fact that the APA governed "the Agency's duties and Petitioner's rights and privileges regarding any action taken by the Agency pursuant to the enforcement of N.C. Gen. Stat. § 110-90.2 (1997)." The trial court then ordered the agency itself to attempt a settlement of the matter with petitioner. Finally, if resolution were not reached, the court ordered that either party may file a petition with the Office of Administrative Hearings for a formal hearing. The trial court retained jurisdiction only for the limited purpose of ensuring compliance with its mandates.

Section 110-90.2(d) clearly provides a different, adequate judicial remedy, however. It is the "other statute" described in section 150B-43, which removes it from the procedures of the APA. Moreover, if 110-90.2(d) did not exist, or were somehow considered inapplicable, the district court would have no jurisdiction. It is the superior court, not district, that has ultimate jurisdiction concerning appeals or review under the APA.

In the matter at hand, the district court does have jurisdiction because the legislature's wording of section 110-90.2(d) establishes it as the proper forum for a challenge of the respective decision. Since the district court is the legislature's choice of forum, and since there is no constitutional prohibition of that choice, the next inquiry is whether the statutory scheme gives the trial court discretion to transfer its jurisdiction. Within section 110-90.2(d), there is no authority for the trial court to utilize the APA or in any way transfer or delegate the jurisdiction so established. The matter, therefore, was appropriately in the district court. However well-intentioned the trial court's belief as to what constitutes better practice, the district court is required to retain jurisdiction for the hearing of motions as well as for any hearing on the merits.

Accordingly, we find the partial transfer of jurisdiction ordered by the trial court to be error. We reverse and remand for appropriate hearing on the merits.

REVERSED AND REMANDED.

Judges WYNN and McGEE concur.

CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY; DUKE UNIVERSITY MEDICAL CENTER; MISSION-ST. JOSEPH'S HEALTH SYSTEM, INC.; MOSES CONE HEALTH SYSTEM; THE NORTH CAROLINA BAPTIST HOSPITALS, INC.; AND WAKE MEDICAL CENTER, PETITIONERS v. H. DAVID BRUTON, M.D., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, RESPONDENTS

No. COA00-743

(Filed 17 July 2001)

1. **Administrative Law— declaratory ruling—underlying cases previously decided—ruling undesirable**

The trial court did not err by affirming a final agency decision by the North Carolina Department of Health and Human Services (DHHS) declining to issue a declaratory ruling regarding Medicaid coverage for aliens where DHHS had previously decided the actual cases from which petitioners drew their facts. The APA requires agencies to issue declaratory rulings to aggrieved parties as to the validity of a rule or the applicability of a set of facts, with an exception when the agency for good cause finds the issuance of a ruling undesirable. Respondents in this case believed that ruling on two cases upon which it had already ruled would be a waste of resources; this clearly constitutes good cause.

2. **Appeal and Error— preservation of issues—issues not raised at trial—issues not assigned as error**

Issues not before the trial court and not assigned as error were not considered.

Appeal by petitioners from judgment entered 19 April 2000 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 19 April 2001.

Turner, Enochs & Lloyd, P.A., by Melanie M. Hamilton, Thomas E. Cone, and Wendell H. Ott, for petitioner-appellants.

Michael F. Easley, Attorney General, by Grady L. Balentine, Jr., Assistant Attorney General, for the respondent-appellees.

THOMAS, Judge.

Petitioners, Charlotte-Mecklenburg Hospital Authority, Duke University Medical Center, Mission-St. Joseph's Health System, Inc., Moses Cone Health System, the North Carolina Baptist Hospitals, Inc., and Wake Medical Center, appeal from the trial court's order affirming the respondents' decision to decline issuing a declaratory ruling. Petitioners set forth one assignment of error. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Petitioners are medical service providers whose patients include legal aliens here on a temporary visa who experience emergency medical conditions. Respondent, the North Carolina Department of Health and Human Services (DHHS), Division of Medical Assistance (DMA), has denied Medicaid coverage for the aliens because they are in North Carolina on currently unexpired visas. The denial of Medicaid coverage at issue is based on DHHS's policy, set out in two manuals published by DMA: the North Carolina Family and Children's Medicaid Manual (MAF Manual) and the North Carolina Aged, Blind and Disabled Medicaid Manual (MABD Manual). The relevant language of the MAF Manual reads:

> Non-immigrants may be legally admitted to the U.S., but only for a temporary or specified period of time. These aliens are **NOT ELIGIBLE for full Medicaid or emergency medical services** because they do not meet the N.C. residency requirement.
>
> > NOTE: An alien admitted for a limited period of time who does not leave the U.S. when the period of time expires becomes an illegal alien. If he then establishes N.C. residency, he may be eligible for emergency Medicaid only.

The North Carolina Family and Children's Medicaid Manual § 3404 (III.E.3) (emphasis in original). The relevant language contained in the MABD Manual is identical. *See* The North Carolina Aged, Blind & Disabled Medicaid Manual § 2504 (III.E.3).

On 29 March 1999, petitioners filed a petition with DHHS, requesting a declaratory ruling that the provisions contained in the two manuals referenced above are: (a) inconsistent with superior federal and state law and regulations; (b) unenforceable because they have not been properly promulgated in accordance with the North Carolina Administrative Procedure Act; and (c) invalid, void, and of no effect. As part of their petition, petitioners offered factual scenarios of two aliens whose applications for Medicaid coverage had been denied.

On 27 May 1999, DHHS sent a letter to petitioners informing them of its refusal to issue a declaratory ruling. The reason given was that the factual situations upon which petitioners based their request are actual cases DHHS already decided in two separate administrative hearings. On 21 June 1999, petitioners then filed a Petition for Judicial Review in Wake County Superior Court challenging DHHS's decision not to issue a declaratory ruling. The trial court affirmed DHHS's decision on 19 April 2000. From this order petitioners appeal.

[1] By their only assignment of error, petitioners argue the trial court erred in affirming the final agency decision declining to issue a declaratory ruling. We disagree.

The North Carolina Administrative Procedure Act (APA) establishes a uniform system of administrative adjudicatory procedures for North Carolina agencies, including DHHS. N.C. Gen. Stat. § 150B-1 *et seq.* (1986). The APA requires agencies to issue declaratory rulings to aggrieved parties as to the validity of a rule, or the applicability of a set of facts to a statute administered by the agency or of a rule or order of the agency. *Id.* at § 150B-4(a). An exception to that requirement is when the agency for good cause finds the issuance of a ruling undesirable. *Id.* Additionally, the APA requires each agency to prescribe in its rules the circumstances in which declaratory rulings shall or shall not be issued. *Id.* Thus, pursuant to the APA's mandate, DHHS adopted in its rules the following provision: Whenever the Secretary [of DHHS] or his designee believes for good cause that the issuance of a declaratory ruling is undesirable, he may refuse to issue one. 10 N.C. Admin. Code tit. 10, r. 1B.0108(c) (Nov. 1989).

In the instant case, respondents believed the issuance of a declaratory ruling was undesirable because the two factual situations upon which petitioners based their request for a declaratory ruling are actual cases DHHS decided in two separate administrative hearings. Petitioners are in fact asking DHHS to rule on two cases upon which it has already ruled. Respondents believed, and we agree, that this would be a waste of administrative resources, and is clearly unnecessary.

The nature of the error asserted by the party seeking judicial review of an agency decision dictates the proper standard of review. *Christenbury Surgery Ctr. v. N.C. Dep't of Health and Human Servs.*, 138 N.C. App. 309, 311-12, 531 S.E.2d 219, 221 (2000), *review improvidently allowed*, 353 N.C. 354 (April 6, 2001). If the party seeking review asserts the agency's decision was affected by a legal error,

de novo review is required. *Id.* at 312, 531 S.E.2d at 221. Petitioners contend DHHS erred as a matter of law when it refused to issue a declaratory ruling and that *de novo* review is the appropriate standard. Respondents likewise conceded at the trial court level that *de novo* review was appropriate. We hold *de novo* review is proper and accordingly proceed.

Here, DHHS believed the issuance of a declaratory ruling was undesirable, and its refusal is valid under the APA and DHHS regulations as long as good cause is shown. This Court has previously held:

> good cause exists for denial of a request for a declaratory ruling where the denial is based on the existence of a prior agency ruling which necessarily required an interpretation of the same statute which is the subject of the request for declaratory ruling. To hold otherwise would be to require an agency to twice decide the same case, between the same parties, by applying the same statute to the same facts.

Catawba Mem'l Hosp. v. N.C. Dep't of Human Resources, 112 N.C. App. 557, 563, 436 S.E.2d 390, 393 (1993). For these purposes, the statutes at issue in *Catawba* are the equivalent of the regulations at issue in this case. Thus, the fact DHHS had previously decided the actual cases from which petitioners drew their facts clearly constitutes good cause under *Catawba*. The refusal to issue a declaratory ruling was proper under the APA and DHHS regulations, and in accordance with our holding in *Catawba*. We therefore reject the assignment of error.

[2] Petitioners next contend DHHS's policy regarding aliens here on a temporary visa is in conflict with state and federal law. However, the issue was not assigned as error by petitioners. Accordingly, this argument is not properly before us. N.C.R. App. P. 10(a) (2000). Even if petitioners had assigned it as error, however, the merits of the policy regarding Medicaid coverage was never before the trial court and is not an issue for us to consider.

Petitioners also contend DHHS's policy, set out in the MAF and MABD Manuals, is invalid because it was not promulgated in accordance with the APA. However, petitioners likewise failed to assign the issue as error and we do not consider it. N.C.R. App. P. 10(a) (2000).

Accordingly, as to the issue properly before us, we affirm the trial court.

AFFIRMED.

Judges MARTIN and BIGGS concur.

CLIFF CARDWELL, PLAINTIFF-APPELLANT v. BRENDA HENRY, DEFENDANT-APPELLEE

No. COA00-1027

(Filed 17 July 2001)

Landlord and Tenant— implied warranty of habitability— breach—calculation of damages

There was competent evidence in a nonjury trial to support the trial court's findings and conclusions that plaintiff breached the implied warranty of habitability; however, defendant's damages were improperly calculated.

Appeal by plaintiff from judgment dated 14 June 2000 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 23 May 2001.

Harkey, Lambeth, Nystrom, Fiorella & Morrison, L.L.P., by Jeffrey S. Williams-Tracy, for plaintiff-appellant.

Legal Services of Southern Piedmont, Inc., by Linda S. Johnson and Theodore O. Fillette, for defendant-appellee.

WALKER, Judge.

Plaintiff was the owner of residential premises located at 1005 Andrill Terrace (the premises) in Charlotte (the City). Defendant has lived at the premises since 1992 pursuant to a series of oral leases. On 10 September 1999, plaintiff entered into a written lease with defendant agreeing to pay a monthly rental rate of $360 due on or before the first day of each month. Beginning in November 1999 and continuing through 31 January 2000 when plaintiff sold the premises, the premises had certain defects which violated the City's Housing Code. These defects included unsafe electrical wiring, which caused defendant an insufficient supply of electrical power, often rendering useless the premises' heat, hot water, and appliances. During this time, defendant's payment of rent was not always timely.

On 22 December 1999, plaintiff received a complaint and notice of hearing from the City regarding violations of the housing code on the premises. That same day, plaintiff filed a complaint for summary ejectment against defendant for breach of the lease by nonpayment of rent. On 11 January 2000, defendant answered and counterclaimed, alleging breach of implied warranty of habitability and unfair or deceptive trade practices.

After the small claims court found for plaintiff, defendant appealed to the district court. By judgment dated 14 June 2000, the district court concluded plaintiff had breached the implied warranty of habitability and committed "unfair or deceptive acts in commerce in violation of N.C.G.S. § 75-1.1 et. seq. . . ." The district court thus dismissed with prejudice plaintiff's claim for summary ejectment and ordered plaintiff to pay defendant damages in the amount of $880, which was trebled to $2,640. Costs of the action were further taxed to plaintiff.

Plaintiff contends the district court erred in finding plaintiff had breached the implied warranty of habitability owed to defendant. Plaintiff further contends the district court erred in its calculation of damages and in finding that plaintiff committed unfair and deceptive acts, thereby trebling defendant's damages.

Defendant contends the district court properly determined she was entitled to damages from November 1999 through January 2000 for breach of the implied warranty of habitability, refund of unlawful rent and unfair acts and deceptive practices. Defendant further asserts that under this Court's recent decision of *Von Pettis Realty, Inc. v. McKoy*, 135 N.C. App. 206, 519 S.E.2d 546 (1999), *disc. review denied*, 351 N.C. 371, 542 S.E.2d 661 (2000), the trial court utilized the proper method for calculating her damages.

At the outset, we note the standard of review for bench trials:

> In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith. It is well settled law that although the sufficiency of the evidence to support the trial court's findings may be raised on appeal, the 'appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.'

Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 460, 490 S.E.2d 593, 596, *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998) (citations omitted), *quoting In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984).

This Court has held:

> [T]he proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition; provided, however, the damages do not exceed the total amount of rent paid by the tenant. Additionally, the tenant is entitled to any 'special and consequential damages alleged and proved.'

Von Pettis Realty, Inc. at 210, 519 S.E.2d at 549, *quoting Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694, *disc. review denied*, 321 N.C. 296, 362 S.E.2d 779 (1987).

In its order, the trial court made the following findings in part:

. . .

> 2. [Defendant] has lived at the premises since 1992 pursuant to a series of oral leases; at the time the complaint was filed, the monthly rent was $360.00.
>
> 3. From November 1999 until the present, there have been certain defects in the premises which violated the Housing Code of the City of Charlotte, including unsafe electrical wiring.
>
> 4. Plaintiff knew of these defects, as the defects were reported by defendant. Plaintiff made repairs, but the electrical problem recurred.
>
> 5. This defect [has] seriously affected the use and enjoyment of the premises by defendant. The fair rental value of the premises as provided by plaintiff to defendant was no more than $200.00 per month for the months of November 1999 and no more than $100.00 per month for the months of December 1999 and January 2000. If the defects had all been repaired and the premises had been in the condition required by law, the fair rental value would have been $360.00 per month.
>
> 6. The unsafe wiring and the lack of an operable lock on the bathroom window rendered the premises 'immediately dangerous to

health and safety' as defined by Section 11-35(d) of the Housing Code of the City of Charlotte, which was enacted November 9, 1998. From December 1998 through December 1999, plaintiff collected $4420.00 in rent from defendant.

7. Plaintiff continued to demand rent for the premises in its substandard condition, and this action was unethical, oppressive, and substantially injurious to the defendant.

8. During the tenancy, plaintiff collected rent by going to the premises and receiving the payments directly from defendant, usually on a weekly basis. Plaintiff refused to accept any payments from defendant after receiving the Complaint and Notice of Hearing from the housing inspector on December 22, 1999, though the balance of rent for December was tendered by defendant.

The trial court then concluded in part:

. . .

3. By failing to put and keep the premises in a fit and habitable condition, plaintiff breached the implied warranty of habitability owed to defendant. As a result of plaintiff's breach of the implied warranty of habitability, defendant has been damaged in an amount of $160.00 per month for November 1999 and in an amount of $260.00 per month for the months of December 1999 and January 2000.

4. Pursuant to the Housing Code of the City of Charlotte, it was unlawful for the plaintiff to collect rent for the premises beginning in November 1999, and defendant is entitled to damages in the amount of all rent paid to plaintiff in November 1999 ($360.00) and December 1999 ($100.00).

. . .

6. [Plaintiff's] failure to repair the premises and continued demands for full rent for the premises in their unfit condition, continuing to collect rent while the premises were immediately dangerous, and retaliatory eviction violated state public policies and constituted unfair or deceptive acts in commerce in violation of N.C.G.S. § 75-1.1 et seq., and defendant's damages must be trebled.

Based on these conclusions, the trial court ordered that defendant recover $360 for November 1999 and $260 per month for December

1999 and January 2000 for breach of implied warranty of habitability. The trial court further ordered that these amounts be trebled such that plaintiff's recovery amounted to $2,640.

We conclude from a review of the record there is competent evidence to support the trial court's findings and conclusions that plaintiff breached the implied warranty of habitability of the premises and defendant is entitled to damages. However, after further review, we conclude the trial court improperly calculated defendant's damages in the following respects: (1) For November 1999, the trial court determined the fair rental value for this month to be $200. Defendant paid rent for this month in the amount of $360, leaving defendant's damages at $160; (2) For December 1999, the trial court determined the fair rental value for this month to be $100; however, defendant only paid rent in the amount of $100. Defendant was therefore not entitled to damages for this month; and (3) For January 2000, the trial court determined the fair rental value for this month to be $100; however, defendant did not pay any rent. Thus, $100 should be offset against defendant's damages for this month.

Therefore, the portion of the judgment awarding damages is reversed and the case is remanded to the trial court for a determination of defendant's damages consistent with this opinion.

Affirmed in part; reversed and remanded in part.

Judges McCULLOUGH and SMITH concur.

RUTH K. MUSCATELL v. RANDE J. MUSCATELL AND DARRYL J. YSTEBOE

No. COA00-997

(Filed 17 July 2001)

Contribution— medical payment coverage—entitlement to credit or setoff—collateral source rule—Uniform Contribution Among Tortfeasors Act

The trial court erred in a negligence action arising out of an automobile accident by concluding a defendant was required to pay the $5,000 judgment without contribution from his codefendant, because even though the collateral source rule holds that

neither defendant may benefit from a credit or setoff of money paid to plaintiff under the medical payment coverage, the Uniform Contribution Among Tortfeasors Act provides that contribution is allowed between defendants held jointly and severally liable for plaintiff's injuries. N.C.G.S. § 1B-1(a), (b).

Appeal by defendant Ysteboe from judgment entered 23 May 2000 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 May 2001.

Law Offices of Michael J. Bednarik, P.A., by Michael J. Bednarik, for plaintiff-appellee.

Caudle & Spears, P.A., by Michael J. Selle and Christopher J. Loebsack, for defendant-appellee Rande J. Muscatell.

Morris York Williams Surles & Barringer, by John P. Barringer, for defendant-appellant Darryl J. Ysteboe.

WALKER, Judge.

This action arises from an automobile accident which occurred on 18 March 1995 in Mecklenburg County, North Carolina. At the time of the accident, plaintiff was married to defendant Muscatell and was a passenger in his vehicle. The accident occurred as defendant Muscatell attempted to turn left out of his driveway onto the main road, colliding with a vehicle traveling on the main road owned and operated by defendant Ysteboe.

As a result of the injuries received in the accident, plaintiff incurred medical expenses in the amount of $3,743.11. Plaintiff was reimbursed for these expenses under the medical payments coverage of the automobile insurance policy issued to plaintiff and defendant Muscatell.

Plaintiff filed this action alleging negligence on the part of both defendants. Each defendant answered denying negligence and cross claimed against each other for contribution. Later, defendant Muscatell was permitted to amend his answer to assert his right to a setoff and credit for the medical payment coverage paid to plaintiff under their joint insurance policy.

At trial, the jury found plaintiff was injured by the negligence of both defendants and therefore entitled to recover $5,000 for her injuries. On 23 May 2000, the trial court entered a judgment ordering

both defendants jointly and severally liable in the amount of $5,000. Defendant Muscatell was allowed "a credit or setoff in the amount of $3,743.11" representing the amount of medical payment coverage paid to plaintiff. Accordingly, defendant Ysteboe was denied any credit or setoff.

Defendant Ysteboe assigns error to the trial court's ruling that he is not entitled to a credit or setoff for the $3,743.11 paid to plaintiff under her medical payment coverage, thus requiring him to pay the $5,000 judgment without contribution from defendant Muscatell. Defendant Ysteboe argues this denial of his right to credit or setoff is in error because: (1) North Carolina adheres to the rule that double compensation or overcompensation for a single injury shall not be collected; and (2) if it is determined that plaintiff is entitled to a double recovery, then neither party would be entitled to credit or setoff for the medical payment coverage paid to plaintiff. Defendant further contends the trial court erred in requiring him to pay the full $5,000 against plaintiff because, as a joint tortfeasor, he is entitled to contribution from defendant Muscatell.

On the other hand, plaintiff contends the $3,743.11 paid to her was pursuant to the contractual coverage available to her, both as a named insured and as a guest passenger in the vehicle. She asserts this coverage is available to her regardless of whether defendant Muscatell was at fault in causing the accident.

The nature of plaintiff's medical payment coverage, as opposed to liability coverage, was explained by our Supreme Court as follows:

> '(Insurer's) responsibility under its liability coverage [depends] upon its insured being shown negligent; its responsibility under its [m]edical [p]ayments [c]overage [has] nothing to do with negligence at all.
>
> A claim based on the liability feature of the policy is a tort claim; a claim based on the medical payments feature of the policy is a claim sounding in contract . . . .'

Tart v. Register and Flowers v. Register, 257 N.C. 161, 173, 125 S.E.2d 754, 763 (1962), *citing Distefano v. Delta Fire and Casualty Co.*, 98 So.2d 310 (La. App. 1957). Here, plaintiff's receipt of medical payment coverage was not on behalf of defendant Ysteboe but due to a contractual obligation. For this reason, plaintiff's receipt of payment under this policy does not raise an issue of double or overcompensation as defendant Ysteboe contends.

This case raises the collateral source rule which provides "[a] tort-feasor [sic] should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981) (holding plaintiff's sick leave benefits from her employer were included within protection of collateral source rule). *See also Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993) (holding automobile insurer was not entitled to $10,000 credit against its underinsured motorist coverage limit for amount paid to insured under medical payments provision of policy); 2 Clifford S. Fishman, *Jones on Evidence* § 13.26 at 526-27 (7th ed. 1994) (citations omitted) (stating "[b]ecause [under common law], plaintiff's receipt of other collateral benefits is irrelevant in assessing the amount of compensatory damages the tortfeasor owed to the plaintiff, under the [collateral source rule], evidence of such benefits is inadmissible, and cannot be utilized by the tortfeasor to reduce his claim for damages.") Therefore, under the collateral source rule, neither defendant may benefit from a credit or setoff of money paid to plaintiff under the medical payment coverage.

Notwithstanding the collateral source rule, this State's Uniform Contribution Among Tortfeasors Act (Act) provides in pertinent part:

> (a) . . . where two or more persons become jointly or severally liable in tort for the same injury to person or property for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (b) The right of contribution exists only in favor of a tort-feasor [sic] who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor [sic] is compelled to make contribution beyond his own pro rata share of the entire liability.
>
> . . .

N.C. Gen. Stat. § 1B-1(a)-(b) (1999).

By filing the cross claim, defendant Ysteboe took advantage of the potential for contribution under the Act, since the trial court found he and defendant Muscatell were jointly and severally liable for plaintiff's injuries. Thus, upon payment of the $5,000 judgment by

defendant Ysteboe, he is entitled to contribution from defendant Muscatell.

For the foregoing reasons, we vacate the judgment and remand the case to the trial court for a modification of the judgment to provide for contribution to defendant Ysteboe from defendant Muscatell.

Vacated and remanded.

Judges McCULLOUGH and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 JULY 2001

AKINS v. CITY OF THOMASVILLE No. 00-1294	Davidson (00CVS560) (00CVS561)	Dismissed
ALVIS v. LUNDY No. 00-603	Lee (99CVS315)	Reversed and remanded
BAKER v. STRICKLAND No. 00-1030	Columbus (99CVS01416)	Reversed and remanded
BALOCH v. N.C. DEP'T OF CORR. No. 00-150	Wake (99CVS3635)	Vacated and remanded
BRANCH BANKING & TR. CO. v. REFLECTIONS CARWASH No. 00-788	Mecklenburg (97CVS8498)	Affirmed
CAROLINA STRATEGIES GRP., L.L.C. v. COWGILL ENTERS., INC. No. 00-748	Mecklenburg (98CVS4671)	Dismissed
COBB v. COBB No. 00-398	Caswell (93CVD287)	Reversed and remanded
COLLIER v. PARKER No. 00-929	Ind. Comm. (727745)	Affirmed
CULBRETH v. CULBRETH No. 00-1051	Durham (99CVD4194)	Affirmed
FISHER v. ARKANSAS BEST FREIGHT SYS. No. 00-838	Ind. Comm. (555169)	Affirmed
GREENE v. DANA CORP. No. 00-934	Ind. Comm. (547882)	Affirmed
HACKNEY v. CLEGG'S TERMITE & PEST CONTROL, INC. No. 00-472	Craven (97CVS1938)	No error
HARRY v. CRESCENT RES., INC. No. 00-958	Mecklenburg (97CVS14726)	Affirmed
HOBSON v. HITCHCOCK No. 00-971	Guilford (98CVS5189)	Affirmed
HONBARRIER v. BEAVER No. 00-668	Rowan (99CVD118)	Affirmed
HUTTON v. SHEPHERD No. 00-902	Forsyth (99CVS4177)	Affirmed

IN RE KNAFEL No. 00-599	Alamance (99J136) (98J81)	Affirmed
IN RE REINHARDT No. 00-1136	Mecklenburg (98J765) (98J766) (98J767)	Affirmed
IN RE WILL OF SUGG No. 00-876	Wake (98SP0020) (98CVS14447)	No error
JARRETT v. LORRICK INDUS. No. 00-939	Ind. Comm. (833469)	Affirmed
JONES v. CROWN AUTO. MGMT. CO. No. 00-901	Ind. Comm. (625017)	Affirmed
KALMBACH v. GAH INT'L, LTD. No. 00-303	Mecklenburg (98CVS15752)	Affirmed
KINGS MOUNTAIN BD. OF EDUC. v. CLEVELAND CTY. BD. OF COMM'RS No. 00-1180	Cleveland (00CVS1000)	Dismissed
MINTZ v. FOWLER No. 00-900	Cherokee (98CVS506)	Reversed and remanded
SHOEMAKE v. SIDES No. 00-872	Yadkin (98CVS816)	Affirmed in part, reversed in part
STATE v. ALSTON No. 00-665	Lee (99CRS4024)	No error
STATE v. BROADNAX No. 00-1103	Rockingham (99CRS004921)	No error
STATE v. BROCK No. 00-622	Stanly (98CRS1427) (99CRS0363) (99CRS2051)	No error in trial; judgment arrested in 99CRS0363; remanded for entry of an order arresting judgment in 99CRS0363
STATE v. BURCH No. 00-836	McDowell (99CRS4254)	Affirmed
STATE v. CHILDS No. 00-1234	Rowan (99CRS15254)	No error

STATE v. COVINGTON No. 00-333	Columbus (97CVS9652) (97CVS9653) (97CRS9655) (97CRS9657) (97CRS9659) (97CRS9658)	No error
STATE v. EDWARDS No. 00-1064	Buncombe (98CRS68559) (99CRS45) (99CRS46) (99CRS47) (00CRS3262) (00CRS3263)	Affirmed
STATE v. EVANS No. 00-1107	Mecklenburg (97CRS29836) (97CRS29837)	No error at trial
STATE v. FORREST No. 00-653	Cabarrus (99CRS14267) (99CRS14268) (99CRS14269)	No error
STATE v. GARNER No. 00-1167	Guilford (00CRS077464)	No error
STATE v. McCLAIN No. 00-431	New Hanover (99CRS1573)	No error
STATE v. McRAE No. 00-1237	Mecklenburg (99CRS31492) (99CRS31493) (99CRS31494) (99CRS31496)	No error as to trial; remanded for correction of clerical error in judgment
STATE v. MONK No. 00-773	Cumberland (97CRS49852) (97CRS49853)	No error
STATE v. PULLIAM No. 00-733	Buncombe (98CRS68597)	No prejudicial error
STATE v. SABLON No. 00-1229	Pasquotank (00CRS481)	No error
STATE v. SHOOTER No. 00-236	Robeson (96CRS18294)	No error
STATE v. SIMUEL No. 00-854	Wake (98CRS018871) (98CRS018872)	Affirmed

STATE v. STORIE No. 00-944	Caldwell (99CRS7602) (99CRS7603) (99CRS7604) (99CRS7605) (99CRS7606) (99CRS7607) (99CRS7608) (99CRS7609) (99CRS7610) (99CRS7611) (99CRS7612) (99CRS7613) (99CRS7614) (99CRS7615) (99CRS7616) (99CRS7617) (99CRS7618) (99CRS7619) (99CRS7620) (99CRS7621) (99CRS7622) (99CRS7623) (99CRS7624) (99CRS7625) (00CRS224) (00CRS225) (00CRS226)	No error
STATE v. THOMAS No.00-600	Cumberland (98CRS10580)	No error
STATE v. THOMPSON No. 00-771	Union (99CRS1464) (99CRS1465)	No error
STATE v. TINGLE No. 00-45	Orange (97CRS5722) (97CRS5723) (97CRS5724) (97CRS5725) (97CRS5726) (97CRS5727)	Affirmed in part, and remanded in part for resentencing in a manner not inconsistent with this opinion
STATE EDUC. ASSISTANCE AUTH. v. GARDNER No. 00-612	Wake (97CVS01942)	No error
TEASLEY v. BRAKE No. 00-550	Durham (92CVD3896)	Affirmed
WALKER v. GILLESPIE No. 00-928	Surry (99CVS157)	No error

WELDIN v. HARDY No. 00-652	Pitt (97CVS2727)	Dismissed
WELLS v. HEALTH MGMT. ASSOCS., INC. No. 00-659	Richmond (98CVS14)	Affirmed
WOODWARD v. N.C. MGMT. CO. No. 99-1337	Nash (93CVS2069)	Reversed and remanded

BRENDA HENRY AND FOSTER HENRY INDIVIDUALLY, AND BRENDA HENRY AS GUARDIAN AD LITEM FOR CRYSTAL HENRY, A MINOR CHILD, PLAINTIFFS V. SOUTHEASTERN OB-GYN ASSOCIATES, P.A., JAMES L. PRICE, M.D., AND LAIF LOFGREN, M.D., DEFENDANTS

No. COA00-37-2

(Filed 7 August 2001)

Evidence— medical malpractice—expert testimony—standard of care

The trial court did not err in a medical malpractice action by excluding testimony from plaintiff's expert and by granting a directed verdict for defendants where the alleged malpractice occurred in Wilmington and plaintiffs failed to establish that their expert was familiar with the standard of care practiced in Wilmington or similar communities. The previous opinion in the same case at 142 N.C. App. 561 is superseded.

Judge GREENE concurring in the result.

Judge HUDSON dissenting.

Appeal by plaintiffs from order entered 20 September 1999 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Originally heard in the Court of Appeals 13 February 2001. An opinion affirming the order of the trial court was filed on 3 April 2001. Plaintiffs' Petition for Rehearing was filed on 7 May 2001, granted on 23 May 2001, and heard without oral argument, but with additional briefs. This opinion supersedes the previous opinion filed on 3 April 2001.

Britt & Britt, P.L.L.C., by William S. Britt, for plaintiff appellants.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by O. Drew Grice, Jr., and Robert D. Walker, Jr., for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs Mr. and Mrs. Henry brought this medical malpractice action on behalf of themselves and their daughter, Crystal Henry, seeking recovery for the allegedly negligent prenatal and obstetrical care rendered by defendants. At trial, plaintiffs tendered one expert witness: Dr. Chauhan, an OB-GYN specialist practicing in Spartanburg, South Carolina, and licensed in South Carolina and

Georgia. After finding that plaintiffs failed to present competent medical testimony establishing the relevant standard of care, the trial court granted directed verdict in defendants' favor. Plaintiffs appealed from this judgment.

Plaintiffs argue that the trial court erred in excluding their medical expert's testimony as to the applicable standard of care, and as a result, subsequently directing verdict in favor of defendants. We find no error by the trial court, and therefore affirm directed verdict for defendants.

Plaintiffs contend that, although Dr. Chauhan was unfamiliar with the medical community in Wilmington, North Carolina, where defendants practice and the alleged malpractice occurred, he could nevertheless competently testify to the prevailing standard of prenatal and obstetrical care in Wilmington, because he was familiar with the applicable national standard of care. Plaintiffs further argue that Dr. Chauhan was familiar with the standard of care in Spartanburg, South Carolina, and that this standard would be the same standard applied at Duke Hospital in Durham, North Carolina, or at UNC-Hospital in Chapel Hill, North Carolina. Thus, argue plaintiffs, Dr. Chauhan could testify to the applicable standard of care in Wilmington even though he was unacquainted with its medical community.

N.C. Gen. Stat. § 90-21.12 prescribes the relevant standard of care in a medical malpractice action:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical . . . care, the defendant shall not be liable . . . unless . . . the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in *the same or similar communities* at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (1999) (emphasis added). The report of a study commission recommending adoption of N.C. Gen. Stat. § 90-21.12 makes clear that the Legislature intended to avoid a national standard of care for North Carolina health care providers:

> The North Carolina Supreme Court has gone only as far as a "same or similar communities" standard of care, and the

> Commission recommends that this concept be enacted into the General Statutes to avoid further interpretation by the Supreme Court which might lead to regional or national standards for all health care providers.

North Carolina Professional Liability Insurance Study Commission, Report to the Gen. Assembly of 1976, 32 (1976). This Court has also stated that "[b]y adopting the 'similar community' rule in G.S. 90-21.12 it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers . . . ." *Page v. Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980). *See also Thompson v. Lockert*, 34 N.C. App. 1, 4-5, 237 S.E.2d 259, 261, *disc. review denied*, 293 N.C. 593, 239 S.E.2d 264 (1977) (specifically rejecting the application of a general or national standard of care for even a "highly trained and certified specialist"); Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. Rev. 711, 734, 740 (1984) (noting that the "North Carolina General Assembly's apparent purpose in codifying the same or similar community standard for health care providers was to foreclose judicial adoption of a regional or national standard" and that such an adoption would be "inconsistent with North Carolina case law and statutes").

After reviewing Dr. Chauhan's testimony in its entirety, we find that the record indicates he failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities. Although Dr. Chauhan testified that he was familiar with the national standard of care, there is no evidence that the national standard of care is the standard practiced in Wilmington. *See Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997) ("Although [the expert witness] testified that he was familiar with the standard of care in North Carolina, he failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community."). Moreover, there is no evidence in the record that the standard of care practiced in Wilmington is the same standard that prevails in Durham or Chapel Hill, or that these communities are the "same or similar."

In *Tucker*, a recent case remarkably similar to the one before us, plaintiffs sought to recover from defendants physician and hospital "for an allegedly negligently repaired episiotomy performed on [plaintiff patient] following child birth [*sic*] in Winston-Salem, North Carolina." *Tucker*, 127 N.C. App. at 197, 487 S.E.2d at 828. The trial court found, and this Court affirmed, that plaintiffs' expert witness

could not establish the standard of care, and that therefore directed verdict for defendants was proper. Because plaintiffs' witness was familiar only with the standard of care in North Carolina, rather than the standard of care in Winston-Salem, his testimony was "irrelevant." *Tucker*, 127 N.C. App. at 199, 487 S.E.2d at 829. The *Tucker* Court further noted that the "same or similar communities" standard "allows for consideration of the effect that variations in facilities, equipment, funding, etc., throughout the state might have on the standard of care." *Id.* Thus, it is clear that the concept of an applicable standard of care encompasses more than mere physician skill and training; rather, it also involves the physical and financial environment of a particular medical community. The *Tucker* Court concluded that "the problem with [plaintiffs' expert witness'] testimony was not that he had not practiced in North Carolina; rather, it was his failure to testify that he was familiar with the standard of care in Winston-Salem or similar communities." *Id.*

Plaintiffs nevertheless argue that a uniform standard of care governs prenatal and obstetrical care to which Dr. Chauhan could competently testify. Plaintiffs note that, "if the standard of care for a given procedure is 'the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community[.]' " *Marley v. Graper*, 135 N.C. App. 423, 428, 521 S.E.2d 129, 134 (1999) (quoting *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985)), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000). This Court, however, has recognized very few "uniform procedures" to which a national standard may apply, and to which an expert may testify. *See, for example, Haney*, 71 N.C. App. at 736, 323 S.E.2d at 434 (allowing expert medical witness to testify that taking and reporting vital signs of a deteriorating patient was the same for nurses in accredited hospitals across the country); *Page*, 49 N.C. App. at 536, 272 S.E.2d at 10 ("nursing practices in connection with patients' use of a bedpan are so routine and uncomplicated that the standard of care should not differ appreciably between . . . neighboring counties").

The case before us concerns the prenatal care of a patient with gestational diabetes and the delivery of an infant suffering from shoulder dystocia. Such a scenario involves medical procedures considerably more complicated than the taking of vital signs or the placement of bedpans. Accordingly, a national standard cannot be applied to defendants' conduct.

Furthermore, plaintiffs' reliance upon *Marley* is misplaced. In *Marley*, plaintiffs contended that the trial court erred in allowing testimony by defendants' expert witness, who stated that the defendant physician "*met* the standard of care for plastic surgery not only in [Greensboro] but anywhere in the United States." *Marley*, 135 N.C. App. at 430, 521 S.E.2d at 134 (emphasis added). Affirming the trial court, this Court stated that "[a]lthough the [expert] witness did not testify that he was familiar with the standard of care for Greensboro, the testimony he did provide *obviated the need for such familiarity*." *Id.* (emphasis added). The Court explained that, because the expert testified that defendant's performance "met the highest standard of care found anywhere in the United States," the Court reasoned that "if the standard of care for Greensboro matched the highest standard in the country, [defendant's] treatment of [plaintiff] met that standard; if the standard of care in Greensboro was lower, [defendant's] treatment of [plaintiff] exceeded the area standard." *Marley*, 135 N.C. App. at 430, 521 S.E.2d at 134. Thus, the testimony was "sufficient to meet the requirements of section 90-21.12," and the trial court did not err in allowing the witness to testify. *Id.*

In the instant case, plaintiffs failed to establish that their expert was familiar with the standard of care practiced in Wilmington or a similar community. Further, unlike *Marley*, Dr. Chauhan would have testified that defendants *failed* to meet the national standard of care, creating an obvious need for the establishment of the applicable standard through proper testimony. Even if Dr. Chauhan was familiar with the standard of care in Chapel Hill or Durham, there was no evidence that a similar standard of care prevailed in Wilmington. "N.C.G.S. § 90-21.12 mandates that the relevant standard of care is that of the community where the injury occurred (or similar communities) and not that of the state as a whole." *Tucker*, 127 N.C. App. at 198, 487 S.E.2d at 829. To adopt plaintiffs' argument, this Court would have to ignore the plain language of N.C. Gen. Stat. § 90-21.12 and its evidentiary requirement that the "similar community" rule imposes, as well as well-established case law. This we decline to do. *See Baynor v. Cook*, 125 N.C. App. 274, 277, 480 S.E.2d 419, 421, *disc. review denied*, 346 N.C. 275, 487 S.E.2d 537 (1997) (rejecting plaintiff's assertion that our law "allows a doctor's conduct to be judged against a national standard of care when the standard of care is the same across the country"); *In re Dailey v. Board of Dental Examiners*, 60 N.C. App. 441, 443, 299 S.E.2d 473, 475 (1983) (noting that "[i]t is clear from the wording of [N.C. Gen. Stat. § 90-21.12] that the test is not that of a statewide standard of health care"); *Tucker*,

127 N.C. App. at 197, 487 S.E.2d at 829; *Thompson*, 34 N.C. App. at 4, 237 S.E.2d at 261.

As Dr. Chauhan was unfamiliar with the relevant standard of care, his opinion as to whether defendants met that standard is unfounded and irrelevant, and thus we hold that the trial court properly excluded Dr. Chauhan's testimony. There being no other expert witnesses to establish defendants' negligence, defendants were entitled to a directed verdict as a matter of law. In light of our holding, we need not address further argument by defendants. The trial court is hereby

Affirmed.

Judge GREENE concurs in the result with separate opinion.

Judge HUDSON dissents.

GREENE, Judge, concurring in the result.

I fully agree with Judge McCullough that our General Assembly has rejected the use of a regional or national standard of care for judging the care provided by healthcare professionals to their patients. N.C.G.S. § 90-21.12 (1999). Instead, in North Carolina, healthcare professionals are held to a standard of care practiced among other members of their profession (1) in the same or a similar community, (2) with similar training, and (3) with similar experience. *Id.* The rationale for focusing on the standard of practice in the same or a similar community, as opposed to a national standard, is that available medical resources, i.e., the conditions, facilities, and equipment available to a healthcare professional, may differ from community to community. *See* David W. Louisell & Harold Williams, 1 *Medical Malpractice* § 8.04, at 8-36.4 (2001); *Tucker v. Meis*, 127 N.C. App. 197, 199, 487 S.E.2d 827, 829 (1997) (noting the "same or similar community" standard "allows for consideration of the effect that variations in facilities, equipment, funding, etc., . . . might have on the standard of care"). Thus, section 90-21.12 permits a physician, otherwise qualified under Rule 702 of the North Carolina Rules of Evidence, to testify regarding the applicable standard of care in a medical malpractice case when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in

the defendant's community and is familiar with the standard of care in other communities having access to similar resources.

In this case, Dr. Chauhan did not testify that he was familiar with defendants' training, experience, or the standard of care practiced in defendants' community. Additionally, Dr. Chauhan did not testify he was familiar with the resources available in defendants' community as well as the standard of care practiced in communities with similar resources. Thus, Dr. Chauhan's testimony was not sufficient to establish the applicable standard of care in this case. Accordingly, for the reasons herein I would affirm the trial court's directed verdict in favor of defendants.

HUDSON, Judge dissenting.

This Court filed its original opinion in this case on 3 April 2001, along with my dissent. Because the substance of the majority decision has not changed on rehearing, my dissenting opinion remains the same.

In the case at bar, plaintiffs' expert witness was prepared to testify at trial that the standard of care for prenatal treatment in Wilmington, North Carolina in 1990 was the same as the standard of care for prenatal treatment in any other location in the United States, and that he was familiar with this standard. He was further prepared to testify that defendants failed to employ certain fundamental medical procedures in their rendering of prenatal care. However, the trial court excluded this testimony at trial on the grounds that the expert had testified during his deposition that he did not know anything about Wilmington, North Carolina, the city in which defendants practice. Because his testimony was excluded in large part, the trial court granted defendants' motion for a directed verdict. The issues on appeal are (1) whether the trial court erred in excluding the expert's testimony at trial, and (2) whether such testimony, had it been admitted, would have satisfied the "same or similar" community standard pursuant to N.C.G.S. § 90-21.12 (1999). I believe the trial court erred in excluding the testimony, and that the testimony would have satisfied the statute.

In medical malpractice actions against individual health care providers, G.S. § 90-21.12 requires that testimony must be presented concerning the standard of care in "the same or similar communities." *See Thompson v. Lockert*, 34 N.C. App. 1, 5, 237 S.E.2d 259, 261 (1977) (clarifying distinction between actions against individual

"health care providers," including "physicians and surgeons," and actions against accredited hospitals). I believe this statutory requirement may be satisfied in at least three ways. It is clear that the statute is satisfied where an expert witness testifies that he is familiar with the standard of care in the community in question as a result of practicing in that community. It is also clear that the statute is satisfied where an expert witness testifies that he is familiar with the standard of care in the community in question as a result of practicing in a similar community. In addition, I believe the statute is satisfied where an expert witness testifies that he is familiar with the standard of care in the community in question as a result of the existence of, and his familiarity with, a standard of care for the treatment in question that is uniform across the country, and which does not vary depending upon the community.

This third approach to establishing the applicable standard of care in actions against individual health care providers may, at first blush, appear to be the equivalent of applying a national standard of care. And, as the majority aptly notes, it is clear that the legislature, in codifying the same or similar community approach in G.S. § 90-21.12, specifically intended not to adopt a national standard of care. However, I believe there is a crucial, albeit subtle, distinction between adopting a national standard of care as a matter of law, and allowing a party to present evidence of a national standard of care as a matter of fact. Without adopting a national standard of care as a matter of law, I believe G.S. § 90-21.12 permits the jury to consider factual evidence of the existence of a national standard of care in the process of determining the standard of care in the community in question.

This distinction was addressed in *Baynor v. Cook*, 125 N.C. App. 274, 480 S.E.2d 419 (1997), a medical malpractice action against individual doctors and their private partnerships. In *Baynor*, the plaintiff presented two expert witnesses who testified that there was a uniform standard of care across the country for the diagnosis and treatment of a thoracic aortic rupture (TAR), and that the defendant doctor, located in Beaufort County, had deviated from this standard of care. The defendants presented multiple expert witnesses who testified that they were familiar with the standard of care of an emergency room physician in Beaufort County, and that the defendant doctor had not deviated from this standard of care. *Id.* at 275-76, 480 S.E.2d at 420. At the close of the trial, the plaintiff requested the trial court to instruct the jurors that if they found a national standard of

care existed for the diagnosis and treatment of TARs, they could hold the defendants to this national standard of care in determining whether the defendants had been negligent. *Id.* at 276, 480 S.E.2d at 420. The trial court denied this request and, instead, instructed the jury on the standard of care as mandated by G.S. § 90-21.12 and set forth in the Pattern Jury Instructions for North Carolina. *Id.* On appeal the plaintiff argued that the trial court committed reversible error in denying her request for an instruction on the national standard of care. We concluded that the trial court's denial of the plaintiff's request was not error because North Carolina has not adopted a national standard of care as a matter of law. *Id.* However, we also noted that

> the jury heard testimony that the community standard in Beaufort County for the treatment of TARs is the same across the country. *The trial court properly allowed plaintiff's experts to testify that based on their familiarity with the national standard of care as related to a common medical issue (TARs), this standard of care did not vary depending on the community.*

Id. at 278, 480 S.E.2d at 421 (emphasis added).

These comments clarify that a plaintiff may satisfy G.S. § 90-21.12 by offering the testimony of an expert who asserts that (1) the standard of care for the treatment in question is uniform across the country and does not vary depending upon the community, and (2) he is familiar with this national standard. Such evidence is clearly some evidence of the standard of care in the community in question. When this type of evidence is offered by a plaintiff, I believe it should be presented to the jury for consideration, as it was in *Baynor*, and not excluded by the trial court. This comports with the language of the statute itself, which provides that a defendant in an action for medical malpractice shall not be liable "unless *the trier of the facts is satisfied by the greater weight of the evidence* that the care of such health care provider was not in accordance with" the applicable standard of care. G.S. § 90-21.12 (emphasis added). The statute expressly contemplates a determination by the jury, rather than the trial court, as to whether the greater weight of the evidence presented by the parties establishes a breach of the applicable standard of care.

Furthermore, admitting such evidence for consideration by the jury is not the same as adopting a national standard of care as a matter of law. If our State had adopted a national standard of care as a

matter of law, the standard of care actually practiced in a defendant's community would be irrelevant to the legal analysis, even if that standard of care were lower than the national standard of care. Thus, a local doctor could be found negligent even where his treatment conformed to the standard of care practiced among the doctors in his community. On the other hand, the same or similar community approach, which we have adopted in North Carolina, recognizes that there are often differences in the standards of care practiced in different communities. Under the same or similar community approach, these differences are relevant and central to the legal analysis because the jury must ultimately determine the applicable standard of care in each particular case. However, in making this determination, there is no reason why a jury should not be allowed to consider factual evidence of a national standard of care for the medical procedure in question.

Here, the named defendants are two individual doctors and their private partnership association. At trial, plaintiffs offered the expert medical testimony of Dr. Sunseet P. Chauhan. Dr. Chauhan had been deposed by defendants prior to trial. At the deposition, Dr. Chauhan testified that the only information he had about the medical community in which defendants practiced was the fact that it is located in the United States of America. He also testified that he had not undertaken a comparison of this community with any other community with which he was familiar. However, Dr. Chauhan testified that the standard of care in Wilmington, North Carolina in 1990 for the type of prenatal care at issue was the same as that in any other location in the United States, and that this standard did not vary depending upon the community.

Prior to trial, the court denied a motion by defendants to exclude the testimony of Dr. Chauhan based on his lack of familiarity with the local community in question. At trial, counsel for defendants noted that plaintiffs had not supplemented Dr. Chauhan's deposition testimony following the deposition, and therefore, pursuant to N.C.R. Civ. P. 26, requested that the trial court limit Dr. Chauhan's testimony to information contained in his deposition. The trial court indicated that it would rule on any objections to Dr. Chauhan's testimony as they were made during the trial.

Dr. Chauhan took the stand and testified before the jury that he is board certified in the areas of obstetrics, gynecology, and maternal-fetal medicine, with a speciality in high-risk pregnancy. He testified

that he practices in Spartanburg, South Carolina, and teaches medical residents from the Medical University of South Carolina located in Charleston. Dr. Chauhan was admitted as an expert witness. The following questioning transpired during the direct examination of Dr. Chauhan:

> Q. [A]re you familiar with the standard of care for board certified obstetricians/gynecologists practicing in Wilmington, North Carolina, or similar communities, in December of 1990?
>
> A. Yes, sir.
>
> MR. WALKER: Objection, deposition.
>
> THE COURT: Okay. I'm going to sustain the objection.
>
> . . .
>
> Q. All right. In terms of 1990, do you have an opinion . . . as to whether or not the standards of practice for board certified physicians in Wilmington, or similar communities, in 1990 would have been the same in not only Wilmington but throughout North Carolina?
>
> MR. WALKER: Objection. Deposition, if Your Honor please.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Sustained.
>
> . . .
>
> Q. Doctor, do you have an opinion . . . as to whether or not the standards of practice for board certified OB/GYN physicians practicing in Wilmington, North Carolina . . . would be the same as that of a board certified physician practicing at Duke or Chapel Hill, or anywhere in North Carolina in 1990?
>
> MR. WALKER: Objection, if Your Honor please.
>
> THE WITNESS: Yes.
>
> MR. WALKER: Not only 26 but the deposition itself.
>
> THE COURT: Overruled.
>
> Q. Do you have such an opinion?
>
> A. Yes, I do.

Q. What is that opinion?

MR. WALKER: Objection.

THE COURT: I'm going to sustain that.

Q. Doctor, would those standards be the same as the standards of board certified physicians practicing in Spartanburg or in Georgia in 1990?

MR. WALKER: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, it would be. . . .

Q. Doctor, state whether or not the standards of practice for the board certified obstetricians/gynecologists in [Portsmouth Naval Hospital] would have been the same at Camp Lejeune in 1990, to the best of your knowledge?

MR. WALKER: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, they would be.

. . .

Q. Based on your knowledge of those standards, would those standards, in your opinion, be applicable to Wilmington, North Carolina, in 1990?

MR. WALKER: Objection.

THE COURT: Sustained. He's already testified he doesn't know a thing about Wilmington.

The jury was then excused from the courtroom, and the trial court judge explained his perspective to the parties:

[H]ow can you compare an apple if the only thing you've looked at is oranges? I mean, from what I read in this deposition, this gentleman has never been to Wilmington, he'd never talked with anybody from Wilmington at the time of his deposition, that he didn't know anything about Wilmington at the time of the deposition, and then, subsequent to that, there's been no supplementation of his answers from the deposition as were requested or required. That's where I see the problem.

In the absence of the jury, Dr. Chauhan was called back to the stand for voir dire questioning, at which time the following testimony transpired:

> Q. Dr. Chauhan, how can you say you're familiar with the standards of care in Wilmington or similar communities if you have not done a comparison with any communities that you're familiar with versus Wilmington?
>
> . . .
>
> A. The reason is, because the thing I found what was lacking in the care, or below the standard of care, is so fundamental it's applicable everywhere. . . . These are simple guidelines which everyone should follow across the country.

The trial court took the position that because Dr. Chauhan had testified during his deposition that he knew nothing about Wilmington, and because plaintiffs had not supplemented this testimony following the deposition, Dr. Chauhan could not testify as to his familiarity with the standard of care for board certified obstetricians and gynecologists practicing in Wilmington in 1990. I believe the exclusion of this testimony by the trial court was based upon a misunderstanding of the law, and constitutes reversible error. The applicable standard of care may be established by any of the three methods discussed above, and Dr. Chauhan was prepared to establish the applicable standard of care by testifying as to his familiarity with a national standard of care for prenatal treatment that does not vary depending on the community. An expert witness need not be familiar with the particular community in question. He need only be familiar with the applicable standard of care in that community. *See Warren v. Canal Industries*, 61 N.C. App. 211, 215-16, 300 S.E.2d 557, 560 (1983) (holding, in action against a private clinic and an individual doctor, that it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant as long as the witness is familiar with the applicable standard of care). This principle was recently applied in *Marley v. Graper*, 135 N.C. App. 423, 521 S.E.2d 129 (1999), *cert. denied*, 351 N.C. 358, — S.E.2d — (2000). *Marley* involved a medical malpractice action against individual doctors. Therefore, although the concurring opinion is correct in noting that the cases cited in *Marley* for this proposition may have involved accredited hospitals, the holding in *Marley* itself is clear precedent for the application of this principle to actions against individual doctors. I do not believe that *Marley* can

be distinguished simply on the grounds that it involved the testimony of a defendant's expert, rather than a plaintiff's expert. There is no logical reason to treat the testimony of a defendant's expert witness differently than the testimony of a plaintiff's expert witness in terms of the type of evidence required by G.S. § 90-21.12 for establishing the applicable standard of care.

As the majority opinion points out, where an expert testifies regarding a uniform standard of care across the country, it is vital that he also specifically testify that he is familiar with the standard of care in the community in question or similar communities based on his assertion that the uniform standard is, in fact, the standard practiced in the community in question. *See Tucker v. Meis*, 127 N.C. App. 197, 487 S.E.2d 827 (1997) (holding that this requirement applies to cases in which an expert bases his opinion upon either a purported state-wide standard of care or a purported national standard of care); *Howard v. Piver*, 53 N.C. App. 46, 52, 279 S.E.2d 876, 880 (1981). In *Tucker*, we described this necessary element as "the statutorily required connection" between a purported uniform or state-wide standard of care and the same or similar community rule mandated by G.S. § 90-21.12. *Id.* at 198-99, 487 S.E.2d at 829. However, I disagree with the assertion that Dr. Chauhan "failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities." Dr. Chauhan testified during his deposition that he was familiar with the applicable standard of care in Wilmington in 1990. His testimony was based on his assertion that the standard of care for prenatal treatment in Wilmington, North Carolina in 1990 was the same as that in any other location in the United States, and that he was familiar with this uniform standard. This is precisely the "statutorily required connection" discussed in *Tucker*. In my view, the only reason this testimony was not admitted at trial is because the trial court incorrectly ruled that Dr. Chauhan's deposition testimony precluded him from testifying at trial as to his familiarity with the standard of care for prenatal treatment in Wilmington in 1990.

Because plaintiffs could not establish the applicable standard of care without the excluded testimony of Dr. Chauhan, the trial court granted defendants' motion for directed verdict at the close of plaintiffs' evidence. I believe this constitutes reversible error as well. Had Dr. Chauhan's testimony been admitted at trial, as I believe it should have been, defendants would not have had grounds for a directed verdict in their favor. In considering a motion for directed verdict, the question presented is whether the evidence, viewed in the light most

favorable to the non-movant, is sufficient to submit the case to the jury. *Clark v. Perry*, 114 N.C. App. 297, 304, 442 S.E.2d 57, 61 (1994). Where an expert testifies that the standard of care for a particular type of treatment is uniform across the country and does not vary depending on the community, and further testifies that he is familiar with this uniform standard of care, such testimony is admissible and should be considered by the jury. *See Baynor*, 125 N.C. App. at 278, 480 S.E.2d at 421. This is especially the case where the nature of the treatment in question is relatively simple. *See Wiggins v. Piver*, 276 N.C. 134, 138, 171 S.E.2d 393, 395-96 (1970); *Howard*, 53 N.C. App. at 51-52, 279 S.E.2d at 880. In the instant case, Dr. Chauhan's testimony indicated that the alleged negligence by defendants included the failure to undertake certain medical procedures that are considered basic and fundamental in the area of prenatal treatment.

For the reasons stated herein I respectfully dissent. I would reverse the trial court's order granting defendants' motion for a directed verdict. I would remand for a new trial, and hold that Dr. Chauhan's testimony as to his familiarity with the standard of care for prenatal treatment in Wilmington in 1990 is admissible at trial.

ROBERT KERIK AND WIFE, BETTY KERIK; FELIX HEGE; RONALD L. MUSGRAVE AND WIFE, CHRISTINE MUSGRAVE; JAMES V. BUSICK; DON BRANNOCK AND WIFE, MAE C. BRANNOCK; AND DAVIDSON COUNTY NEIGHBORS COALITION, PLAINTIFFS V. DAVIDSON COUNTY; GEORGE F. SOWERS AND WIFE, DOROTHY B. SOWERS; FOLTZ ENTERPRISES; FRED C. SINK; JEFF CECIL; BILLY JOE KEPLEY; BROWN LOFTIN; FRED D. MCCLURE; LARRY W. POTTS; D. REID SINK, JR., MEMBERS OF THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, DEFENDANTS

No. COA00-660

(Filed 7 August 2001)

1. Zoning— ordinance amendment—rezoning property subject to option to purchase—motion to dismiss

The trial court did not err by denying defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 41(b) an action considering a zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase, because the county failed to show any abuse of discretion by the trial court.

2. Zoning— ordinance amendment—rezoning property subject to option to purchase—standard of review—whole record

The trial court erred in its review of defendant board of commissioner's zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase, because: (1) the trial court improperly reviewed the matter de novo; and (2) the proper standard of review for a board of commissioners' legislative decision is the whole record test.

3. Zoning— ordinance amendment—rezoning property subject to option to purchase—contract zoning

The trial court erred by declaring that defendant board of commissioners' zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase was void based on alleged illegal contract zoning, because: (1) the board of commissioners did not enter into a bilateral contract and there is no evidence that a transaction occurred in which either side undertook to obligate itself in any way; and (2) the board of commissioners' actions were the result of a valid exercise of its legislative discretion, and the board did not abandon its independent decision-making role.

4. Zoning— ordinance amendment—rezoning property subject to option to purchase—consideration of permissible uses of property

A zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase was not void based on the board of commissioners' alleged failure to consider all permissible uses of the property within the new zoning classifications, because: (1) the board did consider all permissible uses of the property proposed to be rezoned into the new classifications, as well as other factors relevant to its powers to act in the interests of the public's health, safety, morals, and general welfare; (2) the board's decision is supported by substantial evidence; and (3) the board's actions were not arbitrary and capricious.

5. Zoning— ordinance amendment—rezoning property subject to option to purchase—invalid provision of ordinance separable

Although the board of commissioners exceeded its powers by imposing the restriction of a 100 foot buffer along the western

boundary of certain property that was not imposed on similarly zoned property in any other location in the county, this error does not affect the validity of the remaining zoning ordinance amendment that rezoned the property because Section 16.1 of the board's zoning ordinance expressly declared that should any provision be held to be invalid, the decision does not affect the validity of any of the remaining provisions.

Judge WALKER concurring in the result.

Appeal by defendant Davidson County from judgment entered 15 December 1999 by Judge Sanford L. Steelman, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 28 March 2001.

Roberson Haworth & Reese, P.L.L.C., by William P. Miller, for plaintiff-appellees.

Blanco Tackabery Combs & Matamoros, P.A., by Reginald F. Combs, for defendant-appellees George F. Sowers and wife Dorothy B. Sowers and Foltz Enterprises.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker, for defendant-appellants Davidson County and the Board of Commissioners of Davidson County.

HUNTER, Judge.

Davidson County appeals from the trial court's judgment declaring the rezoning of certain property owned or subject to an option to purchase by George Sowers (hereinafter "Sowers' property") void. On appeal, the primary issue for this Court to determine is whether Davidson County's amendment of its Zoning Ordinance, which in essence rezoned Sowers' property, is in fact void. After a careful review of the record and briefs, we reverse the trial court and hold that the Zoning Ordinance amendment is valid, however the provisions imposing buffers on the property are void, yet separable.

The relevant facts to this action are undisputed. On 14 December 1993, the Board of Commissioners of Davidson County ("Board of Commissioners") adopted a Zoning Ordinance creating, *inter alia*, Rural Agriculture Districts (RA-3), Highway Commercial Districts (HC), Heavy Industrial Districts (HI), Limited Industrial Districts (LI), and Office and Institutional Districts (O/I). Thereafter, on 22 June 1998, George Sowers ("Sowers") submitted an application to the Davidson County Planning and Zoning Department ("Planning

Department") seeking the rezoning of approximately 140.4 acres in Arcadia Township, Davidson County. The application was for the rezoning—and not for a conditional use permit—of the following contiguous parcels of land:

Parcel I (approximately 5.9 acres) from RA-3 to HC.

Parcel II (approximately 26.8 acres) from RA-3 to HC.

Parcel III (approximately 61.1 acres) from RA-3 to HI.

Parcel IV (approximately 5.4 acres) from LI to HC.

Parcel V (approximately 21 acres) from LI to HI.

Parcel VI (approximately 5.6 acres) from RA-3 to LI.

Parcel VII (approximately 44 acres) from RA-3 to O/I.

Along with the application, Sowers submitted (1) a map, which depicted the parcels for which he sought rezoning, the zoning classifications existing at the time of the application, and the proposed classifications, and (2) a memo dated 23 June 1998, which outlined the proposed uses on the parcels to be rezoned and described various conditions to be placed upon the parcels, including undisturbed buffers, proposed roadways, and the proposed relocation of an existing non-conforming use. On 9 July 1998, Sowers revised his rezoning application to add additional comments regarding Parcels III and V.

While awaiting a hearing on his application, Sowers sent a series of memos to each member of the Board of Commissioners regarding the property he sought to have rezoned. These memos referenced such topics as Sowers' intent to offer Davidson County approximately twenty acres to be used as a park, a sewer project for the proposed rezoned property, and if the Board of Commissioners rejected the proposed sewer project, Sowers' intent to revert to an alternative plan for residential housing on the property.

Ultimately, the Planning Department staff examined Sowers' application and prepared a favorable recommendation (with the exception that the staff recommended that Parcel III be rezoned LI instead of HI, as requested). On 21 July 1998, the Davidson County Planning and Zoning Board ("Planning Board") held a hearing on Sowers' rezoning request. At the completion of the hearing, the Planning Board voted four to one to recommend approval of Sowers' application for rezoning, including the rezoning of Parcel III to LI. The application was then referred to the Board of Commissioners.

On 3 August 1998, the Board of Commissioners held a public hearing to consider Sowers' application. At the completion of this hearing, the Board of Commissioners voted five to two to approve the rezoning as recommended by the Planning Board, but with the addition of a 100 foot buffer along the western edge of Parcel V, at its boundary with Parcel VIII.

Subsequently, on 1 October 1998, Robert and Betty Kerik, Felix Hege, Ronald and Christine Musgrave, James Busick, Don and Mae Brannock, and the Davidson County Neighbors Coalition ("plaintiffs") instituted this action seeking a judgment declaring the rezoning of Sowers' property by Davidson County illegal and void. On 23 August 1999, a hearing was held on the parties' motions for summary judgment before the Honorable Sanford L. Steelman, Jr., of the Superior Court of Davidson County. By order filed 8 September 1999, Judge Steelman granted summary judgment in Davidson County's favor and dismissed thirteen of plaintiffs' sixteen claims, but denied summary judgment and left pending the claims that (1) the rezoning was arbitrary and capricious, (2) the rezoning constitutes unlawful contract zoning, and (3) Sowers failed to show before the Board of Commissioners that the land was suitable for all purposes in the proposed zoning classification.

Then, on 15 November 1999, this matter came before Judge Steelman for a non-jury trial (the parties having waived their right to a trial by jury). At trial, the court accepted into evidence Davidson County's Zoning Ordinance, Sowers' rezoning and revised rezoning applications, minutes of both the Planning Board and the Board of Commissioners, a tape recording and transcript of the public hearing before the Board of Commissioners on 3 August 1998, as well as all other evidence that was before the Board of Commissioners during the rezoning process. Significantly, the court also admitted the affidavits of several involved parties (including the affidavit of Guy Leslie Cornman ("Cornman"), Zoning Administrator for Davidson County), and the testimony of four witnesses (again, including Cornman).

After the trial, Judge Steelman entered a judgment on 15 December 1999 declaring that the rezoning of Sowers' property was void on the grounds that it was illegal contract zoning, and that the action of Davidson County in rezoning the property was arbitrary and capricious. Specifically, Judge Steelman found that there was an agreement on the part of Sowers to maintain certain buffers on his property in consideration for the rezoning by Davidson County.

Therefore, Judge Steelman considered the rezoning to constitute illegal contract zoning, which tainted the entire rezoning process. Davidson County appeals.

[1] First, Davidson County contends that the trial court erred in denying its motion to dismiss. We disagree.

At the close of plaintiffs' evidence, Davidson County made a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (1999), which was subsequently denied. "Dismissal under Rule 41(b) is left to the sound discretion of the trial court." *Smith v. Quinn*, 91 N.C. App. 112, 114, 370 S.E.2d 438, 439 (1988), *rev'd on other grounds*, 324 N.C. 316, 378 S.E.2d 28 (1989). Therefore, "the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion." *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985). At bar, Davidson County has failed to show any abuse of discretion by the trial court. Thus, this assignment of error is overruled.

[2] Next, Davidson County argues that the amendment of its Zoning Ordinance, which rezoned Sowers' property, is valid. After a careful review of the "whole record," we hold that the Zoning Ordinance amendment is valid, however the provisions imposing buffers on the property are void, yet separable.

"[A]s a general matter, the power to zone real property is vested in the General Assembly by article II, section 1, of the North Carolina Constitution." *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). "This zoning power may be and has been conferred by the General Assembly upon various local governments by legislative enactment." *Id.* In Davidson County, this zoning power has been conferred upon its Board of Commissioners.

"Zoning decisions are typically characterized as being in one of four different categories—legislative, advisory, quasi-judicial, and administrative." *County of Lancaster v. Mecklenberg County*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993). In fact, we recognize that zoning decisions regarding *conditional use and special use permits* are quasi-judicial in nature, and thus require judicial review which includes:

(1) Reviewing the record for errors in law,

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

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

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

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

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980); *see also Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974).

However, in the case *sub judice*, we are dealing with a Board of Commissioners' *rezoning* decision. Generally, N.C. Gen. Stat. § 153A-344(a) (1999) allows counties to amend their zoning ordinances for rezoning purposes. Accordingly, "[a]doption, amendment, or repeal of a zoning ordinance is a legislative decision that must be made by the elected governing board—the city council or the county board of commissioners. . . ." David W. Owens, *Legislative Zoning Decisions Legal Aspects*, at 36 (2d ed. 1999). In other words, "[r]ezoning is a legislative act . . . ." *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360 (1986); *see also Brown v. Town of Davidson*, 113 N.C. App. 553, 556, 439 S.E.2d 206, 208 (1994). Thus, a Board of Commissioners, in amending its Zoning Ordinance for rezoning purposes, is involved in a legislative act. Consequently, the review of a Board of Commissioners' legislative authority is quite distinct from that review utilized when a Board is acting in a quasi-judicial nature.

"A county's legislative body has authority to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare." *Willis v. Union County*, 77 N.C. App. 407, 409, 335 S.E.2d 76, 77 (1985). "Ordinarily, the only limitation upon [the Board of Commissioner's] legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971). Furthermore:

> When the most that can be said against such [rezoning] ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of

> determining whether its action is in the interest of the public health, safety, morals, or general welfare. . . .

In re Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938).

Therefore, in determining whether a Board of Commissioners' decision is "arbitrary and capricious, . . . the reviewing court must apply the 'whole record' test." *Sun Suites Holdings, LLC, v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 528, *writ of supersedeas and disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (quoting *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (citation omitted), *disc. review denied*, 351 N.C. 357, 540 S.E.2d 349 (1999)); *see Armstrong v. McInnis*, 264 N.C. 616, 625-26, 142 S.E.2d 670, 676-77 (1965) (in a declaratory judgment action upholding a city council's rezoning decision, the trial court sat "as an appellate court and was authorized only to review questions of law and legal inferences arising on the record"). The "whole record" test

> ". . . requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the [Board of Commissioners'] decision is supported by 'substantial evidence.' *Pisgah Oil[v. Air Pollution Control Agency*, 139 N.C. App. [402,] 405-06, 533 S.E.2d [290,] 292-93 [(2000)] (quoting *Amanini[v. N.C. Dept. of Human Resources]*, 114 N.C. App. [668,] 674, 443 S.E.2d [114,] 118 [(1984)]). Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Dialysis Care v. N.C. Dept. of Health*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000) (quoting *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (citations omitted)). The reviewing court should not replace the [Board of Commissioners'] judgment as between two reasonably conflicting views; '[w]hile the record may contain evidence contrary to the findings of the [Board], this Court may not substitute its judgment for that of the [Board].' " *Id.* (citation omitted).

SBA, Inc. v. City of Asheville City Council, 141 N.C. App. 19, 26-27, 539 S.E.2d 18, 22 (2000).

At bar, Judge Steelman conducted a full trial, which included the consideration of all of the evidence that was before the Board of Commissioners during the rezoning process. However, the trial court also considered affidavits of several involved parties and heard the

testimony of four witnesses—and admittedly relied on the testimony of at least one, Cornman, in arriving at its decision. Although the court did not state which standard of review it used, the trial court did include in its findings of fact that:

> 5. The Court has had the opportunity to observe the testimony of each witness, to assess the credibility of each witness, and to determine the weight to be given to the testimony of each witness.
>
> . . .
>
> 17. Mr. Cornman testified that his understanding of the action of the Board of Commissioners was that they declined to rezone [the 100 foot buffer on Parcel V] . . . . The Court finds this testimony not to be credible. This testimony is contradicted by Mr. Cornman's own affidavit . . . .

Thus, it is clear from Judge Steelman's judgment that he improperly reviewed this matter *de novo*. Again, the proper standard of review for a Board of Commissioners' legislative decision, including a determination on whether it engaged in contract zoning, is the "whole record" test. Consequently, the trial court committed error in its review.

We note that in his concurring opinion, Judge Walker presents the cases *Hall v. City of Durham*, 88 N.C. App. 53, 362 S.E.2d 791 (1987), and *Allgood v. Town of Tarboro*, 281 N.C. 430, 189 S.E.2d 255 (1972), *inter alia*, to support his conclusion that a trial court may receive evidence in addition to the record upon a challenge of a local government's rezoning decision. However, we have failed to find any instance in those cases, or any other case dealing with the legislative decision of rezoning, where the trial court actually heard new evidence, outside of the record.

In fact, in *Hall*, *supra*, the trial court received into evidence unedited and *edited* copies—with council members' comments deleted—of the city council's minutes, and an affidavit from a citizen explaining the omitted portions of those minutes. This evidence, therefore, did not constitute evidence outside of the city council's proceedings. Thus, we reiterate that the proper review of a local government's rezoning decision should be based on the "whole record." "It is not for the Superior Court or for this Court to review the action of the Town Council for the purpose of substituting the judgment of the Court for that of the Council concerning the wisdom of" rezoning.

Allgood, 281 N.C. at 444, 189 S.E.2d at 264. Opening review to new evidence, such as affidavits, witness testimony, and the like, would destroy deference to the "whole record."

Notably, "[a] determination [that the trial court committed error in its review] might well require remand of the case to the trial court for its application of the proper standard of review." *Sun Suites*, 139 N.C. App. 269, 274, 533 S.E.2d 525, 528. However, in the case *sub judice*, the entirety of the record is before us, therefore, in the interests of judicial economy, we conclude remand of this case is unnecessary. *See id.*, 533 S.E.2d at 528-29.

[3] "A duly adopted rezoning ordinance is presumed to be valid and the burden is upon the plaintiff to establish its invalidity." *Nelson v. City of Burlington*, 80 N.C. App. 285, 288, 341 S.E.2d 739, 741 (1986). Here, plaintiffs first argue that the Board of Commissioners' Zoning Ordinance amendment constitutes illegal contract zoning, and therefore is void. We disagree.

One limitation on a Board of Commissioners' legislative authority in rezoning is contract zoning. At bar, Judge Steelman made the following findings:

> 23. It is clear that a fundamental consideration for the rezoning in this matter were the buffer areas . . . . At the public hearing in this matter, the Davidson County Board of Commissioners further required an additional 100 foot buffer along the western boundary of Parcel V, where it adjoined Parcel VIII. There was an agreement on the part of Sowers to maintain all of these buffers, in consideration for the rezoning by Davidson County. The rezoning of the parcels . . . constituted illegal contract zoning between the defendant, Sowers, and Davidson County.
>
> 24. The Court further finds that the contract zoning tainted the entire rezoning process, and that the proper remedy is to void the entire rezoning.
>
> 25. . . . Davidson County considered impermissible criteria in evaluating the Sowers rezoning request. The action of Davidson County in rezoning the Sowers property was arbitrary and capricious.
>
> 26. The Court has considered the arguments of the plaintiffs that there was an agreement between the defendant, Sowers, and Davidson County encompassing the rezoning, a contract for the

> extension of sewer, and the deeding of lands for a park to Davidson County. While there is evidence that would support such a finding, the Court finds that plaintiffs have failed to meet their burden of proof on this contention.

Based on his findings, Judge Steelman declared the rezoning of Sowers' property to be void as illegal contract zoning.

We recognize that "[r]ezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 441. "Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a bilateral contract." *Chrismon*, 322 N.C. 611, 635, 370 S.E.2d 579, 593 (emphasis omitted). "In short, a 'meeting of the minds' must occur; [and] mutual assurances must be exchanged." *Hall v. City of Durham*, 323 N.C. 293, 298-99, 372 S.E.2d 564, 568 (1988).

Having carefully reviewed the record, we conclude that the Board of Commissioners did not enter into a bilateral contract. First, with his application for rezoning, Sowers submitted a memo detailing various conditions to be placed upon the proposed rezoned property, including undisturbed buffers. The only promises made as to these buffers were unilateral, from Sowers to the Board of Commissioners. No promises whatsoever were made by the Board of Commissioners in exchange. Second, the Board of Commissioners imposed the 100 foot buffer on Parcel V, and made no promise associated with this provision. Likewise, Sowers made no promise in return. Lastly, as to plaintiffs' contention that there was an agreement between Sowers and the Board of Commissioners as to the rezoning, the sewer project, and the deeding of land for a park, we concur with the trial court that the record does not support that any such reciprocal agreement existed.

Viewing the "whole record," there is no evidence that a transaction occurred in which either side undertook to obligate itself in any way. No meeting of the minds took place, and no reciprocal assurances were made. Therefore, we hold that the Board of Commissioners' actions were the result of a valid exercise of its legislative discretion; and the Board did not abandon its independent decision-making role. Accordingly, we hold that "substantial evidence" in the record supports that the Board of

Commissioners' Zoning Ordinance amendment did not constitute illegal contract zoning.

[4] Secondly, plaintiffs contend that the Zoning Ordinance amendment is void because the Board of Commissioners failed to consider all permissible uses of the property within the new zoning classifications. Again, we disagree.

Previously, our Supreme Court has held, "when rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a [Board of Commissioners] must determine that the property is suitable for all uses permitted in the new general use district . . . ." *Hall*, 323 N.C. 293, 305, 372 S.E.2d 564, 572. Consequently, all permissible uses of property proposed to be rezoned into a new classification must be considered for the rezoning to be valid.

A review of the record *sub judice* reveals that the Board of Commissioners did consider all permissible uses of the property proposed to be rezoned into the new classifications. At the 3 August 1998 meeting, members of the Board of Commissioners received with their agendas a detailed list of the permitted uses in HC, LI, O/I, and HI districts. Furthermore, minutes of the 3 August 1998 meeting show that the Board of Commissioners considered restrictions on proposed industries, permissible uses such as asphalt and chemical plants, parks, and schools; moreover, the Board of Commissioners considered such factors as proximity to other commercial, industrial, and residential property, buffers, traffic, location of highways, and potential tax revenue.

Additionally, minutes of the Planning Board's meeting of 21 July 1998 reveal that the Planning Board, too, considered many permissible uses of the property to be rezoned, including possible HI district uses (such as junk yards, chemical plants, slaughter houses, recycling facilities, and other heavy industrial plants), possible LI district uses (such as waste treatment plants, parcel delivery facilities, light manufacturing, and warehousing), and other permissible uses such as asphalt and concrete plants, parks, and schools. The Planning Board also considered proximity to commercial, industrial, and residential property, buffers, traffic, location of highways, creation of new jobs, and potential tax revenue. We note that both the Board of Commissioners' and the Planning Board's meetings were open to the public, and those in opposition to Sowers' rezoning request were given adequate opportunity to be heard.

After our review of the "whole record," we find that the Board of Commissioners considered all permissible uses of the property at issue, as well as other factors relevant to its power to act in the interests of the public's health, safety, morals, and general welfare. Therefore, we hold that the Board of Commissioners did not consider impermissible criteria; the Board's decision is supported by "substantial evidence" in the record; the Board's actions were not "arbitrary and capricious"; and the Zoning Ordinance amendment is valid.

[5] Finally, we turn our attention to the proposed buffers on the rezoned property. Our Supreme Court has stated:

> "When a city adopts a zoning ordinance restrictions on use must be uniform in all areas in a defined class or district. Different areas in a municipality may be put in the same class. The law does not require all areas of a defined class to be contiguous, but when the classification has been made, all areas in each class must be subject to the same restrictions."

Decker v. Coleman, 6 N.C. App. 102, 106-07, 169 S.E.2d 487, 490 (1969) (emphasis omitted) (quoting *Walker v. Elkin*, 254 N.C. 85, 87, 118 S.E.2d 1, 3 (1961)). At bar, Sowers' application for rezoning indicated the existence of several undisturbed buffers on the property. Additionally, the Board of Commissioners imposed the restriction of a 100 foot buffer along the western boundary of Parcel V. The record supports that these buffers only applied to Sowers' property, and they were not imposed on similarly zoned property in any other location in Davidson County. "Since the [provisions regarding buffers] exceeded statutory limitations imposed by the General Assembly when it enacted the statutes delegating to cities power to enact zoning ordinances, the [provisions are] void." *Decker*, 6 N.C. App. at 107-08, 169 S.E.2d at 491.

Nevertheless, this holding does not affect the validity of the remaining Zoning Ordinance amendment, as the Board of Commissioners has expressly declared in Section 16-1 of its Zoning Ordinance that "should any provision, portion, section, or subsection of this ordinance be held to be invalid, such a decision shall not be construed as affecting the validity of any of the remaining provisions, portions, sections or subsections . . . ." Again, our Supreme Court has held that:

> "It is well settled that if valid provisions of a statute, or ordinance, are separable from invalid provisions therein, so that if the

invalid portions be stricken the remainder can stand alone, the valid portions will be given full effect if that was the legislative intent."

Decker, 6 N.C. App. at 108, 169 S.E.2d at 491 (quoting *Jackson v. Board of Adjustment*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969)). Here, the Board of Commissioners has expressly declared such an intent. Therefore, the provisions imposing buffers on the property are separable from the remainder of the Zoning Ordinance amendment.

In sum, we reverse the judgment of the trial court. In so doing, we hold that Davidson County's amendment of its Zoning Ordinance, which rezoned the property at issue, was a proper and valid exercise of its legislative authority; the Board of Commissioners did not engage in illegal contract zoning; the Board's decision is supported by "substantial evidence" in the record; and the Board's actions were not "arbitrary and capricious." Accordingly, the Zoning Ordinance amendment is valid, however the provisions imposing buffers on the property are void, yet separable.

Reversed.

Judge WALKER concurs in the result in a separate opinion.

Judge TYSON concurs.

WALKER, Judge, concurring in the result.

I agree with the majority decision that the Board of Commissioners' (Board) re-zoning the subject property was a valid exercise of its legislative authority and that the Board did not engage in illegal contract zoning. However, I conclude the trial court did not err in receiving additional evidence from plaintiffs in support of their allegation that the Board's decision resulted in illegal contract zoning. After a careful review of the record, including evidence received by the trial court, I find there is insufficient evidence to support the allegations of illegal contract zoning.

Plaintiffs' action is brought under the Declaratory Judgment Act (Act) found in N.C. Gen. Stat. § 1-254 et. seq. Our case law clearly establishes that a declaratory action is a proper vehicle to be utilized to review decisions of a local government. *See Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986); *Stutts v. Swaim*,

30 N.C. App. 611, 228 S.E.2d 750, *disc. review denied*, 291 N.C. 178, 229 S.E.2d 692 (1976); *Taylor v. City of Raleigh*, 22 N.C. App. 259, 206 S.E.2d 401 (1974), *aff'd*, 290 N.C. 608, 227 S.E.2d 576 (1976); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972). However, I find nothing in this Act or applicable case law which confines a trial court's review of those decisions to the record made at the re-zoning hearing.

In *Hall v. City of Durham*, 88 N.C. App. 53, 362 S.E.2d 791 (1987), *aff'd*, 323 N.C. 293, 372 S.E.2d 564 (1988), plaintiffs filed a declaratory judgment action alleging the re-zoning was the product of illegal contract zoning. The trial court received into evidence edited minutes from the city council meeting and an affidavit concerning statements some council members had made at the hearing. *Id.* at 57, 362 S.E.2d at 793-94. The trial court granted summary judgment for plaintiffs, ruling the re-zoning action by the City amounted to prohibited contract zoning. *Id.* at 55, 362 S.E.2d at 792. In affirming the trial court, we concluded "[i]n our opinion, the portions of the minutes and the affidavit to which defendants object were properly received by the trial court to show the Council's consideration of the facts before it." *Id.* at 58, 362 S.E.2d at 794.

Likewise in *Allgood v. Town of Tarboro*, 281 N.C. 430, 189 S.E.2d 255 (1972), plaintiffs brought an action challenging a re-zoning by the town of Tarboro. Our Supreme Court noted with approval that "[a]fter hearing the evidence and arguments of counsel," the trial court made findings upholding the decision of the town and the Supreme Court affirmed. *Id.* at 434, 189 S.E.2d at 258.

Further, in *Armstrong v. McInnis*, 264 N.C. 616, 142 S.E.2d 670 (1965), cited by the majority, as well as *Sherill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344 S.E.2d 357, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986), the trial court received evidence at trial in addition to the record from local government regarding re-zoning decisions with approval by our appellate courts. I find no authority which would limit the trial court's review in a declaratory action to the record made at the re-zoning hearing. Here, the majority apparently applies for the first time the "whole record" test and would limit review of the Board's decision to the record made at the hearing on the re-zoning of the subject property.

In a situation where evidence may be forthcoming after the re-zoning hearing, which may give rise to allegations of illegal contract zoning, the declaratory action enables the trial court to receive evi-

dence in support of those allegations, while nevertheless being mindful that deference is accorded the legislative decision of local government. *See In re Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938) (holding ". . . the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare").

Therefore, I conclude that in a declaratory action challenging a re-zoning decision of a local government, the trial court, upon review, may receive evidence in addition to the record made at the hearing.

STATE OF NORTH CAROLINA v. NATIVIDAD PENA CORONEL

STATE OF NORTH CAROLINA v. JOSE RAFAEL PENA TOMAYO

No. COA00-503
No. COA00-504

(Filed 7 August 2001)

1. Bail and Pretrial Release— remittance of forfeited bond—death of defendant after trial date—extraordinary circumstances—factors—diligent pursuit

The trial court did not abuse its discretion by concluding that the death of two defendants who had fled to Mexico from drug trafficking charges did not constitute sufficient extraordinary cause to warrant remittance of a bail bond judgment. The purpose inherent in the statutory scheme governing remittance suggests that it would be unfair to sureties to deny remittance when they diligently pursue defendants who die through no fault of the surety, even where the defendants die after the execution of judgment of forfeiture. However, extraordinary cause does not exist based solely on the defendant's death; the fact of the defendant's death must be weighed against certain other factors, including the inconvenience and cost to the State and the courts; the diligence of the surety in staying abreast of the defendant's whereabouts prior to the date of appearance and in searching for the defendant prior to his death; the surety's diligence in obtaining information of the defendant's death; the risk assumed by the sureties; the surety's status as private or professional; and the

timing of defendant's death. Extraordinary cause did not exist in this case because the sureties' pursuit was not diligent.

2. Trials— bail bond remittance—action without jury—finding supported by evidence

Competent evidence supported the finding of a trial court, sitting without a jury to consider remittance of a bail bond forfeiture, that the sureties made no efforts to locate the defendant prior to a specific date. Although the sureties contend that there was evidence to support a contrary finding, the credibility of the evidence is weighed by the trial court rather than the appellate court.

3. Judgments— date of entry—filing with clerk

The trial court incorrectly found that a judgment of forfeiture of a bail bond was entered on 8 April rather than on 20 April, which affects the interest owed, where the order was signed on 8 April but filed on 20 April. An order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

Appeal by sureties from orders entered 1 November 1999 by Judge Michael E. Beale in Superior Court, Richmond County. Heard in the Court of Appeals 28 March 2001.

Parker, Poe, Adams & Bernstein, L.L.P., by Jack Cozort, for Connecticut Indemnity Company and Black Jack Bail Bonds, sureties-appellants.

George E. Crump, III, for Richmond County Board of Education, judgment creditor-appellee.

TIMMONS-GOODSON, Judge.

Connecticut Indemnity Company ("Connecticut") and Black Jack Bail Bonds ("Black Jack") (collectively "sureties") appeal the Superior Court's orders denying their motions to remit judgment of bond forfeiture. The Richmond County Board of Education ("the Board") are judgment creditors and appellees in the present action by virtue of its opportunity to be heard pursuant to section 15A-544 of our General Statutes. *See* N.C. Gen. Stat. § 15A-544 (1999) (repealed Jan. 1, 2001). Upon review of the materials submitted on appeal and arguments of counsel, we affirm the orders of the Superior Court but remand for the limited purpose herein stated.

The pertinent factual and procedural background is as follows: On 21 September 1998, the Richmond County Grand Jury indicted Jose Rafael Pena Tomayo ("Tomayo") and Natividad Pena Coronel ("Coronel") (collectively "defendants") for "trafficking in marijuana by manufacturing." In October 1998, defendants posted bond in the amount of $200,000.00, for which Black Jack and Connecticut acted as the sureties.

In paperwork submitted to Connecticut, defendants both noted they were of Hispanic descent, their parents resided in Mexico, they resided in North Carolina, and they worked for a farming operation. Coronel further related that he resided with his wife, that he had two children, one twenty-six years of age and one thirteen months old, and that he had resided in the United States for eighteen years. Notably, Tomayo wrote that he resided with his aunt and uncle, Coronel and his wife, and had only been a resident of the United States for one year and five months.

On 14 December 1998, defendants failed to appear at the criminal session of Superior Court, Richmond County. Sureties did not attend the 14 December court session. The Superior Court entered orders of bond forfeiture against defendants and gave notice to the sureties of those orders on 22 December 1998.

In orders entered 20 April 1999, the trial court filed two "Judgment[s] of Forfeiture" against defendants and sureties, each in the amount of $200,000.00. On 20 October 1999, sureties filed motions to remit the forfeited bond, stating that "extraordinary circumstances exist[ed]" for the court to set aside its judgment, in that "defendants [were] deceased and unable to be surrendered."

At a hearing based on sureties' motion, Sean Regan ("Regan"), office manager and supervising agent for Black Jack, testified that in an effort to retrieve defendants, his company "sponsored two trips to Mexico by [Agent] Brian Moody where the defendants were originally located in Guadalajara[.]" Regan further testified that while in Mexico, Agent Moody received death threats due to defendants' connections to the local drug cartel and was forced to retreat. According to Regan, Black Jack tried to arrange for legal extradition of defendants, but at some point, turned the matter over to its insurance company, who also tried to have defendants extradited. Regan admitted that his company had no independent means to monitor whether defendants appear in court.

Frederick Yerger ("Yerger"), a recovery agent supervisor for Capital Bonding Company ("Capital") (the organization who underwrote the bonds for Connecticut), testified concerning Capital's efforts to recover defendants. Yerger's testimony revealed that upon receiving notice that defendants failed to appear, he "r[a]n a computer check . . . to see if defendants show[ed] up anywhere in [the] public record" and assigned the case to recovery agent Troy Thompson ("Agent Thompson" or "Thompson"). According to Yerger, "later in April" 1999, he also assigned another recovery agent, only identified as "Collins," to manage defendants' recovery effort. "At that point," Collins confirmed that defendants had fled to Mexico.

According to Yerger, Capital sponsored two trips to Mexico, in which recovery agents attempted to legally extradite defendants to North Carolina. Agent Thompson submitted an expense report from his Mexican "trips" ("Thompson's expense report"), indicating that his expenses began on 4 July 1999, ended on 24 August 1999, and totaled $1,903.36. This was the only evidence submitted indicating the actual expenses and time exhausted in the recovery of defendants. A check request form was also submitted at trial noting that Capital paid Thompson $7,203.31 for the recovery of Tomayo. According to Yerger, the amount of the check was in addition to Agent Thompson's expenses.

Yerger testified that on their first trip to Mexico, three agents, including Thompson, observed defendants for three days. However, because the Mexican "federales" would not cooperate with the agents and defendants were "under armed guard," the agents "backed off" to avoid an incident. Evidence at trial further revealed that on his second trip to Mexico, Agent Thompson discovered that defendants had died in an 11 August 1999 automobile accident from "[t]rauma to the cranial area." Agent Thompson filed an affidavit with the court noting the following: "[D]efendants were located during prior investigations in Guadalajara, Mexico. After returning to that area to attempt to apprehend [defendants], it was learned through the 'federales' that [defendants] were deceased . . . ."

Yerger acknowledged that he did "not supervise how the bonding company looks after [defendants in North Carolina] or tr[ies] to keep up with them." Yerger admitted that it was not unusual for "Mexicans doing farm labor to return to Mexico." Yerger further acknowledged that once a Mexican farm worker retreats to Mexico, "you can get him, but you just can't get him in the same way you

do here." Yerger affirmed that this was "[a]bsolutely" a risk that bond companies take.

On 1 November 1999, the trial court entered an order as to each defendant, denying sureties' motions. Pertinent to the issues presented on appeal, the trial court's findings of facts are as follows:

> 4. Judgment of bond forfeiture . . . was entered against defendant[s] and each surety . . . on April 8, 1999[.]
>
> . . . .
>
> 6. That the grounds stated in the sureties' motion[s] are that [defendants are] deceased and unable to be surrendered by the surety and, therefore, extraordinary circumstances exist wherein it would be fair for the Court to set aside all or part of the [judgments of bond forfeiture]."
>
> . . . .
>
> 14. [The] valid death certificate[s] of [defendants show] that [the] date of [their] death[s] was August 11, 1999.
>
> 15. [Sureties] have introduced no evidence that [defendants were] either dead or hospitalized on December 14, 1998, the date that [defendants] called and failed [sic] in Richmond Criminal Court and the date the Order of Forfeiture was issued.
>
> 16. [Sureties] have introduced no evidence whatsoever that they made any assurance as to the attendance of [defendants] on December 14, 1998 . . . .
>
> 17. [Sureties] have introduced no evidence that [they] made any efforts to verify whether or not [defendants were] in attendance in Court on . . . December 14, 1998.
>
> 18. [Sureties] made no efforts to locate [defendants] prior to July 4, 1999, as shown by [Thompson's expense report].

Based upon these findings, the trial court concluded that "the circumstances of the defendant[s'] death[s] on August 11, 1999, does not constitute 'extraordinary cause' as a matter of law to warrant remittance of the bond judgment in whole or in part." Sureties appeal the court's 1 November 1999 orders, and the appeals have been consolidated for consideration by this Court.

Sureties argue on appeal that the trial court erred (I) in concluding that they failed to present "extraordinary cause" warranting remittance of the forfeited bond; (II) in finding as fact that their first efforts to locate defendants began in July 1999; and (III) in finding as fact that judgment of forfeiture was entered on 8 April 1999.

I.

[1] By their first argument, sureties contend that the trial court erred in concluding that the death of defendants did not constitute "extraordinary cause." Sureties argue that because death of a principal constitutes "extraordinary cause," they are entitled to remittance of the forfeited bonds when the death of their principal occurred after the execution of judgment of forfeiture. With this argument, we disagree.

Section 15A-544 of our General Statutes, now repealed,[1] governs the forfeiture of the bond in the present case. N.C. Gen. Stat. § 15A-544. Even after the entry of judgment of forfeiture, if a surety surrenders a defendant within ninety days, the trial court must remit the bond. N.C. Gen. Stat. § 15A-544(e). Section 15A-544 allows for remittance of bonds, in whole or in part, after entry of judgment of forfeiture, where the defendant is not surrendered to the court within ninety days, in two situations. Pursuant to section 15A-544(e), the trial court "may" remit judgment anytime within ninety days after entry of judgment if "justice requires." N.C. Gen. Stat. § 15A-544(e). Section 15A-544(h) states, in pertinent part: "For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." N.C. Gen. Stat. § 15A-544(h).

Whether a surety must show that "extraordinary cause" exists for or "justice requires" remittance of forfeiture, depends upon when the motion of remittance is filed, not when the cause entitling a surety to

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1. Relief from final judgment of forfeiture is now governed by North Carolina General Statutes section 15A-544.8, which provides:

> (a) Relief Exclusive.—There is no relief from a final judgment of forfeiture except as provided in this section.
>
> (b) Reasons.—The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:
>
> (1) The person seeking relief was not given notice . . . .
>
> (2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

N.C. Gen. Stat. § 15A-544.8 (effective Jan. 1, 2001).

remittance occurs. For example, if the death of a principal occurs prior to the date of appearance, but the surety does not discover that death prior to execution of the judgment of forfeiture, the surety must file his remittance motion pursuant to section 15A-544(h). Likewise, if death occurs between the appearance and the entry of judgment or within ninety days thereof, but the surety does not discover the death until after execution, the surety must also file his motion pursuant to section 15A-244(h), requiring him to show "extraordinary cause," not section 15A-244(e).

Because sureties in the case *sub judice* did not move to remit the judgments of forfeiture in the case within the period allowed by section 15A-544(e), section 15A-544(h) was the authority by which sureties moved for remittance of forfeiture and is the statutory provision at issue in the present appeal.

This Court has previously held that it is within the court's discretion to remit judgment for "extraordinary cause," and we therefore review the court's decision pursuant to section 15A-544(h) for abuse of discretion. *See State v. Harkness*, 133 N.C. App. 641, 516 S.E.2d 166 (1999). "Extraordinary cause," under section 15A-544(h), is cause " 'going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee.' " *State v. Vikre*, 86 N.C. App. 196, 198, 356 S.E.2d 802, 804 (1987) (alteration in original) (quoting *Webster's Third New International Dictionary* (1968)). In determining whether the facts of a particular case constitute "extraordinary cause," the trial court must make " 'brief, definite, pertinent findings and conclusions.' " *State v. Moore*, 64 N.C. App. 516, 520, 307 S.E.2d 834, 836 (1983) (quoting *State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 541, 272 S.E.2d 3, 5 (1980)); *see also State v. Lanier*, 93 N.C. App. 779, 379 S.E.2d 109 (1989).

There are no North Carolina appellate cases examining remittance of forfeiture pursuant to section 15A-544(h) under the circumstances presented by the instant case. Thus, the issue of whether death after the execution of judgment of forfeiture can constitute "extraordinary cause," allowing for remittance under section 15A-544(h) is one of first impression in this State. Generally, North Carolina appellate cases reviewing remittance of forfeiture pursuant to section 15A-544(h) examine circumstances concerning defendant whereabouts *on the day he was to appear in court*, which are discovered after the execution of judgment, or situations in which

defendants are captured after execution of judgment. Furthermore, our review of our appellate cases yields no clear consensus as to what set of circumstances constitutes "extraordinary cause." Rather, these cases indicate that such a determination is a heavily fact-based inquiry and therefore, should be reviewed on a case by case basis. A brief review of "extraordinary cause" cases is therefore instructive.

In *Moore*, 64 N.C. App. 516, 307 S.E.2d 834, for example, a private surety secured the bond of a long-time, rather impoverished employee. On the day the defendant was to appear in court, he had been arrested and released on a prior pending charge. The surety later moved for remittance of forfeiture. The surety claimed that he was unaware of the prior charge, and that although he could not confirm it, he was informed that the defendant committed suicide. The surety believed that the prior charge " 'accounted for the defendant's disappearance.' " *Id.* at 518, 307 S.E.2d at 835. Evidence further revealed that the forfeiture of bond would have forced the surety into bankruptcy. There was no evidence that defendant died prior to the date he was to appear in court, only that he had been released prior to that date. Based upon these circumstances, this Court found that there existed ample evidence of "extraordinary cause." *Id.* at 519, 307 S.E.2d at 836. *Compare State v. White*, 93 N.C. App. 773, 379 S.E.2d 269 (1989) (finding that trial court did not abuse its discretion in concluding no "extraordinary cause" existed where defendant was arrested after date of appearance and private surety was not well-educated, but he knew defendant's whereabouts on the day he was to appear, had not expended a great amount of money in searching for defendant, and his efforts were not dramatic).

Regarding professional sureties, our appellate courts have found that where the defendant is in custody in another jurisdiction on the day he was to appear in court and this fact was not discovered until after the entry of judgment of forfeiture, "extraordinary cause" generally does not exist. *Vikre*, 86 N.C. App. 196, 356 S.E.2d 802; *State v. Pelley*, 222 N.C. 684, 24 S.E.2d 635 (1943). Where sureties are aware that defendants have a connection to Mexico and they are subsequently held in Mexican custody on the day that they are to appear in court, "extraordinary cause" does not exist, even where sureties expend considerable time and money in recovery. *Vikre*, 86 N.C. App. 196, 356 S.E.2d 802. The above-referenced decisions are based upon the risks assumed by the sureties and their custodial relationship with the defendants. *Vikre*, 86 N.C. App. at 198, 356 S.E.2d at 805 (by

initially securing the bond, "[t]he sureties become custodians of the [defendant] and are responsible for the [defendant] and . . . for the bond if the [defendant] fails to appear in court when required"). At least one of these cases, *Pelley*, indicates, in *dicta*, that death or illness of the principal *on the day he is to appear in court* can constitute an excusable defense requiring remittance of forfeiture after the ninety-day time limit has passed. *See Pelley*, 222 N.C. at 688, 24 S.E.2d at 637 (noting that relief can be sought where appearance by defendant is rendered impossible or excusable by "an act of God"); *see cf. State v. Horne*, 68 N.C. App. 480, 483, 315 S.E.2d 321, 323 (1984) (finding that motion for remittance under section 15A-544(e), not section 15A-544(h), was properly denied where "there was no evidence of personal sickness or death" on the day defendant was scheduled to appear in court).

Finally, our appellate courts have held that "extraordinary cause" exists where the professional surety actually recovered the defendant after the ninety-day deadline, although surety's search efforts were "not dramatic." *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979).

The Board argues, based upon *Pelley*, that death can constitute "extraordinary cause," only upon a showing that death occurred *on or prior to the date the defendant should have appeared in court.* We find that neither *Pelley* nor any other North Carolina case supports this assertion. Rather, as stated *supra*, *Pelley* only mentions in *dicta* that proof of death prior to the date of the defendant's appearance allows for remittance of forfeiture, but it does not limit remittance to cases where death occurs prior to the date defendant should have appeared in court.

We, in fact, agree with the Court in *Pelley*, that a defendant's death prior to the date the principal was to appear in court constitutes "extraordinary cause," even if discovered after the execution of judgment of forfeiture. It is axiomatic that under those circumstances it would be not only beyond "extraordinary," but impossible for the surety to ensure the defendant's appearance. As the United States Supreme Court long ago acknowledged: "It is the settled law . . . that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law." *Taylor v. Taintor*, 83 U.S. 366, 369, 21 L. Ed. 287, 289 (1873) (footnote omitted). Situations "[w]here the principal dies before the day of performance" falls within the above-noted category of cases. *Id.*; *see also People v. Parkin*, 189 N.E. 480 (N.Y. 1934) (sug-

gesting that death of defendant prior to appearance allows remittance of right).

We do not agree, however, that remittance should be allowed only where defendant's death occurs prior to or on the date of his scheduled appearance. As noted *supra*, there is no North Carolina case supporting this assertion. Neither do our appellate courts expressly exclude the possibility that "extraordinary cause" can exist where death occurs after the defendant's scheduled appearance.

Furthermore, while cases from other jurisdictions are not binding on this Court, they provide insight into how this novel issue has been previously analyzed and are therefore instructive. These cases indicate that while remittance of forfeiture based upon the defendant's death prior to the date he is to appear in court is either a matter of right or of course, remittance *may* be allowed when the defendant's death occurs after the court date, given certain circumstances. *See Parkin*, 189 N.E. 480; *People v. Midland Ins. Co.*, 411 N.Y.S.2d 521 (N.Y. Sup. Ct. 1978); *see also Western Surety Co. v. People*, 208 P.2d 1164 (Colo. 1949); *State v. Warwick*, 29 N.E. 1142 (Ind. App. Ct. 1892); *State v. Traphagen*, 45 N.J.L. 134 (N.J. 1883). These cases further indicate that essential to determining what conditions allow remittance of forfeiture is a close examination of the statutory provisions governing remittance. *See e.g., Warwick*, 29 N.E. 1142 (noting that the right to obtain discharge from forfeiture is statutory); *People v. Caro*, 753 P.2d 196 (Colo. 1988) (indicating a strict adherence to the statutory language in that where statute did not allow for forfeiture to be set aside, sureties' only option was a motion per Rule 60). Accordingly, to determine whether remittance of forfeiture is allowed in this State where death occurs after the date of appearance and, as in the present case, even after execution of judgment, we now examine section 15A-544(h).

In construing the meaning of a statute, this Court must effectuate the intent of the legislature, which is revealed in "the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983). The plain language of section 15A-544(h) provides no guidance as to whether "extraordinary cause" can exist where a defendant's death occurs after the date of appearance. However, what we do glean from section 15A-544(h) is that the statutory language does not prohibit remittance under those circumstances. It follows that the legislature did not, as the Board suggests, intend to limit remittance of forfeiture on a motion made after the

execution of judgment only to those cases where the surety can present a valid excuse for defendant's failure to appear. Rather, the use of the term "extraordinary cause" engenders a less rigid interpretation reflecting the compromise between the purpose of the forfeiture statute and the purpose of our bail bonds system in general. *Accord* Fed. R. Civ. P. 46(e)(1) (stating that forfeiture may be set aside if defendant is "subsequently surrendered . . . *or if it otherwise appears that justice does not require the forfeiture.*") *and* advisory committee's note to Rule 46(e) (noting that Rule 46(e) represents an effort to incorporate some flexibility).

The purpose of the forfeiture statutes is to establish "an orderly procedure for forfeiture [of bail bonds]," N.C. Gen. Stat. § 15A-544, official commentary; while the well-established purpose of bail bonds is to "secure the appearance of the principal in court as required." *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804. *See generally Wiegand v. State*, 768 A.2d 43 (Md. 2001) (discussing extensively purpose behind forfeiture statutes). North Carolina's "orderly procedure for forfeiture," relies upon the continued cooperation of private and professional sureties. Sureties must be assured that if they expend money, time, and effort to recover criminal defendants, they have viable remedies for the return of forfeited bond money.

By the same token, the court system's paramount concern is ensuring the return of the criminal defendant for prosecution. *See Caro*, 753 P.2d at 201 ("the primary purpose of a bail bond is to assure that the defendant appears for trial"). We have accordingly deemed sureties the custodians of defendant and thus, "when the sureties entered into the conditions of the bail bonds on behalf of defendant . . . they became responsible for his appearance in . . . court." *Vikre*, 86 N.C. App. at 200, 356 S.E.2d at 805. To this end, we have also required, pursuant to our definition of "extraordinary cause," that sureties and their bondsmen diligently pursue defendants. The dual purpose inherent in our statutory scheme governing remittance suggests that where sureties diligently pursue defendants, who subsequently die through no fault of the surety, it would be unfair to the surety, whose function is to ensure the orderly procedure for the return of the defendants, not to then allow remittance.

Based upon the purpose behind section 15A-544(h), we conclude that "extraordinary cause" can exist where the defendant dies after the date of appearance and even, as in this case, after the execution of judgment of forfeiture. However, given the well-established and flexible definition of "extraordinary cause," it is our belief that "extra-

ordinary cause" does not exist based solely on the fact of defendants' death where it occurs after the date of appearance, and especially if it occurs after the execution of judgment. The fact of the defendant's death must be weighed against certain factors in determining whether a forfeited bond may be remitted for "extraordinary cause." In accordance with our jurisprudence in this area, these factors include the inconvenience and cost to the State and the courts, *see Jeffers v. United States*, 588 F.2d 425, 427 (1978); the diligence of sureties in staying abreast of the defendant's whereabouts prior to the date of appearance and in searching for the defendant prior to his death; the surety's diligence in obtaining information of the defendant's death and the risk assumed by the sureties, *see Vikre*, 86 N.C. App. 196, 356 S.E.2d 802; the surety's status, be it private or professional; and the timing of the defendant's death—whether it occurred after the date of appearance and prior to entry of judgment, after the entry of judgment and prior to execution, or, as in this case, after execution of judgment.

Our emphasis on a surety's diligence as a factor notwithstanding, we caution that diligence alone will not constitute "extraordinary cause," for due diligence by a surety is expected. *See State v. Shredeh*, 909 S.W.2d 833, 836 (Tenn. Ct. App. 1995) ("authority to relieve sureties from liability may only be exercised in extreme cases, such as the death of the defendant or some other condition making it impossible for sureties to surrender the defendant; the good faith effort made by the sureties or the amounts of their expense are not excuses"). Neither will the amount of expenses incurred by professional sureties due to a forfeiture constitute extraordinary cause. *See id.*

Furthermore, it was suggested at oral argument that because death is the ultimate justice, punishment, and capture, and because it ends the State's prosecution of defendants, death alone, at any time, constitutes "extraordinary cause." With this argument, we cannot agree. If death alone at any time after defendant's date of appearance were to constitute "extraordinary cause," it would give sureties no incentive to diligently pursue defendants. Presenting simply a death certificate, months, maybe years after execution of the judgment of forfeiture, sureties, who possibly expended little time and effort to search for defendants, could move for and receive remittance. *See cf. Western Surety Co.*, 208 P.2d at 1166 (citation omitted) (noting that although death after forfeiture may constitute a defense to forfeiture, " 'it seems that if a long period of time has elapsed after the forfeiture

of the bond before the death of the principal occurs—as, for example, two years—the death does not constitute a defense to an action on the bond' "). Such a result runs contrary to the purpose behind the remittance statute.

Although we agree with sureties, that "extraordinary cause" can exist where death occurs after the execution of judgment of forfeiture, we conclude "extraordinary cause" did not exist in the present case. Based on the facts presented at the hearing, sureties' pursuit was simply not diligent. The key to this conclusion is a complete lack of evidence demonstrating that the sureties were concerned with defendants' 14 December appearance. They did not attend court on that date and acknowledged that they had no method of knowing whether defendants attended court. Moreover, they offered no explanation as to why defendants were not in attendance.

Furthermore, sureties subsequently located defendants in Mexico, apparently on trips that did not commence until July 1999. It appears that sureties could have detected defendants' whereabouts much earlier, given the information submitted to them by defendants, and their own sources indicating, possibly as early as April 1999, that defendants fled to Mexico. Sureties certainly assumed some risk, as defendants were Mexican farm workers, *see Vikre*, 86 N.C. App. at 198, 356 S.E.2d at 804, one of whom had only lived in the United States for one year and five months. Sureties were also aware that their power to capture defendants in Mexico was very limited, compared to their authority to do so in the United States. *See Taylor*, 83 U.S. 366, 21 L.Ed. 287. Given the facts presented by the present case, we conclude that the court did not abuse its discretion in concluding: "the cause of the defendant[s'] death[s] on August 11, 1999, does not constitute 'extraordinary cause' as a matter of law to warrant remittance of the bond judgment in whole or in part." Sureties' first argument is therefore overruled.

II.

[2] Sureties next contend that the court erred in finding as fact: "[Sureties] made no efforts to locate [defendants] prior to July 4, 1999, as shown by [Thompson's expense report]." To support their argument, sureties offer Yerger's testimony that upon receiving notice that defendants did not appear in court, he ran a record check on defendants "to see if they show up . . . anywhere in [the] public record." Sureties further note that Yerger testified that he assigned the case to Agent Thompson and "later in April" assigned the case to

another recovery agent, only referred to as "Collins," who "at that point" discovered that defendants were in Mexico. With sureties' argument, we disagree.

Rule 52(a) of our Rules of Civil Procedure specifies: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically." N.C. Gen. Stat. § 1A-1, Rule 52(a) (1999). A trial court's factual findings are conclusive on appeal if supported by competent evidence. *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988). As such, "[t]he trial court's findings have the force of a jury verdict if they are supported by competent evidence even though there may be evidence which would support findings to the contrary[.]" *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999).

The trial court, not the appellate court, weighs the credibility of evidence. *Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990). Therefore, "[w]here there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence." *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 845 (2000) (citation omitted), *disc. review denied*, 353 N.C. 374, — S.E. 2d. — (2001).

Thompson's expense report revealed the sureties' expenditures in relation to the recovery of the two defendants did not begin until July 1999. Despite testimony indicating other possible trips to Mexico, there was absolutely no other evidence, such as agent's affidavits or other expense reports, to support sureties' contentions that they began their search prior to July 1999. Thompson's expense report, upon which the trial court presumably relied, therefore supports the court's finding that sureties made no efforts to locate defendants prior to 4 July 1999.

As for sureties' contention that Yerger's testimony supports a contrary finding, we point out the confusing and vague nature of that testimony, along with that of Black Jack employee, Regan. For instance, there was not a clear time line of events; there was no way to determine when the two trips Black Jack claimed to sponsor took place and whether they were in conjunction with the trips sponsored by Capital; there was no indication why defendants were under armed guards when Capital agents arrived in Mexico; and there were unexplained, vague references to several unnamed recovery agents. Therefore, we presume that the trial court weighed the expense

report against the above-referenced testimony, regarding the testimony as less credible. Because we find that competent evidence supported the court's challenged finding, sureties' second argument is also overruled.

III.

[3] Finally, sureties argue that the trial court incorrectly found as fact that the judgment of forfeiture was entered on 8 April 1999. Sureties contend that the judgment was entered on 20 April 1999, the date it was filed, and that this error should be corrected as it affects the interest they will owe if the bond money is not remitted.

The trial court found in finding number four: "Judgment of bond forfeiture . . . *was entered* against defendant[s] and each surety . . . on April 8, 1999[.]" (Emphasis added.) An examination of the actual order shows that it was signed 8 April 1999 but filed on 20 April 1999. Rule 58 of our Rules of Civil Procedure provides: an order is entered when "reduced to writing, signed by the judge, and *filed with the clerk of court.*" N.C. Gen. Stat. § 1A-1, Rule 58 (1999) (emphasis added). Because the judgment of forfeiture was filed with the Clerk on 20 April 1999, this date represents the date the judgment was entered. Accordingly, the court was incorrect in finding that the judgment of forfeiture was entered on 8 April 1999. We, therefore, remand the case for the limited purpose of correcting finding of fact number four in both 1 November 1999 orders, thus allowing the record to speak the truth. *See* N.C.R. App. P. 9(b)(4); *State v. Dixon*, 139 N.C. App. 332, 533 S.E.2d 297 (2000).

In sum, we affirm the 1 November 1999 orders but remand the case in part for the limited purpose of correcting finding of fact number four consistent with this opinion.

Affirmed in part; remanded in part.

Judges WYNN and HUDSON concur.

LINDA A. CARLTON, PLAINTIFF-APPELLANT v. GREG CARLTON, DEFENDANT-APPELLEE

No. COA00-861

(Filed 7 August 2001)

Child Support, Custody, and Visitation— custody—modification of order—affect of changed circumstances on welfare of child

The trial court erred by modifying a child custody order based upon defendant's move to Hawaii and plaintiff's absconding with the child where there were insufficient findings that the change of circumstances affected the child's welfare.

Judge EAGLES concurring.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 28 March 2000 by Judge Robert E. Hodges in District Court, Catawba County. Heard in the Court of Appeals 21 May 2001.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by J. Scott Hanvey, for plaintiff-appellant.

Sigmon, Sigmon and Isenhower, by C. Randall Isenhower, for defendant-appellee.

McGEE, Judge.

This is an appeal by plaintiff from an order modifying a prior custody order based upon change of circumstances. Linda A. Carlton (plaintiff) and Greg Carlton (defendant) are the parents of Angela Margaret Carlton (Angela), who was born 29 May 1989. Plaintiff and defendant were divorced on 19 January 1994 and plaintiff and defendant were granted joint custody of Angela, with physical custody being alternated between them on a weekly basis.

Defendant moved to Atlanta, Georgia in 1996. Because of defendant's move to Atlanta, plaintiff filed a motion in the cause on 14 August 1996, seeking modification of the 19 January 1994 child custody order, requesting exclusive custody of Angela, or in the alternative, primary physical custody of Angela. The record shows the issues of custody and visitation were referred to mediation but the parties were unsuccessful in reaching an agreement.

Defendant filed a motion in the cause on 26 February 1998 requesting that he be awarded custody of Angela. In his motion, defendant alleged substantial change of circumstances including plaintiff's unstable employment record, Angela's poor performance in school, plaintiff's insufficient supervision of Angela's homework, and Angela's "inordinate number" of absences and tardiness which he alleged placed her in jeopardy of having to repeat the third grade. On 10 June 1998, plaintiff filed a supplemental motion relating to support of Angela and requesting primary custody.

A hearing on the pending motions in the cause was held on 10 June 1998 and the original joint custody order was modified in an order entered on 22 July 1998, *nunc pro tunc* to 3 July 1997. The trial court concluded that Angela's performance at school was declining, that defendant had relocated to Atlanta, and that these were substantial changes of circumstance. The court ordered that plaintiff and defendant be given joint custody of Angela with physical custody being alternated between them every two weeks. In accordance with this order, plaintiff was to turn over physical custody of Angela to defendant on 13 July 1998. Plaintiff failed to return Angela to defendant and on 14 July 1998 an order was filed directing plaintiff to return Angela immediately to defendant. In response to plaintiff's failure to return Angela to him, defendant filed a motion for contempt and for immediate custody on 22 July 1998. The trial court entered a show cause order and an immediate temporary custody order granting defendant temporary custody of Angela and ordered plaintiff to return Angela to defendant. On 4 August 1998 defendant was granted temporary, exclusive custody of Angela. On 17 September 1998, defendant filed a motion in the cause seeking permanent exclusive custody of Angela. In September 1998, plaintiff returned with Angela to Catawba County. Plaintiff later testified that, based on information from her older sister, she feared defendant was planning to murder her and thus plaintiff decided to take Angela out of the county. Plaintiff and Angela lived with plaintiff's sister and in a series of protective shelters.

Subsequent temporary orders were entered setting forth specific visitation schedules. Plaintiff was allowed supervised visitation with Angela and defendant retained temporary exclusive custody. The trial court granted plaintiff the right to unsupervised visitation with Angela on 4 May 1999.

Plaintiff filed a motion in the cause on 29 June 1999 alleging a substantial change of circumstances in that defendant had moved to

Hawaii, that defendant planned to take Angela to live with him in Hawaii, and that this move would greatly hinder plaintiff's rights to have regular and frequent visitation and would prevent plaintiff from maintaining a close relationship with Angela. Plaintiff requested primary physical custody of Angela during the school year, with defendant having secondary custody during the summer and school year.

In an order filed on 30 July 1999, the trial court found in part that defendant had moved to Hawaii on 22 June 1999 and that Angela was residing in the home of defendant's parents. The court further found that Angela should not go to Hawaii with defendant and granted temporary placement of Angela with defendant's parents. The trial court ordered a psychological assessment of Angela to determine any impact on her with regard to moving to Hawaii.

Following a hearing on 21 September 1999, the trial court made the following findings of fact in an order filed 1 November 1999: (1) Angela had seen a psychiatrist, but no evaluation had been submitted; (2) evidence had been presented that for the past several years Angela had at times performed poorly in school; (3) the court deemed it appropriate that a psychiatrist see Angela to assess any impact on her with regard to her moving to Hawaii and potential problems with her school work; (4) from 13 July 1998 until 17 September 1998, plaintiff kept Angela's whereabouts hidden from the court and the defendant; (5) plaintiff testified that her sister advised her that defendant and others conspired to physically harm her, and that because of this information, she concealed Angela's whereabouts; (6) plaintiff characterized her actions in hiding Angela for over two months as being in "poor judgment;" (7) while plaintiff and Angela were gone, Angela missed thirty-eight days of school; (8) when Angela returned to school, she was behind in her school work and her teacher and defendant spent additional time giving Angela extra educational instruction; (9) the court found the alleged threats to plaintiff to be totally unfounded; and (10) plaintiff acknowledged and testified that she was violating a court order by keeping Angela from defendant. The trial court concluded temporary placement of Angela with defendant's parents should continue pending further hearings. The trial court continued the hearing until 1 December 1999 in order to receive the report of the psychiatrist. The trial court filed an order on 28 March 2000 that stated

> this Order resolves all pending Motions and issues in this matter, being the Motion for Contempt and Show Cause filed by the

> Defendant on July 22, 1998, the Supplemental Motion in the Cause filed by the Defendant on September 17, 1998, the Supplemental Motion filed by the Plaintiff on June 10, 1998, and that Motion in the Cause filed by the Defendant on February 26, 1998.

The order did not specifically refer to later filed motions, including the motion alleging substantial change of circumstances as a result of defendant's move to Hawaii. The trial court incorporated in its order the findings of the 1 November 1999 order and the psychiatric assessment of Angela. The trial court made these additional findings: (1) that defendant accepted employment in Hawaii and moved to Hawaii in June 1999; (2) that defendant rented a house in Hawaii which was suitable for him and Angela to live in; (3) that over the course of the years, defendant provided more assistance, and showed greater ability to help Angela in her school work; (4) that since the 3 July 1997 hearing when plaintiff had joint custody of Angela, she had numerous unexplained absences and tardiness from school; and (5) as of the date of the hearing, Angela's grades had not improved since she had been in defendant's custody, or the custody of her paternal grandparents.

Based on these findings, the trial court concluded that substantial and material changes of circumstance had occurred justifying a modification of the prior custody order granting the parties joint custody of Angela with defendant having the primary care, custody and control of Angela, subject to secondary custody and visitation of plaintiff. In addition, the court concluded that defendant was a fit and proper person to have the primary care, custody and control of Angela, and that it was in the best interest of Angela for defendant to be granted primary custody. The trial court awarded joint custody of Angela to plaintiff and defendant, with defendant having primary custody. The court further ordered that defendant enroll Angela in school in Hawaii and that plaintiff have secondary custody and visitation during summer vacations. Plaintiff appeals from the 28 March 2000 order.

Plaintiff first argues that the trial court erred in modifying custody of Angela on the grounds that the findings of fact are not based upon competent evidence that a substantial change of circumstance affecting the welfare of Angela has occurred. "Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in

custody is in the best interest of the child." *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (citations omitted); N.C. Gen. Stat. § 50-13.7(a) (1999). A party seeking modification of a child custody order bears the burden of proving a substantial change of circumstances has occurred which affects the welfare of the child. *See Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967). In order to meet this burden, such party must prove that " 'circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified.' " *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678-79 (1992) (quoting *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969)). Only after evidence of a substantial change of circumstances is presented does the court consider evidence probative of the "best interest of the child" issue. *Garrett v. Garrett*, 121 N.C. App. 192, 464 S.E.2d 716 (1995). Whether there has been a substantial change of circumstances is a legal conclusion; as such, it must be supported by adequate findings of fact. *Id.* at 196, 464 S.E.2d at 719. A trial court's findings of fact "are conclusive on appeal if there is evidence to support them." *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987) (citation omitted). "However, the trial court's conclusions of law are reviewable *de novo*." *Browing v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000) (citation omitted).

In this case, defendant counters that two significant factors had occurred since the entry of the prior custody order that support the trial court's conclusion of a substantial change of circumstances: (1) plaintiff's violation of the court's order by irrationally hiding Angela from 13 July 1998 until 17 September 1998, and (2) defendant's move to Hawaii.

A majority of the trial court's 1 November 1999 findings pertain to plaintiff's decision to hide herself and Angela based on the belief of plaintiff's sister that defendant was planning to kill plaintiff. The trial court found that plaintiff's action was in violation of its order and had caused Angela to miss thirty-eight days of school, putting her behind in her school work. The trial court also found that plaintiff's belief in the alleged threats were unfounded and that plaintiff had characterized her actions as "poor judgment." However, the trial court failed to make any finding of fact regarding any effect that plaintiff's actions had on the welfare of Angela. Although the trial court found that plaintiff's hiding of Angela placed Angela behind in her school work, in the previous 22 July 1998 joint custody order, the court had already found that Angela's performance at school had not been good. The 30

November 1999 psychological assessment determined that Angela had a "steady deterioration from first through fifth grade" and Angela's poor school performance was due to "[p]arental discord, weekly residential exchange [as mandated by the joint custody order] and over-involvement of her doting grandmother[.]" Defendant offered the testimony of Angela's fourth grade teacher at the 22 September 1999 hearing, and the teacher testified that Angela suffered academically because of the time she missed from school; however, Angela "passed all of her state tests" and graduated from the fourth grade on schedule. Thus, there is no evidence in the record to support the trial court's conclusion that plaintiff's hiding of Angela caused a substantial change in Angela's academic performance.

In addition, defendant testified that upon Angela's return to his exclusive temporary custody, she had lost weight but that in defendant's assessment, she was not emotionally distraught and did not need counseling. Defendant also testified that Angela's relationship to plaintiff continued to be "a good relationship" and that he trusted plaintiff to take care of Angela. Thus, there is no evidence in the record to support that plaintiff's hiding of Angela caused a substantial change in Angela's academic performance, emotional stability, or in plaintiff's ability to care for Angela. The trial court made no findings, based on the psychological report, as to plaintiff's actions causing a change in Angela's welfare.

The trial court's finding that defendant had "provided more assistance, and shown greater ability, to help the minor child in her school work" does not show a substantial change of circumstance. As noted above, the original joint custody order found that "Angela was having problems focusing and paying attention. Her mother hired a tutor, and her father tried to assist her with her math and spelling." Defendant testified that he regularly helped Angela with her school work between one to two hours per day. Angela's fourth grade teacher further testified that defendant worked very hard on Angela's academic work. This evidence in the record is not a substantial change of the parties' participation with Angela's academics from the prior joint custody order.

The trial court's finding that when Angela was with plaintiff she had numerous unexplained absences and tardiness from school was not a substantial change of circumstance from the prior joint custody order. The prior custody order found that during the last school year Angela was absent nineteen days and was tardy several times when she was with plaintiff. The prior custody order

also found that Angela was tardy twice while she was with defendant. Thus, the trial court's finding of absenteeism and tardiness is not a substantial change that has affected the welfare of Angela from the prior joint custody order.

Although defendant asserts in his brief that his move to Hawaii was a substantial change that required the trial court to modify the joint custody order, defendant did not file a motion to modify the joint custody order based on his relocation. The record shows that it was *plaintiff* who filed a motion in the cause on 29 June 1999 and requested primary physical custody of Angela based on the substantial change of defendant's move to Hawaii. Our Court has held that a change in a custodial parent's residence is not, in itself, a substantial change in circumstances affecting the welfare of a child which justifies modification of a custody decree. "Where a parent changes his residence, the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstance." *Gordon v. Gordon*, 46 N.C. App. 495, 500, 265 S.E.2d 425, 428 (1980).

When one parent in *Evans* decided to relocate out of state and thereby affected the child's relationship with the non-custodial parent, our Court followed the analysis employed in *Griffith v. Griffith*, 240 N.C. 271, 81 S.E.2d 918 (1954). In *Griffith*, the custodial mother remarried and planned to move with her daughter to live with her new husband in New Jersey. In light of the proposed move, the trial court ordered that primary custody be awarded to the father. Our Court reversed the trial court's order, concluding that the trial court had failed to properly evaluate the best interests of the child. Our Supreme Court in *Griffith* stated that

> the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so.

Id. at 275, 81 S.E.2d at 921. If the trial court is to modify a plaintiff's right to joint custody of a child, it must consider all factors that indicate which parent is "best-fitted to give the child the home-life, care,

and supervision that will be most conducive to its well-being," *id.* at 275, 81 S.E.2d at 921, but only after determining that a substantial change of circumstance has occurred affecting the well-being of the child.

> In evaluating the best interests of a child in a proposed relocation, the trial court may appropriately consider several factors including:
>
> [T]he advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Evans, 138 N.C. App. at 142, 530 S.E.2d at 580 (citing *Ramirez-Barker*, 107 N.C. App. at 80, 418 S.E.2d at 680).

In the case before us, the trial court found only that defendant had moved to Hawaii, had rented a home that would be suitable for rearing Angela, and that appropriate arrangements had been made for Angela to attend school. The trial court made no other findings about the effect of the proposed relocation on Angela's physical and emotional well-being. *See Brewer v. Brewer*, 139 N.C. App. 222, 233, 533 S.E.2d 541, 549 (2000). Defendant testified that his motive for moving to Hawaii was not for Angela's welfare or for his career, but for the lifestyle that Hawaii offered. Defendant also admitted that Angela's entire family was in the Catawba County area and that Angela "wants a close relationship with all of us in the family," but that Angela "will be very happy to grow up in paradise." The psychological assessment required by the trial court showed that Angela did not want to move to Hawaii and would react with anger upon the relocation. The findings of fact by the trial court do not support the conclusion that there has been a substantial change in circumstances affecting Angela's welfare requiring that the joint custody order be amended granting defendant primary custody and allowing him to move Angela to Hawaii. "It is the effect on the child[] upon which the trial court must focus in determining whether to modify custody." *Browning*, 136 N.C. App. at 425, 524 S.E.2d at 99. "[W]hen the court fails to find facts so that this Court can determine that the order is adequately sup-

ported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby*, 272 N.C. at 238-39, 158 S.E.2d at 80 (citation omitted). The order is vacated and remanded for findings of fact as to whether there was a substantial change of circumstances that affected the well-being of Angela. If the trial court makes findings of fact showing a change of circumstances affecting the well-being of Angela, it must then determine issues of custody and visitation based upon what is in Angela's best interests.

Vacated and remanded.

Chief Judge EAGLES concurs in the result by separate opinion.

Judge TYSON dissents.

EAGLES, Chief Judge, concurring.

I concur in the result reached by the majority. As this Court stated in *Brewer v. Brewer*, 139 N.C. App. 222, 233, 533 S.E.2d 541, 549 (2000), the trial court must make specific findings regarding any effect the change of circumstances had on the welfare of the children. A review of the trial court's order reveals that the court here failed to make adequate factual findings as to whether the substantial change in circumstances affected the child's welfare. I write separately to emphasize that I believe that the trial court has made sufficient findings that defendant's relocation to Hawaii and plaintiff's absconding with the child for two months constitute a substantial change of circumstances.

In its order, the trial court relied on two events to conclude that there had been a substantial change of circumstances: (1) defendant's relocation to Hawaii; and (2) plaintiff's absconding with the parties' daughter. The majority correctly states that a mere change in residency is not enough to constitute a substantial change of circumstances. However, on these facts I believe that the defendant has shown more than a mere change in residency. The record reveals that the trial court's original order called for the child to alternate her residence between parents at the end of every week. The court later altered this arrangement to every two weeks. However, even the most well-to-do individuals could not sustain this arrangement given that the defendant's new residence is more than 4,000 miles

from Catawba County, North Carolina. The travel expenses alone for a transcontinental transfer every two weeks would be beyond the means of most people. This case presents a situation where the original order is not functional. Therefore, in the factual context of this case, defendant's move to Hawaii constitutes a substantial change of circumstances.

I also believe that plaintiff's absconding with the child for two months amounts to a substantial change of circumstances. In its order, the court made extensive findings as to the plaintiff's removal of the child and her refusal to return the child in violation of a court order. The court found that on the advice of her sister, the plaintiff took the child and hid her for approximately two months. According to the record, plaintiff's sister had informed her that the defendant was planning on physically harming her. Rather than going to the authorities, plaintiff took the child and secreted her from defendant and the court. The court found that these alleged threats had no basis and that the plaintiff was never in danger. Plaintiff acknowledged that she had used "poor judgment." The trial court's findings are supported by competent evidence and therefore are conclusive. *See Metz v. Metz*, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000). I believe that the plaintiff's actions in disregarding a court order and hiding the child with no basis amount to a substantial change in circumstances.

I agree that the trial court should revisit this case to determine whether the substantial change of circumstances affected the welfare of the child. If so, the court then may reevaluate what disposition is in the child's best interests.

TYSON, Judge, dissenting.

I would affirm the trial court's order modifying the custody of Angela and awarding defendant primary care, custody, and control of the child. I agree with the concurring opinion to the extent that it upholds the trial court's determination that plaintiff's absconding with Angela and defendant's relocation to Hawaii constitute substantial changes in circumstance. I would hold, however, that the trial court made sufficient findings as to the effect of the changed circumstances on Angela's welfare. Accordingly, I respectfully dissent.

In its 28 March 2000 order, the trial court specifically found as fact that its 1 November 1999 order and the psychiatric assessment report submitted to the court were incorporated into its findings of

fact. Such incorporation of a prior order and evidence is well within the trial court's discretion. *See Starco, Inc. v. AMG Bonding and Ins. Services, Inc.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 214 (1996) ("there is no prohibition against incorporating documents by reference and utilizing the contents of such documents as the trial court's findings of fact."); *Cohen v. Cohen*, 100 N.C. App. 334, 396 S.E.2d 344 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 451 (1991) (incorporating affidavit into trial court's findings in child support order).

Any findings contained in the 1 November 1999 order and the psychiatric assessment report must be considered as the findings of fact by the court on 28 March 2000. In its 1 November 1999 order, the trial court found as fact that the result of plaintiff's absconding with Angela was that she missed 38 days of school. The trial court further found that upon Angela's return to school after this extended absence, she was behind in her school work, requiring that the school teacher and defendant spend additional periods of time instructing Angela.

The trial court further found as fact that the psychiatric assessment of Angela was performed "for the purpose of assessing any impact on the child with regard to the child moving to Hawaii." The psychiatric assessment report found that the impact or effect on Angela of custody and residence being awarded to one parent would be wholly beneficial and would provide needed stability in the child's life. The trial court incorporated the report itself into its findings of fact in the 28 March 2000 order.

In sum, the trial court's findings on 28 March 2000 clearly state: (1) that plaintiff's absconding with the child caused Angela to miss 38 days of school, furthering her failure to maintain her school work and requiring that she obtain additional help from her teacher and defendant to make up school work caused by the absences; and (2) that the effect on Angela of a move to Hawaii and the awarding of primary custody and residence of Angela to one parent would provide needed stability in the child's life.

In *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000) this Court recently held that the trial court failed to make the necessary finding of fact regarding the effect of the defendant-father's cohabitation on the welfare of the children. *Id.* at 424, 524 S.E.2d at 98. The trial court simply found that the children were present in the defendant's residence while "defendant was residing with a person of the

opposite gender to whom he is not related." *Id.* We stated that the "fact that the children were present, however, cannot be construed as a finding that the children's welfare was affected." *Id.* We further held that the trial court's finding that the defendant's conduct " 'is in violation of North Carolina Law' " failed to establish that the children's welfare was affected by the change of circumstances. *Id.* at 425, 524 S.E.2d at 99.

The present case is easily distinguished from *Browning* and *Brewer*. The trial court did more than just find that plaintiff had absconded with Angela, and that plaintiff's action was a violation of the court's order. The trial court's findings make clear that the effect of plaintiff's action on Angela was to cause the child to miss 38 consecutive days of school and to fall further behind in her school work, requiring that she obtain additional tutoring. The trial court also did more than find that defendant had accepted employment in Hawaii, maintains a home in Hawaii suitable for the child, and had made appropriate arrangements for Angela to attend school in Hawaii. The trial court found that the court-ordered psychiatric assessment of Angela was performed "for the purpose of assessing any impact on the child with regard to the child moving to Hawaii," and that the resulting report determined that the move's impact or effect on Angela would provide much needed stability in her life.

The trial court's findings leave no need to draw inferences. The trial court carefully incorporated the findings of fact from its 1 November 1999 order as well as the findings of the court-ordered psychiatric assessment report of 30 November 1999, prepared specifically to assess the impact or effect of a move to Hawaii on Angela. These findings, along with the additional findings from the 28 March 2000 order, taken as a whole, clearly support the trial court's conclusions of law and order.

I decline to read the order appealed from so narrowly as to disregard the incorporated findings, or to constrain the trial court to use certain and specific "buzz" words or phrases beyond that included in the order. I would affirm the order of the learned trial court. I therefore respectfully dissent.

JANE A. WALLACE, PETITIONER v. BOARD OF TRUSTEES, LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. COA00-767

(Filed 7 August 2001)

1. Administrative Law— final agency decision—standard of review—de novo

The trial court properly applied the de novo standard in its review of a final agency decision of the Board of Trustees Local Governmental Employees Retirement System (Board) concluding that petitioner was not entitled to disability retirement benefits for the months of March 1997 and October 1997 through May 1999, because: (1) allegations that the tribunal used an improper form of review are questions of law, and not fact; and (2) petitioner made allegations of errors of law with respect to every conclusion of law made by the Board.

2. Venue— change—lack of jurisdiction—no prejudice

Although the trial court of Durham County erred by denying the Board of Trustees Local Governmental Employees Retirement System's (Board) motion to dismiss based on lack of jurisdiction to order a change of venue to Wake County Superior Court, the error did not prejudice the Board because the Board argued that petitioner should have filed her petition for judicial review in either Wake County or the county in which she resided as required by N.C.G.S. § 150B-45.

3. Pensions and Retirement— disability benefits—continued service

The trial court erred by reversing respondent Board of Trustees Local Governmental Employees Retirement System's (Board) final agency decision concluding that petitioner was not entitled to disability retirement benefits for the months of March 1997 and October 1997 through May 1999 when petitioner continued to work although in a part-time capacity based on her disability, because: (1) our Legislature did not intend that an employee be allowed to continue rendering service with the Retirement System and also receive disability benefits; (2) N.C.G.S. § 128-21(19) provides that in order for a member's retirement to become effective in any month, the member must render no service at any time during that month; and (3) petitioner

worked more than 1,000 hours per year which effectively eliminated her from qualifying to receive a disability retirement allowance, N.C. Admin. Code tit. 20, r. 2C.0802.

4. Estoppel— governmental agency—disability retirement

The trial court erred by finding that respondent Board of Trustees Local Governmental Employees Retirement System was estopped from denying petitioner disability retirement benefits when petitioner continued to work although in a part-time capacity based on her disability, because: (1) a governmental agency is not subject to estoppel to the same extent as a private individual or a private corporation; and (2) estoppel would override the statute's mandate that no one can receive disability retirement benefits without being retired.

Appeal by respondent from orders entered 14 October 1998 and 11 April 2000 by Judges Donald W. Stephens and Henry W. Hight, Jr., respectively, in Durham County Superior Court and Wake County Superior Court, respectively. Heard in the Court of Appeals 18 April 2001.

Lynn A. Andrews for petitioner-appellee.

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

HUNTER, Judge.

Respondent-appellant Board of Trustees Local Governmental Employees Retirement System ("Board") appeals the trial court's reversal of its final agency decision in which the Board decided Jane A. Wallace ("petitioner") was not entitled to disability retirement benefits for the months of March 1997 and October 1997 through May 1999. Having reviewed the whole record before us, we reverse the trial court's ruling.

Facts pertinent to this appeal are as follows: Petitioner "suffers from a bipolar, or manic-depressive, mood disorder." In 1988, she gained full-time employment with Trend Mental Health, Developmental Disabilities, and Substance Abuse Authority Center ("Trend") and "became a contributing member of the Retirement system." During the first several years with Trend, petitioner was able to manage her illness with medication and received several promotions, moving into a management-level position in 1994. However, "[b]egin-

ning in 1994, [petitioner]'s illness became increasingly resistant to medication. During 1996, [she] experienced considerable difficulties in performing her duties as Substance Abuse Program Coordinator. By January of 1997, [she] was unable to perform [her required] duties." Thus in February 1997, with the permission of her employer, petitioner left her full-time management position and began working as a part-time substance abuse counselor. This change was both a reduction in pay and a demotion in position for petitioner.

Also in February 1997, petitioner submitted to her employer an application for disability retirement. Under the section of the application entitled "Employer Certification" was noted that petitioner "[h]as not terminated" and that "[e]mployee is still employ[ed]." Additionally, in forwarding petitioner's disability application to the Retirement System, Trend's human resources director, Rick Wagner, attached a cover letter to the application in which he stated:

> Jane Wallace was out of work for an extended period of time due to health reasons but she has returned to work on a reduced schedule. She requested reclassification from 100% FTE Substance Abuse Program Supervisor at $33,074 to 71% FTE Substance Abuse Counselor II position at $22,391. *This change reduces her work time, salary, and supervisory responsibilities and she feels that this may qualify her for disability benefits. At this time she has not indicated if she plans to stop working due to her disability.*

(Emphasis added.) In response, the Retirement System returned petitioner's application attaching an "Information Checklist" which stated that in order to "fully process [petitioner's] application for retirement," the application needed to be notarized and certain payroll information, which had been requested on the form but was missing, needed to be completed.

Petitioner sent a second disability retirement application to the Retirement System on 4 March 1997, which included the information requested by way of the "Information Checklist." Again, in the section entitled "Employer Certification," the words "full time" were inserted "[w]here the form asked for the [petitioner's] last day of employment." Additionally, in response to the request to "[i]ndicate last day [petitioner] worked (physically on job)," "2/8/97 [—] employee is still employed part time in reduced capacity" was clearly written in the space provided.

The Medical Board "approved [petitioner's] application for disability retirement pursuant to N.C. Gen. Stat. § 128-27(c) and informed the Petitioner of its approval by letter dated April 22, 1997." Petitioner was then notified of her approval, to be effective 1 April 1997. Thereafter, petitioner began receiving her retirement benefits. Subsequently, "[o]n October 27, 1997, the Retirement System notified Petitioner by letter that it was suspending payment of her retirement benefits, because as a contributing member of the system, she was not eligible under the applicable statutes to also receive retirement benefits." The Retirement System further advised petitioner that she was to repay the benefits she had already been paid between 1 April and 30 September 1997, which amounted to $7,236.48.

In response, petitioner filed for a contested case hearing which was held before Administrative Law Judge ("ALJ") Brenda Becton. On behalf of the Board, Marshal Barnes, Deputy Director of the Retirement System, testified that it is possible for a member of the Local Government System to be approved for disability retirement benefits and still work part-time

> [p]rovided that they work less than 1,000 hours per year[and] depend[ing] on where they're working . . . . The statutes governing disability retirement under the Local System do provide a person to have a certain amount of earnings without affecting their benefit[but] it does matter who they go back to work with. If they remain working in the Local Governmental System, they would have to be in a position in which it did not require participation [in the Retirement System].

Mr. Barnes continued:

> [T]he definition of retirement under the statute requires a person to terminate covered employment to be entitled to a retirement allowance.
>
> . . .
>
> [Covered employment being defined a]s 1,000 hours or more per year in the Local System. . . .
>
> . . .
>
> The current [benefit] booklet that I have is dated July 1996, and on page 3, it says, "When you join, you become a member of the Retirement System on your date of hire if you are a permanent

> employee of a participating unit and your duties require that you work at least 1,000 hours a year."

Then, in response to whether the benefit booklet is "distributed to all members of the Local Retirement System," Mr. Barnes answered:

> [W]henever we reprint the benefit booklet, which is generally—sometimes we do it annually, but, generally, it's about every two years that we update that booklet. And whenever we update that, it is distributed to each employer that participates in the System, and we provide them more than enough copies to distribute to their employees.

However in her recommended decision, upon making appropriate findings Judge Becton concluded, among other things, that:

> 2. In the present case, it is clear that at the time [petitioner] was approved for disability, she was able to engage in gainful employment, albeit in a limited capacity and at reduced hours from her usual occupation. The [applicable] statute specifically provides that the ability to engage in gainful employment does not preclude the receipt of disability benefits. . . .

Thus, Judge Becton recommended that the Final Decision of the Board:

> (1) reinstate [petitioner]'s disability payments effective March 1, 1997, pursuant to N.C. Gen. Stat. § 128-27(c)[;] (2) schedule [petitioner]'s disability case for periodic medical review, pursuant to N.C. Gen. Stat. § 128-27(e); and (3) any adjustment of [petitioner]'s disability allowance which may be required be prospective only, pursuant to N.C. Gen. Stat. § 128-27(e)(1) and 20 NCAC 2C.0503.

Nevertheless, in its final agency decision, the Board rejected the majority of Judge Becton's findings and conclusions, and concluded, solely on the basis of N.C. Gen. Stat. § 128-21 and N.C. Admin. Code tit. 20, r. 2c.0802 (September 1977), that:

> 3. At no time relevant to her application for retirement has the Petitioner ever "retired" as that term is defined in the applicable statutes and rules. Therefore, at no time has the Petitioner been qualified to receive disability retirement benefits.
>
> 4. The Retirement System is authorized to seek reimbursement from any member or beneficiary respecting any overpay-

ment of benefits, pursuant to G.S. § 128-27(I). Petitioner has erroneously been overpaid benefits in the amount of $7,236.48.

Petitioner petitioned the superior court for judicial review on the basis that: the Board had failed to review the entire record before it, as required by law; that the Board had unlawfully gone outside of the official record (evidenced by the fact that "some of [its] findings . . . were not supported by any evidence contained in the official record"); that statutory law quoted by the Board in support of its final agency decision does not apply to the situation at hand and does not address the petitioner's claim to disability retirement benefits; that the Board's decision is "[u]nsupported by substantial evidence admissible," and; that the Board's decision is arbitrary and capricious.

After making many detailed findings, including that Judge Becton's findings of fact contained in her ALJ recommended decision were supported by substantial admissible evidence of record, and that the Board "did not consider the 'official record' as defined by N.C.G.S. 150B-37 and 150B-42(b) . . . despite statements to the contrary contained in the Final Agency Decision[,]" the trial court concluded:

> 3. That the [Board] unconstitutionally interfered with the Petitioner's vested rights in her pension plan . . . .
>
> 4. That the [Board] exceeded its statutory authority or jurisdiction [in] den[ying] the Petitioner's request for disability benefits . . . [and in]
>
> 5. . . . discontinu[ing] the Petitioner's disability benefits . . . .
>
> . . .
>
> 9. That the [Board] erred when it failed to interpret N.C.G.S. 128-27 consistent with the overall policies of the retirement, disability and death benefit schemes.
>
> 10. That the [Board]'s findings, inferences, conclusions and decisions are unsupported by substantial evidence admissible under N.C.G.S. 150B-29(a), 150B-30, or 150B-31 in view of the record as submitted . . . .

Thus, the trial court reversed the Board's final agency decision and ordered the Board to pay petitioner the 21 months of disability benefits she sought. The Board appeals.

It must be noted that "[b]y May 1999, [petitioner]'s health had deteriorated to the point that she was forced to leave her part-time job at Trend. She reapplied for and was again granted disability benefits effective June 1, 1999." (This final grant of disability benefits is not at issue.) Additionally, in its brief to this Court, the Board states that it "will forego seeking reimbursement of the benefits paid [to petitioner] in error from April through September, 1997. Thus, the only issue before this Court is whether Petitioner is entitled to benefits for the months of March, 1997 and October, 1997 through May, 1999."

[1] The Board brings forward four assignments of error for this Court's review. First, we choose to address the Board's contention that the trial court utilized the wrong standard of appellate review. In N.C. Gen. Stat. § 150B-51, our General Assembly has set out clear instructions for a trial court to follow when acting as an appellate judicial reviewer of a final agency decision:

> (a). . . In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. . . . Second, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision. . . .
>
> (b). . . After making the determinations, if any, required by subsection (a), the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

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

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51 (1999). Additionally:

> "*The proper standard of review [for a trial court] under [N.C. Gen. Stat. § 150B-51(b)] depends upon the issues presented on appeal [from the agency's final decision]. If appellant argues the agency's decision was based on an error of law, then 'de novo' review is required.* If however, appellant questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test."
>
> *In Re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citations omitted) (emphasis in original). . . . Then, once the trial court has entered its order, should one of the parties appeal to this Court,
>
> "[o]ur task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review."
>
> *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999).

Jordan v. Civil Serv. Bd. of Charlotte, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (emphasis added).

We first note that in accordance with the above statute, on the very first page of its order, the trial court plainly states, "[t]he Court, having reviewed the record in this cause and having considered the arguments of both parties, hereby makes the following **INITIAL DETERMINATIONS**, *pursuant to N.C.G.S. 150B-51(a)*[.]" (Emphasis in original and emphasis added.) Those initial determinations were that the Board did not hear new evidence following the contested case hearing, and that the Board did state specific reasons why it did not adopt the ALJ's recommended decision. Thus, the trial court complied with the initial determination procedures outlined in

N.C. Gen. Stat. § 150B-51(a). Second, we note that although the trial court reversed and modified the Board's decision, it did so pursuant to N.C. Gen. Stat. § 150B-51(b), specifying in each finding and/or conclusion in what way it found the Board's inferences, conclusions, or decisions were: "unconstitutional[]"; "exceeded its statutory authority or jurisdiction"; based "on unlawful procedure," and; "unsupported by substantial evidence admissible under N.C.G.S. 150B-29(a), 150B-30, or 150B-31 in view of the [entire] record as submitted," and which resulted in "the substantial rights of the Petitioner hav[ing] been prejudiced. Therefore, we hold that the trial court properly followed the statutory procedures laid out in N.C. Gen. Stat. § 150B-51.

Nevertheless, the Board argues that "[i]n this instance, the trial court's order is silent as to the standard of review employed. It is therefore impossible to tell whether the court utilized the appropriate scope of review." We disagree. Looking to petitioner's allegations in her appeal to the trial court *(In Re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363), the record reveals that petitioner excepted to many of the Board's findings of fact on the basis that the Board did not review *any* of the record before it. Although these exceptions would seem to be allegations regarding whether the Board's decision was supported by the evidence and as such, require application of the "whole record" test, *id.*, allegations that the tribunal utilized an improper form of review are questions of law—not fact. *See Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). Thus, it was proper in the present case for the trial court to apply a *de novo* review.

This is further borne out by petitioner's allegations that the Board's conclusions of law, are erroneous on the basis that the Board essentially misapplied and/or misinterpreted the statutory provisions regarding disability retirement and "the requirements for entitlement to a disability retirement allowance [as] set forth in G.S. 128-27(c) . . . subject . . . to . . . G.S. 128-27(e) . . . ." These contentions are clearly allegations of errors of law, and because petitioner's alleged errors of law are with respect to every conclusion of law made by the Board, the trial court was obligated to apply a *de novo* review to the entire case before it. *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). Thus, in laying out its very specific and detailed findings of fact and conclusions of law, we believe the record evidences that the trial court applied a standard of *de novo* review. We hold this was the proper standard of review.

[2] We next address the Board's assignment of error arguing that the trial court erred in denying the Board's motion to dismiss for lack of jurisdiction. We note that although the Board argues that "the State of North Carolina cannot be sued except with its consent or upon its waiver of immunity[o]therwise, this immunity is absolute and unqualified," it is not personal or subject matter jurisdiction the Board contends. Instead, the Board contends that the trial court of Durham County lacked jurisdiction to order a change in venue to Wake County Superior court. We agree. However, because the error did not prejudice the Board, it does not constitute reversible error.

The Board is correct in its contention that the Act "provides for a specific waiver of this immunity." Further, it is true that statutory provisions providing for the waiver of the right to judicial review under certain restrictions should be construed strictly. *In re Appeal of Harris*, 273 N.C. 20, 159 S.E.2d 539 (1968). However, this Court has long held that the party seeking relief on appeal, in this case the Board, must show not only error, but also that the error was prejudicial. *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 108 N.C. App. 251, 255, 423 S.E.2d 796, 799 (1992). Thus, in the case at bar, the Board has failed to show it was prejudiced by the change in venue in that the Board does not argue prejudice at all, it simply argues error. Moreover, we find that petitioner's motion to change venue actually resolves the Board's contention. It is the Board's argument that petitioner should have filed her petition for judicial review in either Wake County or the county in which she resided, as required by N.C. Gen. Stat. § 150B-45 (1999). Thus, petitioner's motion to change venue to Wake County Superior court and the trial court's grant of that motion settled the Board's argument by placing jurisdiction with the Wake County Superior Court. Again, we note the Board has failed to allege any prejudice or damage suffered because of the improper venue. Therefore, this assignment is overruled.

[3] We address the Board's final two assignments of error together. The first being, the Board assigns error to the trial court's finding and concluding that, in making it's final agency decision, the Board failed to review and consider the entire official record before it. It is the Board's contention that its "decision itself states that it was based upon '[t]he Board of Trustees, having reviewed the Recommended Decision and the Record in this matter, and having heard the arguments of the parties.' " Secondly, the Board argues that the trial court erred in awarding disability benefits to petitioner for a period of time when she was still employed part-time with Trend.

The scope of this Court's appellate review of the trial court's decision is the same as that utilized by the trial court. *Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991). . . .

. . .

> [Additionally, o]ur review is . . . limited to assignments of error to the trial court's order. *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987). . . .

Vass, 108 N.C. App. at 256-57, 423 S.E.2d at 800.

In the case at bar, the Board assigns as error the trial court's holding that petitioner was statutorily entitled to benefits and that the Board failed to utilize the entire official record in arriving at its final agency decision regarding petitioner's right to disability benefits. These are allegations of errors of law and as such, we must apply a *de novo* review to the record before this Court. *Act-Up Triangle*, 345 N.C. at 706, 483 S.E.2d at 392.

The Board is correct that the statutory definition of retirement is the "withdrawal from active service with a retirement allowance granted under the provisions of th[e governing] Article[, and that i]n order for a member[-employee]'s retirement to become effective in any month, the member[-employee] must render no service at any time during that month." N.C. Gen. Stat. § 128-21(19) (1999). Further:

> (10) "Employee" shall mean any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section, whether employed or appointed for stated terms or otherwise . . . . In all cases of doubt the Board . . . shall decide who is an employee.
>
> (11) "Employer" shall mean any county, incorporated city or town . . . and the State Association of County Commissioners. "Employer" shall also mean any separate, juristic political subdivision of the State as may be approved by the Board . . . .
>
> . . .
>
> (22) "Service shall mean service as an employee as described in subdivision (10) of this section and paid for by the employer as described in subdivision (11) of this section.

N.C. Gen. Stat. § 128-21(10), (11), (22). Conversely, there is no definition in the Act for "disability retirement." However regarding "disability retirement benefits," the Act states that:

> Upon the application of a member[-employee] or of his employer, any member[-employee] who has had five or more years of creditable service may be retired by the Board . . . on a disability retirement allowance: Provided, that the medical Board, after a medical examination of such member[-employee], shall certify that such member[-employee] is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member[-employee] should be retired; Provided further the medical board shall determine if the member[-employee] is able to engage in gainful employment and, if so, the member[-employee] may still be retired and the disability retirement allowance as a result thereof shall be reduced as in subsection (e) . . . .

N.C. Gen. Stat. § 128-27(c) (1999).

Our Courts have long held "[i]t is elementary that when a statute contains a definition of a word or term used therein, such definition, unless the context clearly requires otherwise, is to be read into the statute wherever such word or term appears therein." *Smith v. Powell, Comr. of Motor Vehicles*, 293 N.C. 342, 345, 238 S.E.2d 137, 140 (1977). Nevertheless, petitioner argues that the term "retired" has a different meaning in N.C. Gen. Stat. § 128-27, the disability statute. It is petitioner's position that because N.C. Gen. Stat. § 128-27(e)(1) (2001) clearly requires the Board to "determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation," N.C. Gen. Stat. § 128-27(e)(1) (1999), the statute thereby allows a member to continue to work—without actually retiring—as long as she does so in a different capacity than before. We disagree.

The Act clearly provides for:

> (e) Reexamination of Beneficiaries Retired on Account of Disability.—Once each year during the first five years following retirement of a member on a disability allowance, and once in every three-year period thereafter, the Board . . . may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination . . . .

> (1) The Board . . . shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference . . . between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. . . .
>
> (2) Should a disability beneficiary under the age of 62 years be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the contribution rate which is applicable during his subsequent membership service. . . .
>
> . . .
>
> (3a) *Notwithstanding the foregoing, should a beneficiary who retired on a disability retirement allowance be restored to service as an employee, then the retirement allowance shall cease* as of the first day of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members. . . .

N.C. Gen. Stat. § 128-27(e)(1), (2), (3a) (emphasis added).

In light of the above subsection (3a), we believe that our Legislature did not intend that an employee be allowed to continue rendering service within the Retirement System *and also* receive disability benefits. Instead, the statutory requirement that "[i]n order for a member's retirement to become effective in any month, the member must render *no* service at any time during that month," cannot be ignored. N.C. Gen. Stat. § 128-21(19) (emphasis added). Thus, we cannot agree with the ALJ's interpretation of the disability retirement statutes that, although petitioner continued working at Trend, it was *not in the same "service"* she previously provided (and could no longer provide due to her disability). Additionally, we agree with the Board that a member cannot be *both* a contributing member of the

system and receive payment for disability retirement. Therefore, we find that petitioner did not effectively "retire" (as defined in the Act) when she changed jobs, lessening her hours and being demoted.

Moreover, N.C. Admin. Code tit. 20, r. 2C.0802 (September 1977) clearly states: "An . . . employee in a regular position, the duties of which require not less than 1,000 hours of service per year shall be an employee as defined in G.S. 128-21(10)." As testified to by the Retirement System's Deputy Director, Mr. Barnes, this rule is outlined in the local government employees' handbook which is made available to "each employer that participates in the System . . . enough copies to distribute to their employees." Thus, we hold that where petitioner worked more than 1,000 hours per year—for any local government employer as defined by N.C. Gen. Stat. § 128-21(11)—petitioner would have effectively eliminated herself from qualifying to receive a disability retirement allowance.

From our reading of the Act we believe that the Legislature intended that a member-employee getting a disability retirement allowance for "withdraw[ing[from active service," N.C. Gen. Stat. § 128-21(19), should not be allowed to continue providing similar "[s]ervice," N.C. Gen. Stat. § 128-21(22). Thus, we find that petitioner did not properly retire from service and as such, petitioner was not entitled to disability benefits pursuant to N.C. Gen. Stat. § 128-27(e). Having so found, we need not address the Board's argument that it reviewed the entire official record before it.

[4] Finally, as to the Board's argument that the trial court erred in finding that the Board was "estopped from denying the Petitioner disability retirement benefits," we agree that the trial court did so err. We find the Board's brief to this Court persuasive in this regard:

> A governmental agency is not subject to an estoppel to the same extent as a private individual or a private corporation. *Henderson v. Gill*, 229 N.C. 313, 49 S.E.2d 754 (1948). Moreover, an estoppel may not arise against a governmental entity if such estoppel will impair the exercise of the governmental powers of the entity. *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953).
>
> [Thus, we agree that a]n estoppel argument does not apply [in the present case] because it would override what is clearly written in statute, that no one can receive disability retirement benefits without being retired. . . . The Supreme Court has

stated that "[w]hen the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, the approval of the doing of it by a ministerial officer cannot create a right to do that which is unauthorized or forbidden." *Glover v. Insurance Co.*, 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947). . . .

Having found that plaintiff was disqualified from receiving disability retirement benefits, the trial court's orders are

Reversed.

Judges WALKER and TYSON concur.

EATMAN LEASING, INC AND RUSSELL O. LEITCH, SR. PLAINTIFFS-APPELLEES v. EMPIRE FIRE & MARINE INSURANCE COMPANY, DEFENDANT-APPELLANT, AND DOUGLAS W. SHIPLEY, DEFENDANT-APPELLEE

No. COA00-571

(Filed 7 August 2001)

1. Insurance— automobile—excess liability coverage

The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant driver and finding that all four business auto insurance policies afforded coverage to plaintiffs, because: (1) defendant insurer did not dispute that plaintiffs are covered under the primary garage policy; (2) plaintiff driver's operation of the vehicle was covered under the excess garage policy when plaintiff was using with plaintiff company's permission a covered auto owned by the company; (3) plaintiff driver's operation of the vehicle was covered under the primary rental policy when the car driven by plaintiff was an owned auto covered under the policy, plaintiff company is the named insured under this policy, plaintiff driver was operating a covered auto with the permission of plaintiff company, and there is no exclusion preventing plaintiff driver from being covered; and (4) plaintiff driver's operation of the vehicle was covered under the excess rental policy when it incorporates the key definitions from the primary rental policy, and both plaintiffs are insureds under the primary rental policy.

2. Insurance— automobile—supplemental payments—prejudgment interest over policy limits

The trial court did not err in an action arising out of an automobile accident by declaring that all four business auto insurance policies provided supplemental payments for prejudgment interest over the policy limits, because: (1) prejudgment interest issues are decided based upon the court's interpretation of the specific insurance policy under review in each particular case; (2) the four policies in this case have a provision for payment of either all costs or all interest incurred in addition to liability limits, and therefore the "all costs" language of the policies includes prejudgment interest; and (3) the policies provide that supplementary payments are in addition to the policy limits.

Appeal by Defendant, Empire Fire & Marine Insurance Company from judgment entered on 17 February 2000 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals on 20 April 2001.

Poyner & Spruill, LLP., by Randall R. Adams for Plaintiff-Appellee Eatman Leasing, Inc.

Marshall, Williams, & Gorham, LLP., by W. Robert Cherry, Jr. for Plaintiff-Appellee Leitch.

McGuire, Woods, Battle & Boothe, LLP., by Kurt E. Lindquist, II and Arden Lynn Achenberg for Defendant-Appellant.

Thompson, Smyth & Cioffi, LLP., by Theodore B. Smyth for Defendant-Appellee Shipley.

BRYANT, Judge.

Empire Fire & Marine Insurance Company (Empire) issued four business auto policies (two primary and two excess) to Eatman Leasing which were in effect on 11 January 1997. On that date, Plaintiff Russell O. Leitch, Sr. and Defendant Douglas W. Shipley, were involved in an automobile accident. The vehicle driven by Leitch was owned by Eatman Leasing. Eatman Leasing was in the business of leasing, renting and selling automobiles. Leitch was traveling to Wilmington in order to transport the vehicle to Eatman Leasing's Wilmington operation.

Plaintiffs Eatman Leasing and Leitch filed a complaint for a declaratory judgment against Defendants Empire and Shipley on 23

April 1999. Plaintiffs sought a declaration that Empire had a duty to fully indemnify them under the four insurance policies. Both defendants filed motions for summary judgment. The trial court granted defendant Shipley's motion for summary judgment on 17 February 2000. Empire filed a notice of appeal on 10 March 2000.

There are two basic issues on appeal: whether the trial court erred in granting summary judgment in favor of Shipley in I) finding that the four insurance policies afforded coverage to Eatman and Leitch and II) finding the policies provided for prejudgment interest over the policy limits. For the reasons which follow, we find no error in the trial court's rulings.

I.

The trial court held that: 1) all four policies were in effect on the date of the accident; 2) the vehicle driven by Leitch and owned by Eatman is a covered auto under policy numbers SG231000 and SL231000; 3) Eatman is an insured under the policies because it is the named insured; 4) Leitch is an insured because he operated the vehicle with the permission of Eatman as set forth in the "Who is an Insured" section of the primary policies; 5) the vehicle driven by Leitch and owned by Eatman was a covered auto under Policy Number SF231000, pursuant to the amendatory language of Endorsement EM0808GR; 6) both Eatman and Leitch are insureds under Policy Number SX231000 because that policy incorporates by reference the "insureds" and "covered autos" definitions in the primary policy, SF231000.

[1] Empire first argues that the trial court erred in granting Shipley's summary judgment motion and finding that all four insurance policies afforded coverage to Eatman Leasing and Leitch. Empire argues that the trial court's decision was in direct contravention of the express language of the policies. 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). Once the moving party makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts showing that he can at least establish a prima facie case at trial. *Gaunt v. Pittaway*, 135 N.C. App. 442, 447, 520 S.E.2d 603, 607 (1999),

cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001) *citing Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998).

An insurance policy is a contract and like all other contracts, "the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). The intent of the parties may be derived from the language in the policy. *Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 789, 403 S.E.2d 571, 572 (1991). When the policy language is unambiguous, our courts have a "duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citation omitted). "[W]here the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation," judicial construction is necessary. *Allstate Ins. Co. v. Runyon Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999), *disc. review denied*, 351 N.C. 350, 542 S.E.2d 205 (2000) (citation omitted). If there is uncertainty or ambiguity in the language of an insurance policy regarding whether certain provisions impose liability, the language should be resolved in the insured's favor. *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1967). Moreover, exclusions from liability are not favored, and are to be strictly construed against the insurer. *Southeast Airmotive Corp. v. U.S. Fire Insur. Co.*, 78 N.C. App. 418, 420, 337 S.E.2d 167, 169 (1985).

When an insurance policy provides a definition of a term, that definition should be used. However, when no definition is provided in the policy, the nontechnical words have the same meaning as they would in ordinary speech. *Woods* at 506, 246 S.E.2d at 777. In determining the meaning of a term, the court may consider other portions of the policy and all clauses of it are to be construed, if possible, so as to bring them into harmony. "Each word is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction . . . ." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522 (1970) (citation omitted).

In this case, the four policies issued were: SG231000, entitled "Garage Auto Policy Form" [Primary Garage Policy] with endorsements; SL231000, entitled "Automobile Liability Excess Indemnity Policy Form" [Excess Garage Policy] with endorsements; SF231000

entitled, "Rental Auto Policy Form" [Primary Rental Policy] with endorsements; and SX231000, entitled "Excess Rental Policy" [Excess Rental Policy] with endorsements. Empire does not dispute that Eatman Leasing and Leitch are covered under the Primary Garage Policy, SG231000. However, Empire does challenge the coverage of Eatman and Leitch under the: A) Excess Garage Policy, SL231000; B) Primary Rental Policy, SF231000; and C) Excess Rental Policy, SX231000.

A. Excess Garage Policy [SL231000]

Empire contends that the Excess Garage Policy did not afford coverage for the January 1997 accident because the express provisions of the policy do not cover Leitch. To determine what coverage Leitch is afforded under the Excess Garage Policy, we need to examine this excess policy and the Primary Garage Policy, SG231000, which is specifically referenced in the declarations of the Excess Garage Policy as the "underlying insurance". The relevant portions of the Excess Garage Policy, SL231000 provide:

> INSURING AGREEMENT
>
> Excess Indemnity Over Automobile Liability Insurance
>
> "We" will indemnify "you" for "loss" which occurs during the "policy period" in *excess* (emphasis added) of the "primary insurance."
>
> CONDITIONS
>
> Application of Primary Insurance
>
> Unless a provision to the contrary appears in "our" policy, all the conditions, definitions, agreements, exclusions and limitations of the "primary insurance", including changes by endorsement will apply to "our" policy.

The following "Who is an Insured" provision from the Primary Garage Policy, SG231000 also applies to the excess policy:

> 1. WHO IS AN INSURED
>
> a. The following are "insureds" for covered "autos":
>
> (1) You for any covered "auto".

(2) Anyone else while using with *your permission* (emphasis added) a covered "auto" you own, hire or borrow except:

. . .

(c) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" *unless that business is your "garage operations".* (emphasis added).

The excess policy defines "you" and "your" to mean or refer to the Insured named in the "declarations". However, EM0951, the Specific Named Insured Endorsement amends the definition of "you" and "your" by providing in part:

Definition 1. under DEFINITIONS is deleted in its entirety and replaced with the following:

1. . . . The words "you" or "your" mean or refer to:

a. the Insured named in the "declarations"

. . .

e. only such other individuals who are *specifically listed on this endorsement* (emphasis added)

Empire contends that the endorsement modifies the definition of "insured" in both the primary and excess policies to include only those non-employees who are named in the declarations. Empire takes the position that the only way Leitch would be covered under the Excess Garage Policy is if Leitch was an employee of Eatman Leasing (as Eatman Leasing is the named insured) if Leitch, as an independent contractor or non-employee of Eatman Leasing, is named on the endorsement.

We disagree and find that the "Who is an Insured" language in the primary insurance policy was not altered by the endorsement. This is because the endorsement modified the definition of "you" and "your" but it did not change the definition of "insureds." Thus the "Who is an Insured" language remains applicable to the excess policy. Eatman is the named insured. Leitch was operating the vehicle with Eatman's permission at the time of the collision. Leitch's operation of the vehicle under these circumstances is covered under the excess policy SL231000 because he was "using with [Eatman's] permission a covered auto [Eatman] own[ed]."

B. Primary Rental Policy [SF231000]

Empire next argues that the trial court erred in declaring coverage under policies SF231000 and SX231000 because the two policies were for the benefit of rental vehicles only and that the accident in question arose out of the use of a non-rental vehicle by a non-insured individual. We disagree.

Primary Rental Policy SF231000 contains the following pertinent language:

> I. A: COVERED AUTOS
>
> Covered "autos" are those "autos" described in ITEM TWO of the Declarations for which a premium charge is shown in ITEM TWO and that:
>
> 1. You use;
>
> . . .
>
> II. A: COVERAGE—we will pay all sums an "insured" legally must pay as damages . . . caused by an "accident" and resulting from the ownership, maintenance or *use* of a covered "auto" (emphasis added).
>
> 1. Who is an Insured: you for any covered auto; your employee, but only while acting within the scope of his or her duties; and *anyone else using w/ your permission a covered "auto" you own*, except as set forth in section II. A. 2 (emphasis added)
>
> 2. d. Who is not an Insured: someone using a covered auto while he or she is working in a business selling, moving, transporting, servicing, repairing or parking autos *unless that business is yours. (emphasis added).*

Thus, to obtain coverage the auto must be a "covered auto" as defined in section I. A. and the person must be an "insured" as defined in section II. A.

Under the initial policy, the "covered autos" provision in section I, paragraph A, says "covered autos" are "specifically described autos *available for short-term rental to others*". (emphasis added). However, paragraph A is rewritten in Endorsement EM0808GR, which amends the policy definition of "covered autos". It states:

> This endorsement modifies insurance provided under the following:

Rental Auto Coverage Form

Section I—Covered Autos, Paragraph A, WHICH AUTOS ARE COVERED is changed to read as follows:

A. WHICH AUTOS ARE COVERED AUTOS

OWNED "AUTOS"—Those "autos" you own are covered "autos." This includes those "autos" you acquire ownership of after the policy begins.

. . .

The effect of the endorsement was to replace the Standard Code Symbol System which used symbols "1-10" to code the "covered autos". After the endorsement, only three types of "covered autos" were defined in the policy: OWNED AUTOS, HIRED AUTOS, and NON-OWNED AUTOS. While the initial policy extended coverage for rental vehicles, the endorsement extended the definition of covered autos to include "those autos [Eatman] own[ed]." Thus, the endorsement provisions are in conflict with the coverage provisions in the initial policy. "When such a conflict is present, the provisions most favorable to the insured, *i.e.* those in the endorsement, are controlling." *Drye v. Nationwide Mutual Ins. Co.*, 126 N.C. App. 811, 815, 487 S.E.2d 148, 150 (1997) (citation omitted).

With respect to the Primary Rental Policy, the vehicle owned by Eatman and driven by Leitch, was an OWNED AUTO, and thus a covered auto, as that term was defined in Endorsement EM0808GR. Eatman Leasing, Inc. is the named "insured" under this policy. Leitch is an insured because he was operating a "covered auto" with "permission" of Eatman Leasing, Inc., and thus meets the definition of WHO IS AN INSURED under section II. A. 1. c. Finally, there is no exclusion under section II. A. 2. which would prevent Leitch from being covered. His use of the vehicle, driving from Rocky Mount to Wilmington, was for the benefit of *Eatman's* business (emphasis added).

C. Excess Rental Policy [SX231000]

The final policy at issue in this case, Excess Rental Policy, SX231000, states in pertinent part:

Section I A. "we will pay all sums an 'insured' legally must pay as damages in excess of the 'primary insurance' caused by an 'accident' and resulting from the ownership, maintenance of [sic] use

> of a covered 'auto'. We will not provide coverage if the 'loss' is not covered under the primary insurance.
>
> . . .
>
> Section III—"unless a provision to the contrary appears in our policy, all the conditions, definitions, agreements, exclusions and limitations of the "primary insurance" including changes by endorsement, will apply to our Coverage form." [Primary policy SF 231000]
>
> . . .
>
> Declarations page: "description of automobile(s)—covered autos as defined by the underlying primary insurer."

This Excess Rental Policy directly and specifically references Primary Rental Policy, SF231000. (See previous discussion of SF231000 in section B of this opinion.) The Excess Rental Policy insures the same "covered autos" as the Primary Rental Policy. The term "insured" is defined in part in the Excess Rental Policy as "any person or organization qualifying as an "insured" in the "Who is an Insured" provision of the primary insurance." Inasmuch as both Eatman and Leitch are insureds under the Primary Rental Policy and the Excess Rental Policy incorporates the key definitions from the Primary Rental Policy, we find that Eatman and Leitch are covered under the Excess Rental Policy.

Accordingly, we conclude that the trial court did not err in granting the summary judgment motion and finding that all four policies afforded coverage to Eatman Leasing and Leitch.

II.

[2] Empire's final argument is that the trial court erred in declaring that the four policies provided supplemental payments for prejudgment interest over the policy limits. Again, we disagree.

When a statute is applicable to the terms of an insurance policy, "the provisions of that statute become terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the statute, the provisions of the statute prevail." *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993) (citation omitted). The prejudgment interest statute, N.C.G.S. § 24-5, states in pertinent part:

(b) Other Action—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.

N.C.G.S. § 24-5(b) (2000).

However, our Supreme Court has previously held that N.C.G.S. § 24-5 is not a part of the Financial Responsibility Act so as to be written into every liability policy. *Sproles v. Greene*, 329 N.C. 603, 613, 407 S.E.2d 497, 503 (1991). Thus, when the statute is not applicable to the terms of an insurance policy, "a liability insurer's obligation to pay interest in addition to its policy limits is governed by the language of the policy." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 490, 467 S.E.2d 34, 39 (1996) *quoting Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993).

Our courts have addressed the issue of prejudgment interest in several cases. In each case the court determined whether an insurer was required to pay interest beyond the policy limits based on the language in the policy. Based upon our review of those cases, we find the decision in *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), to be directly applicable to the case *sub judice*. In *Lowe* the insurer expressly agreed to pay, "*all costs* taxed against the insured," in addition to its contractual limit of liability. Id. at 463, 329 S.E.2d at 651. Our Supreme Court held that "prejudgment interest provided for by N.C.G.S. 24-5 is a cost within the meaning of the contract which, under the contract in the present case, the insurer is obligated to pay." Id. at 464, 329 S.E.2d at 651.

Empire contends that *Lowe* should not control in the instant case because other cases decided since *Lowe (Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991); *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993); and *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996)) have held that prejudgment interest constitutes damages, not costs, and as such, it is to be paid by the insurer as a part of the judgment *up to* the insurers' limits of liability. We disagree and distinguish the cases cited by Empire and conclude that the holding in *Lowe does control* in this case.

In *Sproles v. Greene*, 329 N.C. 603, 611-12, 407 S.E.2d 497, 503 (1991), the Court held that "under the language of the policy . . . [the insurer] has agreed to pay, in excess of its liability limits, only the costs of defense and not all costs taxed against the insured, and

[thus] *Lowe* is not controlling." The *Sproles* court distinguished its case from *Lowe* because the phrase "all defense costs we incur" contained in the policy under review in *Sproles* was not as broad as the phrase "*all costs* taxed against the insured" contained in the policy under review by the *Lowe* court. *Id.* at 611, 407 S.E.2d 497 at 502. Therefore, based on the specific terms of the contract, prejudgment interest was applicable only to all *defense* costs, albeit in excess of the liability limits.

In *Baxley*, the Court interpreted the following contractual language to support its holding that the UIM carrier was obligated to pay prejudgment interest up to its policy limits:

> [UIM carrier promises to pay] *damages* which a covered person is *legally entitled to recover* from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.

Baxley at 6-7, 430 S.E.2d at 899. (emphases added)

The contract in *Baxley* did not define damages, thus the Court construed this ambiguity against the drafter, the UIM carrier, and found the definition of damages to include the compensatory damage amount awarded by the jury as well as prejudgment interest. We distinguish *Baxley* because the Court therein analyzed liability language in the primary policy, but did not completely analyze the supplementary payment provisions of that policy which is at issue in the case *sub judice*. However, the *Baxley* Court noted that the "specific prejudgment interest provision [in the supplementary payment provisions] is not rendered "superfluous" by a finding that prejudgment interest is *also* an element of a plaintiff's damages." *Id.* at 10-11, 430 S.E.2d at 901. Further, the *Baxley* Court distinguished *Lowe v. Tarble* by indicating that "Lowe dealt with a supplementary payments provision in the liability section of a policy in which the insurer agreed to pay "*all* costs" taxed against the insured "*in addition to* the applicable limit" of the policy." *Id.* at 11, 430 S.E.2d at 901 (citation omitted). Such specific provisions obligate the carrier to pay prejudgment interest "*in addition to* its policy limits." *Id.* at 10, 430 S.E.2d at 901. Therefore, under our reading of *Baxley*, an award of prejudgment interest would not be precluded where the specific language of the contract provides for such interest in addition to the policy limits.

In *Mabe*, the policy at issue addressed prejudgment interest, post-judgment interest, costs taxed, and defense costs. *Mabe* at 492, 467 S.E.2d at 40. The *Mabe* policy had a provision which defined prejudgment interest as part of damages, leading the Court to conclude "that the definition clause expressly including prejudgment interest as an element of damages control[led] the determination of whether prejudgment interest is payable beyond the policy limits." *Id.*

The cases discussed—*Sproles*, *Baxley* and *Mabe*—clearly indicate that prejudgment interest issues will be decided by our courts based upon the court's interpretation of the specific insurance policy under review in each particular case. *Mabe* at 491, 467 S.E.2d at 39.

In the case *sub judice* the four policies issued to Eatman have a provision for payment of either "all costs" or "all . . . interest incurred" *in addition to liability limits.* The policies contain no specific language discussing prejudgment interest as damages. The primary policies, SG231000 and SF231000, have identical prejudgment interest language which provides:

> 4. COVERAGE EXTENSIONS
>
> a. Supplementary Payments:
>
> In *addition to the Limit of Insurance*, we will pay for the "insured":
>
> . . .
>
> (5) *All costs taxed against the "insured" in any "suit" we defend;* (emphasis added)

The excess policies, SL231000 and SX231000 provide:

> If we exercise this right [to defend the case], we will assume our proportionate share of all court costs, legal fees, investigation costs and *interest incurred with our consent.* (emphasis added).

The "all costs" language in these policies is almost identical to the policy language in *Lowe.* Therefore, following the ruling in *Lowe* and applying it to the policies at issue here we conclude the "all costs" language of the policies includes prejudgment interest. Further, the policies clearly provide that supplementary payments are in addition to the policy limits. Accordingly, we affirm the trial court's ruling that the four policies provided supplemental payments for prejudgment interest over the policy limits.

AFFIRMED.

Chief Judge EAGLES and Judge McCULLOUGH concur.

HARBORGATE PROPERTY OWNERS ASSOCIATION, INC., PETITIONER v. MOUNTAIN LAKE SHORES DEVELOPMENT CORPORATION, FIRST RESPONDENT AND DAVIDSON COUNTY, SECOND RESPONDENT AND NEW HARBORGATE CORPORATION, THIRD RESPONDENT AND BLUEBIRD CORPORATION, FOURTH RESPONDENT

No. COA00-856

(Filed 7 August 2001)

1. Notice— consent judgment recorded in register of deeds— purchaser's notice of restrictions

The trial court did not err by adding respondent-Bluebird Corporation to an action to require specific performance of a consent judgment involving the completion of subdivision amenities where the shareholders in Bluebird were the sole shareholder and corporate secretary of Harborgate, the corporation which purchased the subdivision from the original developer and then transferred it to Bluebird. Although Bluebird argues that it was subjected to the consent judgment without notice or the opportunity to be heard, the consent judgment was analogous to a restrictive covenant, it was recorded in the office of the Register of Deeds, it would have been revealed by a proper search of the public records, and Bluebird is charged with constructive notice of the restrictions contained therein. Moreover, the record is clear that Bluebird was aware of the judgment.

2. Specific Performance— subdivision amenities

The trial court did not abuse its discretion by requiring that respondents Harborgate and Bluebird specifically perform the obligations of a consent judgment where Harborgate and Bluebird were successive owners of a subdivision, both corporations had common owners, the consent judgment involved the completion of subdivision amenities, and Harborgate contended that specific performance was impossible. Harborgate voluntarily agreed to be a party to the consent judgment and to specifically perform its obligations, and Bluebird accepted that obligation by accepting the transfer of the subdivision. Moreover, Harborgate

and Bluebird failed to establish that specific performance was impossible.

3. Judgments— performance bond—amount—evidence sufficient

The trial court did not abuse its discretion by requiring the owners of a subdivision to post a $600,000 performance bond as a part of an order requiring specific performance of a consent judgment to complete subdivision amenities where the amount of the bond was supported by the evidence.

4. Costs— attorney fees—awarded under consent judgment provision—no statutory authority—invalid

The trial court erred by granting attorney fees to a homeowner's association pursuant to a provision in a consent judgment entitling the prevailing party to recover reasonable attorney fees in an action to enforce the judgment. Contractual provisions for attorney fees in North Carolina are invalid in the absence of statutory authority and there is no statutory authority permitting recovery.

Judge TYSON concurring in part and dissenting in part.

Appeal by third and fourth respondents from an order entered 4 May 2000 by Judge James R. Vosburgh in Davidson County Superior Court. Heard in the Court of Appeals 25 April 2001.

Paul Rush Mitchell for petitioner-appellee.

Wilson Biesecker Tripp & Sink, by Joe E. Biesecker, for second respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips, for third and fourth respondent-appellants; Brinkley Walser, PLLC, by Gaither S. Walser, for first and fourth respondent-appellants.

HUNTER, Judge.

New Harborgate Corporation ("Harborgate") and Bluebird Corporation ("Bluebird") appeal from an order adding Bluebird as a party to the action, and requiring both parties and Mountain Lake Shores Development Corporation ("Mountain Lake") to (1) specifically perform the obligations imposed by a Consent Judgment entered on 2 June 1998, (2) post security for the performance of said

obligations, and (3) reimburse Harborgate Property Owners Association, Inc. ("the Association") for attorney fees. On appeal, Harborgate and Bluebird assign error to the entirety of the trial court's order. After a careful review of the record, briefs, and arguments of counsel, we affirm the trial court's order, except the award of attorney fees which is hereby vacated.

This case centers around the property known as the Harborgate residential subdivision ("subdivision"), consisting of approximately 150 acres located in Davidson County, North Carolina. In fact, this particular subdivision has been the subject of much controversy. Particularly, this subdivision was at the heart of an appeal previously heard by this Court, *Harborgate Prop. Owners Ass'n v. Mt. Lake Shores Dev. Corp.*, 133 N.C. App. 347, 521 S.E.2d 151 (unpublished), *disc. review denied*, 351 N.C. 103, 540 S.E.2d 359 (1999) (holding that James and LaVerne Tumlin could not intervene, because their interests were adequately represented by the Association); additionally, this subdivision has been involved in litigation between Tony Susi ("Susi") and Lois Aubin ("Aubin"); and two separate temporary restraining orders have been obtained prohibiting the transfer of the subdivision. Significantly, these restraining orders, which prevented Harborgate from obtaining loans to finance construction within the subdivision, are now both dissolved.

The facts relevant to the appeal presently before us are: in 1996, the Association filed a complaint against Mountain Lake, the original developer of the subdivision, seeking a declaration of its rights and specific performance of the completion of several amenities and common areas within the subdivision—including, *inter alia*, a security gate, tennis courts, swimming pool, and club house. On 2 June 1998, Judge L. Todd Burke entered a Consent Judgment whereby Mountain Lake and the Association agreed to a schedule for the completion of the amenities and common areas. Additionally, the Consent Judgment provided that all subsequent purchasers/developers of the subdivision would be bound by the terms and conditions of the judgment, such parties would be added as a party to the action, the judgment would be enforceable through a motion in the cause, and in the necessity of a motion in the cause, attorney fees would be taxed to the non-prevailing party. The Consent Judgment was recorded in the office of the Register of Deeds of Davidson County.

Thereafter, Susi and Aubin entered into negotiations with Mountain Lake for the purchase of the subdivision. Eventually, Mountain Lake sold its rights in the subdivision to the Susi

Corporation, which later changed its name to New Harborgate. Susi was the President and sole shareholder of the Susi Corporation, and Aubin was the corporation's Secretary. Another corporation involved during the negotiations for the subdivision was Bluebird; notably, Susi and Aubin were also the sole shareholders (fifty percent each) and officers of Bluebird. During the negotiations, the Association claims that it believed that the Susi Corporation was actually Bluebird under a new name. On 8 March 1999, Judge Mark E. Klass entered a Modification of Consent Judgment, whereby the Susi Corporation (Harborgate) consented to being added as a party to the action and to be bound by the Consent Judgment.

Nevertheless, Harborgate failed to meet the completion dates for the amenities and common areas specified in the Consent Judgment. As a result, the Association filed a motion in the cause seeking (1) to set aside the Modification of Consent Judgment as having been obtained by fraud or mistake, and (2) specific performance of the Consent Judgment by Mountain Lake and Harborgate. Then, on 30 April 2000, Harborgate transferred all of its interest in the subdivision to Bluebird by warranty deed. The deed was recorded in the office of the Register of Deeds of Davidson County on the morning of 1 May 2000.

Shortly after the deed was recorded on 1 May 2000, the hearing on the Association's motion in the cause was held before Judge James R. Vosburgh. By order entered 4 May 2000, Judge Vosburgh ordered Bluebird to be added as a party to the action, and required Harborgate, Bluebird, and Mountain Lake to specifically perform the obligations set out in the Consent Judgment, post security in the amount of $600,000.00 for the performance of said obligations, and reimburse the Association for reasonable attorney fees in the amount of $11,350.00. Harborgate and Bluebird appeal from this order.

[1] First, Bluebird assigns error to the trial court's addition of Bluebird as a party to the action and subjection of the corporation to the Consent Judgment. Specifically, Bluebird argues that the order was entered without it being afforded notice or the opportunity to be heard. We disagree.

In a land transaction, " '[a] purchaser is charged with notice of the contents of each recorded instrument constituting a link in [the] chain of title and is put on notice of any fact or circumstance affecting [the] title which any such instrument would reasonably disclose.' " *Randle v. Grady*, 224 N.C. 651, 656, 32 S.E.2d 20, 22 (1944)

(quoting Headnote 7, *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942)). In other words, a "purchaser [of real property] . . . has constructive notice of all duly recorded documents that a proper examination of the title should reveal." *Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986).

Here, the Consent Judgment, which was recorded in the office of the Register of Deeds of Davidson County,

> serve[d] as the Court's interpretation of the declarations as if the same had been included in the Restrictive Covenants and [was] impressed upon the real property described [in the Consent Judgment] together with the covenants and responsibilities set forth [t]herein, the same to run with the real property and be an appurtenance thereto in the same manner as part of the recorded Restrictive Covenants and plats which are recorded in the Register of Deeds of Davidson County, with the same effect of dedicating and placing these rights and responsibilities upon the real property of Harborgate subdivision.

Where a restrictive covenant agreement is on record, purchasers of land are charged with constructive notice of restrictions contained in the agreement. *See Higdon v. Jaffa*, 231 N.C. 242, 248, 56 S.E.2d 661, 665 (1949); *see also Turner*, 220 N.C. 620, 625, 18 S.E.2d 197, 202.

In the instant case, the Consent Judgment is analogous to a restrictive covenant, and therefore is a link in the chain of title. A proper search of the public records pertaining to the subdivision would have revealed the Consent Judgment. Consequently, Bluebird is charged with constructive notice of the restrictions contained therein.

While a better course of action would have been to provide notice directly to Bluebird, the record is clear that Bluebird was aware of the Consent Judgment. Evidence of record reveals that both Susi and Aubin signed the Modified Consent Judgment on 8 March 1999. Additionally, Susi, his counsel, Aubin, and her counsel were present for the hearing on the Association's motion in the cause. While Susi's counsel agreed that Bluebird should be added as a party in the matter, Aubin's counsel did not object when the subject of Bluebird's addition was raised. Accordingly, the trial court did not err in adding Bluebird as a party to the action and subjecting it to the Consent Judgment.

[2] Next, Harborgate and Bluebird assign error to the trial court's requirement that they specifically perform the obligations imposed by the Consent Judgment—particularly, the completion of the amenities and common areas within the subdivision. However, we find no merit to this assignment.

In dealing with the equitable remedy of specific performance,

> [t]he sole function of the . . . remedy . . . is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court; and is conclusive on appeal absent a showing of a palpable abuse of discretion.

Munchak Corp. v. Caldwell, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981) (citations omitted).

"[S]pecific performance may not be granted where the performance of the contract is impossible." *Hong v. George Goodyear Co.*, 63 N.C. App. 741, 743, 306 S.E.2d 157, 159 (1983). Moreover, "specific performance will not be decreed against a defendant who is unable to comply with the contract even though the inability to perform is caused by the defendant's own act." *Id.* at 744, 306 S.E.2d at 159. However, "where a defendant makes the claim that the specific performance would be inequitable as respects him, it is incumbent on him to establish that fact." 71 Am. Jur. 2d *Specific Performance* § 207 (1973).

At bar, Harborgate contends that it presented evidence that it was impossible for it to specifically perform the obligations in the Consent Judgment. Therefore, Harborgate and Bluebird, relying on our Supreme Court's decision in *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986), assert that having,

> offered evidence tending to show that [they are] unable to fulfill [the] obligations under a separation agreement or *other contract* the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance. . . .

Id. at 657, 347 S.E.2d at 23 (emphasis added). However, we are not persuaded by this argument. *Cavenaugh* deals solely with specific performance in respect to a separation agreement. Our Supreme

Court has found that a separation agreement differs from a commercial, arms-length transaction. *See Bromhal v. Stott*, 341 N.C. 702, 706, 462 S.E.2d 219, 222 (1995). Therefore, *Cavenaugh* does not apply to the case *sub judice*.

Thus, we are left to determine whether Harborgate, or Bluebird, established that specific performance was impossible here. First, we note that Harborgate voluntarily agreed to be a party to the Consent Judgment and to specifically perform the obligations therein. Likewise, Bluebird, by accepting the transfer of the subdivision, accepted the obligation to specifically perform. Secondly, Harborgate and Bluebird both failed to establish that specific performance was impossible on their parts. The only evidence of impossibility offered by Harborgate was the fact that it had $7,600.00 in its bank account and several banks had declined to extend it a loan for the subdivision. Moreover, Bluebird offered no evidence whatsoever that it was impossible for the corporation to specifically perform.

On the other hand, evidence was presented that showed it was actually financially feasible for both Harborgate and Bluebird to specifically perform the obligations under the Consent Judgment. For instance, when Susi was asked, "[d]oes [] Harborgate itself have sufficient money in the bank account to build these amenities," he responded, "[y]es, we have." In addition to Susi's admission, counsel for Harborgate and Bluebird admitted during oral arguments before this Court that there was now nothing prohibiting the parties from using the subdivision as security for a loan. Thus, we find that Harborgate and Bluebird failed to establish that it was impossible for the corporations to specifically perform. Accordingly, we hold that the trial court did not abuse its discretion in ordering both parties to specifically perform the obligations set forth in the Consent Judgment—i.e., completion of the amenities and common areas within the subdivision.

[3] Harborgate and Bluebird next assign error to the trial court's requirement that they post a $600,000.00 performance bond. Specifically, both parties contend that the amount is not supported by the evidence. We disagree.

"[A] court of equity may adopt all necessary, reasonable, and lawful means to make its decrees fully effective, and to accomplish the objects intended." 71 Am. Jr. 2d *Specific Performance* § 210 (1973). Furthermore, in a specific performance action, "[t]o assure performance, it is not unusual to require a performance bond . . . ." *Bell v.*

Concrete Products, Inc., 263 N.C. 389, 390, 139 S.E. 629, 630 (1965); *see also* 5A Arthur L. Corbin, *Corbin on Contracts* § 1137 (1964) ("[i]t may be proper for the [court] . . . to require the defendant to give security to prevent future injury").

At the hearing, Harry Winchester ("Winchester"), the Association's president, testified that Susi stated it would take approximately $1,200,000.00 to develop the amenities and common areas. Winchester further testified that to complete the club house alone would cost approximately $400,000.00 to $450,000.00. Additionally, Jeffrey Todd Yates, a general contractor employed by Susi, testified that an estimate for completing the tennis courts, swimming pool, and club house, but excluding the security gate, would be $400,000.00 to $500,000.00. Conversely, Susi testified that his estimate to complete the amenities was approximately $300,000.00 to $400,000.00. At bar, we find that the requirement of a performance bond in the amount of $600,000.00 is supported by the evidence. Hence, we hold that to assure performance, it was not an abuse of discretion for the trial court to order a bond in that amount.

[4] Finally, Harborgate and Bluebird assign error to the trial court's award of attorney fees to the Association pursuant to the Consent Judgment. After review, we vacate those provisions in the trial court's order awarding attorney fees.

Ordinarily, "[a] consent judgment is the contract between the parties entered upon the records with the approval and sanction of the court. It is construed as any other contract." *Redevelopment Comm. v. Hannaford*, 29 N.C. App. 1, 2-3, 222 S.E.2d 752, 753 (1976). In the Consent Judgment *sub judice*, the parties agreed that "[i]n the event any action is brought by either party to enforce this Judgment, the prevailing party or parties in said action shall be entitled to recover reasonable attorney fees from the non-prevailing party for its representation in said subsequent proceedings."

In North Carolina, " '[a]s a general rule[,] contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court . . . .' " *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 167, 510 S.E.2d 690, 695, *disc. review denied and dismissed*, 350 N.C. 379, 536 S.E.2d 70 (1999) (quoting *Forsyth Municipal ABC Board v. Folds*, 117 N.C.

App. 232, 238, 450 S.E.2d 498, 502 (1994)); *see also Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 11, 545 S.E.2d 745, 752 (2001). Moreover, " 'the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.' " *Delta Env. Consultants*, 132 N.C. App. at 167, 510 S.E.2d at 695 (quoting *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980)).

Here, we can find no statutory authority permitting the Association to recover attorney fees. Additionally, we find that the attorney fees at issue are not allowable as costs under N.C. Gen. Stat. § 7A-305(d)(3) (1999) ("[c]ounsel fees, as provided by law") or N.C. Gen. Stat. § 6-20 (1999) (costs allowable "in the discretion of the court"). Moreover, no debt arises from the Consent Judgment, other than the payment of attorney fees from the non-prevailing party, thus the fees are not allowable as an "evidence of indebtedness" under N.C. Gen. Stat. § 6-21.2 (1999). Accordingly, we vacate the trial court's award of attorney fees.

In a recent decision, *Lee Cycle*, 143 N.C. App. 1, 545 S.E.2d 745 (appeal pending in the Supreme Court of North Carolina, No. 271A01), this Court, by a divided panel, reversed a trial court's award of attorney fees due to a lack of statutory authority—despite an express contractual provision allowing such fees. We recognize and appreciate the precedents cited and arguments made by Judge Tyson in his dissents in *Lee Cycle*, 143 N.C. App. at 13-16, 545 S.E.2d at 752-54, and in the case at bar; however, "where one panel of this Court has decided an issue, a subsequent panel is bound by that precedent . . . unless it has been overturned by a higher court." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998). Thus, we are bound by the precedents in this matter, and only our Supreme Court or legislature can change them if they are so inclined.

In sum, we affirm the trial court's order, except the award of attorney fees which is hereby vacated.

Affirmed in part, and vacated in part.

Judge WALKER concurs.

Judge TYSON dissents in a separate opinion.

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

I concur in the majority's opinion on all issues other than the trial court's award of attorney's fees being vacated.

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

A. "Other Evidence of Indebtedness"

G.S. § 6-21.2 provides:

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

N.C. Gen. Stat. § 6-21.2 (1999) (emphasis supplied). The majority's opinion concludes that G.S. § 6-21.2 does not provide statutory authority for the court's award of attorney's fees because "no debt arises from the Consent Judgment, other than the payment of attorney fees from the non-prevailing party, thus the fees are not allowable as an 'evidence of indebtedness.' "

The phrase "other evidence of indebtedness" has been defined by our Supreme Court to include "any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817 (1980). The Supreme Court stated that such a definition "does no violence to any of the statute's specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties." *Id.* at 294, 266 S.E.2d 817-18 (emphasis supplied).

In *Stillwell*, the Supreme Court reversed this Court's holding that G.S. § 6-21.2 was inapplicable, and that an award of attorney's fees arising out of a lease dispute was improper. *Id.* at 295, 266 S.E.2d at 818. The Court noted that the lease agreement at issue contained a legally enforceable obligation by the plaintiff-lessee to remit rental payments to the defendant-lessor in exchange for use of property. *Id.*

at 294, 266 S.E.2d at 818. Holding that such an agreement "is obviously an 'evidence of indebtedness,' " the Court held: "we see no reason why the obligation by plaintiff to pay attorneys' fees incurred by defendant upon collection of the debts arising from the contract itself should not be enforced to the extent allowed by G.S. § 6-21.2." *Id.* at 294-95, 266 S.E.2d at 818 (emphasis supplied).

The majority opinion correctly notes that "[a] consent judgment is the contract between the parties entered upon the records with the approval and sanction of the court. It is construed as any other contract." *Redevelopment Comm. v. Hannaford*, 29 N.C. App. 1, 2-3, 222 S.E.2d 752, 753 (1976). In the Consent Judgment *sub judice*, the parties agreed that "[i]n the event any action is brought by either party to enforce this Judgment, the prevailing party or parties in said action shall be entitled to recover reasonable attorney fees from the non-prevailing party for its representation in said subsequent proceedings."

The $600,000 awarded petitioners by the trial court is "evidence of indebtedness." The court provided respondents with the option of securing this debt by posting a performance bond or by providing petitioners a first lien deed of trust on property owned by respondents.

It is undisputed that petitioners' action before us is a motion in the cause within the original action that ended with the consent judgment that imposed legally enforceable monetary obligations on respondents. When the consent judgment was entered, the obligation of respondents matured. It is also undisputed the petitioners prevailed in enforcing and collecting upon the matured obligations contained in the consent judgment. Thus, consistent with the Supreme Court's holding in *Stillwell*, G.S. § 6-21.2 provides authority for petitioners to recover the attorney's fees "upon collection of the debts arising from the contract itself." *Stillwell* at 294-95, 266 S.E.2d at 818 (emphasis supplied). I would hold that the trial court had statutory authority under G.S. § 6-21.2 to award attorney's fees.

B. Fees as Costs in Equitable Relief

The trial court's award of attorney's fees is also authorized by G.S. § 6-20. G.S. § 6-20 provides that, "[i]n other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C. Gen. Stat. § 6-20 (1999). A trial court may, in

its discretion, award attorney's fees under G.S. § 6-20 if "just and equitable." *Batcheldor v. Boyd*, 119 N.C. App. 204, 208, 458 S.E.2d 1, 3-4, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 753 (1995) (citing *Wachovia Bank & Trust Co. v. Dodson*, 260 N.C. 22, 131 S.E.2d 875 (1963)); *see also, Alsup v. Pitman*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990) (recoverable costs under G.S. § 6-20 may, in trial court's discretion, include expenses for depositions even though deposition expenses do not appear expressly in the statutes).

In suits in equity, the allowance of costs rests in the discretion of the court. *Worthy v. Brower*, 93 N.C. 492, 1885 WL 1714, (N.C.) (1885). Under G.S. § 6-20, the trial court's allowance of costs, including attorney's fees, is within the court's sound discretion and "will not be disturbed on appeal absent an abuse of discretion." *Wachovia Bank of North Carolina, N.A. v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 175, 450 S.E.2d 527, 533 (1994) (citation omitted).

In this case, petitioners filed a motion in the cause seeking the following equitable remedies: (1) to set aside the modification of consent judgment as having been obtained by fraud or mistake, and (2) specific performance of the consent judgment by Mountain Lake and Harborgate. The trial court ordered "specific performance compelling [all] respondents to take such actions as will bring about the completion of the obligations imposed by the Consent Judgment as modified." The court also ordered "[r]espondents to provide security for the performance of the obligations compelled by this Order in the amount of $600,000." The remedy sought and the court's relief is equitable in nature. Thus, under G.S. § 6-20, the trial court had discretion to award petitioners' costs, including attorney's fees. Respondents present no evidence of an abuse of discretion in the trial court's award.

I would affirm the learned trial court's award of attorney's fees under either G.S. § 6-21.2 or G.S. § 6-20. I, therefore, respectfully dissent from that portion of the majority's opinion.

STATE OF NORTH CAROLINA v. CHRISTOPHER LEE FERGUSON

No. COA00-642

(Filed 7 August 2001)

1. **Evidence— subsequent crime or act—defendant's use of handgun**

The trial court did not err in a prosecution for first-degree murder, attempted murder, and robbery with a dangerous weapon which occurred in June 1995 by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) from a witness about an incident in Asheville in July 1995 where defendant had a handgun and threatened to kill someone if she did not tell him where he could locate his marijuana, because: (1) the evidence tended to show that defendant was present in North Carolina in July 1995, possessed and was involved in the sale of marijuana in July 1995, possessed a handgun in July 1995, and had motive to commit the crimes in this case; (2) there was temporal proximity between the Asheville incident and the crimes in this case, as well as similarity between the incidents when both involved the use of a handgun; and (3) defendant cannot show how he was prejudiced by the admission of this evidence when plenary evidence of defendant's guilt was offered at trial.

2. **Constitutional Law— North Carolina—right to be present at all stages—in-chambers conference**

Although the trial court erred in a first-degree murder, attempted murder, and robbery with a dangerous weapon case by holding an unrecorded in-chambers conference with the attorneys in defendant's absence in violation of North Carolina Constitution Article I, Section 23, the error was harmless beyond a reasonable doubt because: (1) the substance of the unrecorded in-chambers conference was reconstructed and summarized for the record, and defendant was present in the courtroom when the trial court reconstructed and summarized what transpired; and (2) defendant had ample opportunity to make any objections or comments to his attorney, or to inquire of his attorney regarding the substance of the conference.

3. **Evidence— photostatic reproduction—hotel registration card—authenticity—chain of custody**

The trial court did not err in a first-degree murder, attempted murder, and robbery with a dangerous weapon case by admitting

a photostatic reproduction of a hotel registration card, because: (1) defendant's signature was properly authenticated under N.C.G.S. § 8C-1, Rule 901(a) by a comparison of his university identification card to the signature on the motel registration card; (2) although the original motel registration card was turned over to the police and its location was unknown, the owner of the motel testified that the exhibit was an exact copy of the original registration card and defendant has not raised any real issue as to the authenticity of the original; and (3) a detailed chain of custody was not necessary when there was no reason to believe the document was altered.

4. Homicide— first-degree murder—indictment—constitutionality

Although defendant contends the trial court erred by denying his motion to dismiss the indictment for first-degree murder based on a failure to disclose the theory and precise elements, defendant concedes that this precise issue has been considered and rejected by our Supreme Court.

Appeal by defendant from judgments entered 20 September 1997 by Judge D. Jack Hooks in Duplin County Superior Court. Heard in the Court of Appeals 14 May 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General James Peeler Smith, for the State.

Margaret Creasy Ciardella, for defendant-appellant.

EAGLES, Chief Judge.

Defendant Christopher Lee Ferguson was tried capitally and found guilty of first-degree murder, attempted murder and robbery with a dangerous weapon in Duplin County Superior Court on 17 September 1997. Defendant was sentenced on 20 September 1997 to consecutive sentences of life imprisonment without parole for murder, 190 to 237 months for attempted murder, and 89 to 116 months for robbery with a dangerous weapon. Defendant appeals. After careful review, we hold that defendant received a fair trial free from prejudicial error.

In the light most favorable to the State, the evidence tended to show the following: On 26 June 1995, defendant and Marcos Nunez (Nunez) rented a room at the Liberty Inn Motel in Wallace. There, defendant and Nunez met Arturo Gonzalez (victim) and Edwin

Caranza (Caranza) to discuss a drug transaction. Caranza testified that defendant and Nunez agreed to pay the victim $30,000.00 for thirty pounds of marijuana.

The next morning, defendant and Nunez followed the victim and Caranza to a house located at 681 Kinsey Mill Road in Duplin County where the marijuana was located. Defendant and Nunez were driving an Oldsmobile owned by Nunez's girlfriend, Yolanda Munoz (Munoz). When the four men arrived at the Kinsey Mill Road house, Caranza testified that the victim directed him to retrieve the drugs from behind the house. When Caranza returned with the marijuana, he placed the bags on the ground to be counted. Nunez and Caranza then knelt on the ground to count the drugs.

Caranza testified that as he was kneeling on the ground, he saw defendant shoot the victim who fell to the ground. Caranza then turned toward defendant and saw a gun in defendant's hand. Defendant then shot Caranza in the leg. As Caranza was running away, defendant again shot him in the hand. Caranza, however, managed to keep running. Later, Caranza took a bus to Miami where he remained for approximately four to five months. When Caranza returned to North Carolina, he identified defendant as the person who shot him and the victim.

Nunez also testified at defendant's trial. Nunez testified that as he was kneeling on the ground he heard a gun shot, saw blood splatter and turned to see defendant holding a gun. Nunez then ran toward the front of the house. As he was running, Nunez heard two more shots. Defendant then yelled to Nunez to stop running and help him with the marijuana. Nunez returned and defendant loaded marijuana into the trunk of the Oldsmobile.

At approximately 4:00 a.m. 28 June 1995, Nunez called Dion Newkirk (Newkirk) and told Newkirk that defendant had shot someone. Nunez called Newkirk later that morning, at approximately 10:00 a.m., and asked Newkirk to meet him and defendant at a Hardees Restaurant in Goldsboro because they were lost. Newkirk testified that when he arrived at the Hardees, both Nunez and defendant had blood on their clothing. Newkirk testified that Nunez again told him that defendant shot someone. Defendant told Newkirk that he (defendant) had "shot [the victim and], . . . that Nunez was screaming and yelling like a little bitch." Later that day, Newkirk saw bloody marijuana bags in the trunk of the Oldsmobile. Newkirk further testified that defendant was carrying a small black handgun.

That morning, the victim's body was found in the backyard of the Kinsey Mill Road house. It was later determined by Dr. Thomas Clark, a forensic pathologist, that the victim had sustained a fatal close range gunshot wound to the right side of his head. A loaded Colt .38 caliber semiautomatic pistol was found in the victim's waistband. Near the victim's body, Detective Ramsey of the Duplin County Sheriff's Department found several bags and bricks of marijuana.

Defendant presented videotaped depositions of five witnesses all of whom testified that defendant was in New York at the time of the shootings. Defendant did not testify.

[1] By his first assignment of error, defendant contends that the trial court committed reversible error by admitting evidence under Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he 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 . . . .

G.S. 8C-1, Rule 404(b). Our Supreme Court has held that Rule 404(b) states

> a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987)); *State v. King*, 343 N.C. 29, 43, 468 S.E.2d 232, 241 (1996). Thus, even though the evidence may tend to show a defendant's propensity to commit other crimes, wrongs or acts, it is admissible under Rule 404(b) so long as it is relevant for some other purpose. *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

When prior incidents are offered for a permissible purpose, "the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect" of Rule 403. *State v. West*, 103

N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). The similarities between the other crime, wrong or act and the crime charged need not, however, " 'rise to the level of the unique and bizarre' in order for the evidence to be admitted under Rule 404(b)." *State v. Thomas*, 350 N.C. 315, 356, 514 S.E.2d 486, 511 (1999) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)). Moreover, remoteness in time generally goes to the weight of the evidence not its admissibility. *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998).

Here, Rhonda Bethea (Bethea) testified on behalf of the State at defendant's trial. During the summer of 1995, Bethea lived next door to Munoz in Asheville. Bethea testified that she first became acquainted with defendant in June 1995 when she, along with Munoz, drove defendant and Nunez from Wallace to Asheville. Bethea then testified that approximately one month after her initial encounter with defendant in June 1995, she saw defendant in Asheville with a handgun. When the State questioned Bethea about the circumstances surrounding this incident in Asheville, the trial court sustained defendant's objection and a *voir dire* of the witness ensued.

During the *voir dire* hearing, Bethea testified that in July 1995, defendant arrived at her apartment in Asheville with a handgun. At the time, Bethea, her two year old daughter and a sixteen year old friend, "Chicago," were in the apartment. Bethea then testified that at her apartment defendant

> was yelling at [Chicago] asking her where was his weed was [sic] at, if she didn't tell him, he was going to kill her. She kept saying—well, she was crying and she was saying, I don't where your weed is at. I don't know what you're talking about. I was saying, she has nothing to do with this, please, let my daughter out of the room. And he said, I don't give a—I'll kill them both. I want my weed.
>
> Q. And did he finally—how did—he didn't kill either one of them; is that correct?
>
> A. No.
>
> Q. Did he finally leave?
>
> A. Yes, sir.
>
> Q. How long was he in the room with them?
>
> A. I would say probably about five or ten minutes.

At the conclusion of the *voir dire* hearing, the trial court ruled that the evidence concerning the incident in Asheville was admissible under Rule 404(b) because it tended to show that defendant was present in North Carolina in July 1995, possessed and was involved in the sale of marijuana in July 1995, possessed a handgun in July 1995, and had motive to commit the Duplin County crimes. The trial court further found that there was temporal proximity between the Duplin County crimes and the incident in Asheville, as well as similarity between the incidents because both involved the use of a handgun. Finally, the trial court concluded that although the evidence possessed some prejudicial effect, the prejudicial effect was outweighed by the probative value of the evidence. Following Bethea's testimony, the trial court gave a limiting instruction to the jury.

Here, defendant argues that the incidents in Asheville and Duplin County were so dissimilar and remote in time as to run afoul of the balancing test between probative value and prejudicial effect. "The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999). Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial. *State v. Campbell*, 133 N.C. App. 531, 540, 515 S.E.2d 732, 738 (1999). Thus, assuming *arguendo* that defendant has met his burden of showing this Court that evidence of the Asheville incident was not admissible under Rule 404(b), he is still required to show he was prejudiced by its admission. *Id.* On this record, he cannot do so.

Plenary evidence of defendant's guilt was offered at trial. Caranza testified that he saw defendant shoot the victim on 27 June 1995. Cranaza further testified that immediately after defendant shot the victim, defendant shot him, wounding him in the hand and the leg. Nunez testified that on the morning of 27 June 1995, he heard several gunshots, saw blood and saw defendant holding a handgun. Finally, Newkirk testified that he saw defendant with a handgun on 28 June 1995, and that defendant admitted to Newkirk that he shot the victim. On this record, defendant cannot show that if the trial court had excluded Bethea's testimony, a different result would have been reached at trial. This assignment of error fails.

[2] By his next assignment of error, defendant contends that the trial court committed reversible error by holding an unrecorded in-chambers conference with the attorneys in defendant's absence.

Defendant argues that by holding such an in-chambers conference, the trial court violated his nonwaivable constitutional right to be present at every stage of his capital trial. Based on *State v. Moss*, 332 N.C. 65, 418 S.E.2d 213 (1992), we are compelled to hold that under Article I, Section 23 of the North Carolina Constitution the trial court erred in failing to insure defendant's presence at every stage of his capital trial. Here, we conclude that the State has shown that the error was harmless beyond a reasonable doubt.

At the outset we note that "[t]hough alluding to the federal constitution as a basis of the right to presence, defendant's argument relies exclusively on the definition of the right contained in North Carolina law. We limit our discussion accordingly." *State v. Adams*, 335 N.C. 401, 408, 439 S.E.2d 760, 763, n.1 (1994).

Article I, Section 23 of the North Carolina Constitution provides: "In all criminal prosecutions, every person charged with a crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . . ." "This protection guarantees an accused the right to be present in person at every stage of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987); *State v. Exum*, 343 N.C. 291, 293, 470 S.E.2d 333, 334 (1996). This State constitutional protection imposes on the trial court the affirmative duty to insure a capital defendant's presence at every stage of a capital trial. *Exum*, 343 N.C. at 294, 470 S.E.2d at 334; *Moss*, 332 N.C. at 73-74, 418 S.E.2d at 218; *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990). Furthermore, it is well settled in North Carolina that "the right to presence cannot be waived in capital cases and includes chambers conferences with counsel." *State v. Call*, 349 N.C. 382, 398, 508 S.E.2d 496, 506 (1998); *Exum*, 343 N.C. at 294, 470 S.E.2d at 334-35; *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L.Ed.2d 777 (1990).

Our courts have found error where the trial court conducted in-chambers conferences in a defendant's absence even though counsel for both the State and defendant were present. *State v. Call*, 349 N.C. 382, 508 S.E.2d 496 (1998); *State v. Exum*, 343 N.C. 291, 470 S.E.2d 333 (1996); *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991).

> However, error caused by the absence of the defendant at some portion of his capital trial does not require automatic reversal. This Court has adopted the "harmless error" analysis in cases where a defendant is absent during a portion of his capital trial.

> The State has the burden of establishing that the error was harmless beyond a reasonable doubt.

Brogden, 329 N.C. at 541, 407 S.E.2d at 163 (internal citations omitted); *Exum*, 343 N.C. at 295, 470 S.E.2d at 335. If the State can establish that an error is harmless beyond a reasonable doubt, a new trial is not required. *Exum*, 343 N.C. at 295-96, 470 S.E.2d at 335; *Moss*, 332 N.C. at 74, 418 S.E.2d at 218.

Thus, "[n]otwithstanding an accused's right to be present, certain violations of this right may be harmless if such appears from the record." *State v. Buchanan*, 330 N.C. 202, 222, 410 S.E.2d 832, 844 (1991). "An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995). Even though an in-chambers conference is not recorded, if the "nature and content of the private discussion" can "be gleaned from the record," for example by a subsequent summary of the conference on the record by the trial court, then the reviewing court may review the record to determine whether the defendant was prejudiced. *Exum*, 343 N.C. at 295-96, 470 S.E.2d at 335; *State v. Hayes*, 130 N.C. App. 154, 177, 502 S.E.2d 853, 869 (1998), *aff'd in part and modified in part*, 350 N.C. 79, 511 S.E.2d 302 (1999).

Here, the record reveals that at the end of the court proceedings on Friday, 12 September 1997, the trial court held a conference with counsel and defendant, out of the presence of the jury. During the 12 September conference, defendant was called regarding his decision not to testify on his own behalf. The record also reflects that there was a discussion regarding the availability of alibi witnesses to testify on behalf of defendant Monday morning, 15 September 1997. The defense then rested, subject to the possibility of reopening on Monday morning for the purpose of presenting additional witnesses.

At the beginning of court on Monday morning with the defendant present, the following transpired out of the presence of the jury:

> THE COURT: Now, I believe that on Friday the Defendant rested subject to reopening this day, is that correct, sir.
>
> MR. SAPP: Yes, your Honor.
>
> THE COURT: And I believe that the understanding that I had with you was that the witnesses from New York who had—at the

time that you advised me that they were then in Rocky Mount, North Carolina, there was one who we had concerns about not being able to do [sic] be here today, a minister.

MR. SAPP: Yes, sir.

THE COURT: And I told you to let me know over the weekend, we had set up a conference call and that we would make plane ticket arrangements. I have heard nothing from you—and it is my understanding Mr. Sapp *from a brief conversation in chambers with counsel* that there would be no further evidence for the Defendant in the guilt innocence phase; that correct, sir. (Emphasis added).

MR. SAPP: That is correct, Your Honor.

THE COURT: Anything further in that line for the Defendant.

MR. SAPP: No.

Here, the substance of the unrecorded in-chambers conference was reconstructed and summarized for the record. Furthermore, the record reflects that defendant was present in the courtroom when the trial court reconstructed and summarized what transpired in the in-chambers conference. Under these circumstances, defendant had ample opportunity to make any objections or comments to his attorney, or to inquire of his attorney regarding the substance of the conference. We have carefully reviewed the record and conclude that although the trial court erred by conducting the conference in defendant's absence, the error was rendered harmless beyond a reasonable doubt by the trial court's actions in assuring that the record reflects what transpired during that conference. *Call*, 349 N.C. at 398, 508 S.E.2d at 507. Accordingly, the assignment of error fails.

[3] Next, defendant contends that the trial court erred by admitting a photostatic reproduction of a hotel registration card. Defendant argues that (1) the signature on the card was not properly authenticated, (2) the card was not the best evidence, and (3) the State failed to establish a chain of custody. We disagree.

Danny Norris (Norris), the owner of the Liberty Inn Motel (motel) in Wallace, testified at defendant's trial. Over objection, Norris identified State's Exhibit 18 as a copy of a registration card used at the motel, dated 26 June 1995. Norris testified that the card routinely is filled out by customers at the time they check into the motel and is then maintained in the motel's business records. When defendant

again objected to the introduction of the registration card, a *voir dire* of Norris was conducted.

During the *voir dire*, Norris testified that prior to defendant's trial the original registration card was turned over to the police. Norris further testified that although he did not remember registering defendant at the motel on 26 June 1995 he did recognize the registration card labeled State's Exhibit 18.

> I recognize my handwriting on the number of—the number of the room that he was assigned and I recognize my handwriting and the amount of money that he paid. And all the other writing is his except for the date. I recognize the date as my handwriting.

At the conclusion of the *voir dire*, the trial court overruled defendant's objections as to the admissibility of the registration card. Norris then testified that the registration card was signed "Saladin Pasha" and the address provided by the guest was 1933 B North Hills Drive, Raleigh, North Carolina.

Michael Downing, a detective with the Asheville Police Department, testified that on 24 August 1995 he saw defendant at the Asheville Police Department. When Downing asked defendant for identification on 24 August 1995, defendant identified himself as "Saladin Pasha." Downing testified that defendant then handed him a North Carolina Central University student identification card which contained defendant's photograph and the signature "Saladin Pasha," and provided his address as 1933 B North Hills Drive, Raleigh, North Carolina. The North Carolina Central University student identification card, labeled State's Exhibit 26, was admitted without objection. State's Exhibits 18 and 26 were then handed up to the jury in order for comparison of the signatures contained on the motel registration card and the university identification card.

Defendant relies primarily on *State v. Austin*, 285 N.C. 364, 204 S.E.2d 675 (1974) to support his argument that the trial court erred by admitting the copy of the 26 June 1995 motel registration card. In *Austin*, our Supreme Court held that it was error for a motel registration card bearing the purported signature of the defendant to be admitted into evidence when the clerk neither knew the defendant nor registered him at the hotel. The *Austin* Court reasoned that the card was not properly admitted because "the signature[] had not been *authenticated*, that is, the State did not present evidence . . . that it was actually the . . . defendant[] who had signed the card[]." *State v.*

Ligon, 332 N.C. 223, 235, 420 S.E.2d 136, 141 (1992). *Austin* is inapposite here.

Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated. G.S. 8C-1, Rule 901(a). Rule 901(b)(3) of the North Carolina Rules of Evidence provides that a jury may authenticate a document by comparing a known sample of a person's handwriting with the handwriting on a disputed document. G.S. 8C-1, Rule 901(b)(3). Expert or other testimony is not required. Here, the State offered the signature on defendant's university identification card to the jury for comparison to the signature on the motel registration card. This was a proper method of authentication. Therefore, we conclude that the motel registration card was properly authenticated and *Austin* does not apply.

We also reject defendant's "best evidence rule" argument. When an original document is lost or destroyed, cannot be obtained or is in the possession of an opponent, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances would be unfair to admit the duplicate in lieu of the original." G.S. 8C-1, Rule 1003. Here, Norris testified that State's Exhibit 18 was an "exact copy" of the original registration card. Although there is nothing in the record to indicate what happened to the original motel registration card after it was turned over to the police, defendant has not raised any real issue as to the authenticity of the original. Moreover, the circumstances presented here do not indicate that it would have been unfair to admit the copy of the registration card. Therefore, we hold that the trial court correctly found that neither Rule 1003 exception applied requiring the production of the original document.

Defendant further argues that the State failed to establish a chain of custody for either the original or the copy of the motel registration card. Admission of evidence at trial is in the trial court's discretion, and the identification of such evidence need not be unequivocal. *State v. Smith*, 134 N.C. App. 123, 516 S.E.2d 902 (1999); *State v. Stinnett*, 129 N.C. App. 192, 497 S.E.2d 696 (1998). A trial court

> exercises its discretion "in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in unchanged

> condition. A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given the evidence and not to its admissibility.

Stinnett, 129 N.C. App. at 198, 497 S.E.2d at 700 (quoting *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984)); *State v. Jones*, 342 N.C. 523, 536, 467 S.E.2d 12, 20 (1996). Here, the trial court properly exercised its discretion in determining that the copy of the motel registration card was "involved in the incident" and was in unchanged condition. Although the document may be of the type that is susceptible to alteration, there is no reason to believe that the document was, in fact, altered. Therefore, under the circumstances presented here, a detailed chain of custody was not necessary. Our courts have consistently stated that any weak links in a chain of custody go to the weight of the evidence, not its admissibility. *Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984); *Smith*, 134 N.C. App. at 126, 516 S.E.2d at 905. This assignment of error fails.

[4] Finally, defendant contends that the trial court erred by denying his motion to dismiss his indictment for first degree murder. Defendant argues that the indictment was faulty in that it "failed to disclose the theory of first degree murder and failed to disclose the precise elements against which defendant would have to defend himself, which failure violated defendant's constitutional rights." Defendant acknowledges that he has raised this issue for preservation purposes and concedes that this precise issue was considered and rejected by our Supreme Court in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000). Accordingly, this assignment of error fails.

No error.

Judges McGEE and TYSON concur.

FRANK A. CONSIDINE, PLAINTIFF-APPELLANT v. COMPASS GROUP USA, INC., DEFENDANT-APPELLEE

No. COA00-843

(Filed 7 August 2001)

Employer and Employee— wrongful discharge—employee-at-will—violation of public policy—specific conduct and specific policy not alleged

The trial court did not err by dismissing a wrongful discharge complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), where plaintiff alleged that he had been employed as in-house counsel by a corporation providing food service to government and private corporations, that he had discovered and sought to end violations of a compliance program that affected federal, state and local government contracts, and that he was discharged for doing what his job required as a monitor of the compliance program. Exceptions to the employment-at-will-doctrine have been recognized in North Carolina, including a prohibition against termination for a purpose in contravention of public policy, but the plaintiff here failed to allege specific conduct violating a public policy specifically expressed in North Carolina's statutes or constitution.

Chief Judge EAGLES dissenting.

Appeal by plaintiff from order entered 3 April 2000 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 21 May 2001.

Ferguson, Stein, Wallas, Adkins, Gresham, & Sumter, P.A., by John W. Gresham, for plaintiff-appellant.

Smith Helms Mulliss & Morre, L.L.P., by H. Landis Wade, Jr. and Paul M. Navarro, for defendant-appellee.

McGEE, Judge.

Frank A. Considine (plaintiff) appeals the dismissal by the trial court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), of his complaint alleging wrongful discharge from employment by his former employer, Compass Group USA, Inc. (defendant) in violation of North Carolina public policy. Plaintiff also alleged he was a third-party beneficiary of a settlement agreement between defendant and the United

States government but plaintiff filed a voluntary dismissal without prejudice of this claim.

Relevant allegations in plaintiff's complaint filed 6 December 1999 include:

> 1. The Plaintiff, Frank A. Considine, is a citizen of North Carolina and a resident of Mecklenburg County. Until November 15, 1996, Plaintiff was employed as in-house counsel by Compass Group, USA, Inc.
>
> 2. Defendant, Compass Group, USA, Inc. (hereinafter "Compass Group" or "Compass") is a Delaware corporation having it's principle [sic] place of business in Charlotte, North Carolina. Compass Group provides products and services under food service contracts for federal, state, local government, and private corporations throughout the United States.
>
> 3. Compass, as of the time of the events complained of herein, owned and controlled various food service contracts, including those of Canteen Corporation, Flagstar Corporation, and Service America Corporation.
>
> 4. Plaintiff was employed by Defendant in June of 1996, as an in-house corporate counsel. His original assignment was to implement the acquisition of certain assets of Service America Corporation by Compass.
>
> 5. Plaintiff was also assigned duties regarding a compliance program mandated by a settlement agreement between Canteen and the federal government.
>
> 6. Between January 1988 and January 1994, Canteen provided commissary and restaurant services to the United States in Canteen's mid-Atlantic region. Canteen provided these services pursuant to various contracts with the United States.
>
> 7. Canteen was required under the terms of a settlement agreement entered into in December of 1995, with the United States, to pay the sum of $900,000.00 for its failure to pass through rebates under the service contracts and to implement a compliance program to ensure that Canteen properly rebated monies to the United States under ongoing contracts.
>
> 8. Under the terms of the settlement agreement, Defendant was specifically prohibited from retaliating against an employee for reporting the failure to properly credit rebates.

9. In carrying out his duties regarding the compliance program, Plaintiff discovered unlawful conduct on the part of the Defendant which affected both federal, state and local government service contracts.

10. Plaintiff then advised his supervisor, the general counsel for the Defendant, regarding the conduct he had discovered. Plaintiff also sought advice from outside counsel regarding ways for the Defendant to remedy its conduct.

11. Less than two weeks later, on November 15, 1996, Plaintiff was discharged without warning on the grounds that "things just weren't working out."

12. Plaintiff was then asked to leave the building without returning to his office. When he did return to his office to obtain his personal effects, he found the general counsel rifling through his desk in search of documents which would show the unlawful conduct of the Defendant.

13. Plaintiff was then asked to sign an agreement that would provide him three months' severance pay if he waived his right to bring any legal action against the Defendant and signed a confidentiality agreement with the Defendant. Plaintiff refused to do so.

14. Plaintiff was terminated because he had learned of the unlawful conduct, reported it to his supervisors and sought to end the unlawful practices.

15. The Defendant's actions as set out herein violate the public policies of North Carolina and are thus unlawful.

16. Because of the unlawful conduct set out herein, Plaintiff has been damaged in an amount in excess of $10,000.00.

Defendant filed a motion to dismiss plaintiff's complaint for wrongful discharge pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Following a hearing on defendant's motion, the trial court granted the motion to dismiss plaintiff's claim for wrongful discharge in an order filed on 3 April 2000. Plaintiff appeals.

The essential question in reviewing the grant of a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1 (1999) Rule 12(b)(6) is whether, "as a matter of law, the allegations of the complaint, treated

as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991) (citation omitted). A motion to dismiss pursuant to Rule 12(b)(6) should not be granted " '*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (citation omitted) (emphasis in original). Therefore, we review the allegations in plaintiff's complaint to determine whether the trial court erred in dismissing plaintiff's claim for wrongful discharge under Rule 12(b)(6).

The discharge of an employee at will generally does not support an action for wrongful discharge in this state. However, as argued by plaintiff, exceptions to this general rule have been recognized by our appellate courts, including a prohibition against termination for a purpose in contravention of public policy. Plaintiff cites the leading cases that have recognized this exception, being *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled on other grounds*, 347 N.C. 329, 493 S.E.2d 420 (1997); *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); and *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992). In each of these cases, our Courts have recognized an exception to the employment at will doctrine by identifying a cause of action for wrongful discharge in violation of public policy. Under the exception, the employee has the burden of pleading and proving that the employee's dismissal occurred for a reason that violates public policy.

The plaintiff in *Sides* alleged in her complaint "that her wrongful discharge [was] in retaliation for truthfully testifying in court [and] was a wanton and reckless violation of public policy and her rights[.]" *Sides*, 74 N.C. App. at 335, 328 S.E.2d at 822. She alleged in her complaint a series of specific actions by the defendant-employer that culminated in the plaintiff's discharge in retaliation for her refusal to testify falsely in a medical malpractice case. These alleged actions by the defendant included threats, a hostile attitude and isolation of the plaintiff in her work environment. Our Court began the analysis of the plaintiff's claim for wrongful discharge by stating "that the legislature is not at all adverse to courts of this State entertaining actions based on a violation of policies that have been enacted or otherwise established for the protection and benefit of the public." *Id.* at 337, 328 S.E.2d at 823. Our Court in *Sides* cited criminal statutes and a

public policy that defendant's alleged conduct violated in holding defendant had no right to terminate plaintiff for an unlawful reason or purpose that contravenes public policy. We further noted that

> [p]erjury and the subornation of perjury were both felonies at common law and are so punishable by G.S. 14-209 and G.S. 14-210. The intimidation of witnesses was an offense at common law and is punishable by G.S. 14-226 as a misdemeanor. These offenses are also an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly[.]

Id. at 337-38, 328 S.E.2d at 823-24.

The plaintiff in *Coman* alleged in his complaint that the defendant-employer discharged him for his refusal to violate United States Department of Transportation regulations by operating his vehicle excessive hours and his refusal to falsify records. The complaint also alleged that the plaintiff was informed by the defendant that he would have to continue to drive for periods of time that violated federal regulations if he wanted to keep his job and that if the plaintiff refused, his pay would be reduced by fifty percent. Our Supreme Court, in finding that the complaint stated a cause of action for wrongful discharge, noted that the alleged conduct by defendant not only violated federal regulations, but "also violated the public policy of North Carolina. N.C.G.S. 20-384 provides that the Division of Motor Vehicles may promulgate highway safety rules[.]" *Coman*, 325 N.C. at 176, 381 S.E.2d at 447. The Court cited a series of statutes enacted to carry out the public policy of our state to protect the safety of our highways that the defendant's alleged conduct violated.

The plaintiffs in *Amos* alleged in their complaint that the defendant-employer had discharged the plaintiffs for refusing to work for less than the statutory minimum wage in violation of North Carolina public policy as set forth in N.C. Gen. Stat. § 95-25.3. Our Supreme Court determined that the plaintiffs' complaint established a cause of action for wrongful discharge as the defendant's alleged conduct had violated the public policy when the defendant discharged the plaintiffs "in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos*, 331 N.C. at 353, 416 S.E.2d at 169. The Supreme Court cited Article 2A of Chapter 95 of the North Carolina General Statutes, the Wage and Hour Act, as setting forth the public policy of this state dealing in part with the wage levels of employees. The Court also held that the public policy exception to

the employment at will doctrine adopted in *Coman* is "a judicially created doctrine, designed to vindicate the rights of employees fired for reasons offensive to *the public policy of this State.*" *Id.* at 356, 416 S.E.2d at 171. (emphasis added).

Plaintiff also asserts that his complaint states a claim for wrongful discharge pursuant to our Court's decision in *Johnson v. Mayo Yarns Inc.*, 126 N.C. App. 292, 484 S.E.2d 840, *disc. review denied*, 346 N.C. 547, 488 S.E.2d 802 (1997). Plaintiff contends that our Court's *dicta* in *Mayo* that "a definition of 'public policy' has evolved which connotes the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good," *Id.* at 296, 484 at 842-43, establishes that an employee in North Carolina can assert a claim for wrongful discharge without demonstrating an express public policy declaration within the North Carolina Constitution or General Statutes. However, plaintiff cites no decision by our appellate courts that supports this assertion.

Defendant responds that plaintiff's reliance on *Mayo* is misplaced as our Court clearly examined the North Carolina Constitution in that case to determine if there was a public policy that the defendant's alleged conduct may have violated and concluded that the plaintiff's conduct carried out in private employment was not constitutionally protected activity. *Id.* at 297, 484 S.E.2d at 843.

Therefore, our Court must determine whether the allegations in plaintiff's complaint sufficiently allege conduct by defendant that violates the public policy of North Carolina when defendant allegedly discharged plaintiff for plaintiff's discovery of defendant's unspecified unlawful conduct that affected federal, state and local government service contracts in a federally mandated rebate compliance program. Plaintiff contends that he has stated in his complaint a valid claim for wrongful discharge in violation of North Carolina public policy by asserting that "[u]nlawful conduct in billing state and local government agencies is clearly injurious to the public and against the public good." We first note, however, that plaintiff's complaint does not allege unlawful conduct in billing state and local government agencies by defendant. Plaintiff's complaint alleges unspecified conduct by defendant that allegedly violates "a compliance program to ensure that [defendant] rebated monies to the United States under ongoing contracts." Plaintiff's complaint does not assert that defendant's unspecified conduct violated any public policy that has been established by our state's statutes or constitution.

"The narrow exceptions to [the employment at will doctrine] have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law." *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 333-34, 493 S.E.2d 420, 423 (1997). In *Deerman v. Beverly California Corp.*, 135 N.C. App. 1, 6, 518 S.E.2d 804, 807 (1999), *disc. review denied*, 351 N.C. 353, 542 S.E.2d 208 (2000), our Court carefully reviewed and analyzed the plaintiff's complaint pursuant to "the public policy of North Carolina as set forth in the Nursing Practice Act (NPA), N.C.G.S. §§ 90-171.19 [through] 90-171.47 (1993), and the administrative regulations promulgated thereunder." Unlike plaintiff's complaint in the case before us that alleges no specific statutory or constitutional violation, the plaintiff in *Deerman* "alleged that in advising the patient's family concerning choice of physicians, [plaintiff] had complied with the North Carolina General Statutes and the North Carolina Administrative Code regulating the practice of nursing." *Id.* at 3, 518 S.E.2d at 805. The plaintiff in *Deerman* alleged that her employment duties were mandated under the public policy of our state pursuant to the General Statutes. Her complaint therefore alleged specific conduct by the defendant that violated "strong public policy favoring administering of nursing services to those acutely or chronically ill and the supervising by nurses of patients during convalescence and rehabilitation." *Id.*

Similarly, in *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992) the plaintiff alleged wrongful discharge in violation of N.C. Gen. Stat. § 122C-66, which makes it a crime to knowingly injure mentally disabled patients in state facilities. The plaintiff alleged that the defendants' conduct violated the statute and she was fired for reporting defendants' alleged abuse. In *Vereen v. Holden*, 121 N.C. App. 779, 468 S.E.2d 471 (1996), *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997), the plaintiff alleged that he was discharged by the defendants due to his political affiliation and activities. Our Court found that this allegation, if true, violated our state constitution and state statutes and therefore the defendants' conduct violated public policy. In *Caudill v. Dellinger*, 129 N.C. App. 649, 501 S.E.2d 99 (1998), *disc. review denied*, 349 N.C. 353, 517 S.E.2d 888 (1999), the plaintiff's complaint alleged that the defendant's conduct violated N.C. Gen. Stat. § 126-84 and Article 1, Section 19 of the North Carolina Constitution. In *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 528 S.E.2d 368 (2000), the plaintiff's complaint alleged that the de-

fendant's conduct violated public policy pursuant to N.C. Gen. Stat. § 143-422.2. The plaintiff alleged that he was handicapped and that the defendant discharged him because of his handicap in violation of the statute.

Plaintiff in the case before us has failed to identify any specified North Carolina public policy that was violated by defendant in discharging plaintiff. The complaint does not allege that defendant's conduct violated any explicit statutory or constitutional provision, nor does it allege defendant encouraged plaintiff to violate any law that might result in potential harm to the public. *See Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 513 S.E.2d 85 (1999). The complaint does not allege any of "[t]he narrow exceptions to [the employment at will doctrine] grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law." *Kurtzman*, 347 N.C. at 333-34, 493 S.E.2d at 423.

Plaintiff argues that it is a violation of public policy for an employer to discharge an employee after the employee has "learned of the [employer's] unlawful conduct, reports [the employer's conduct] to his supervisors and [seeks] to end the unlawful practices." Plaintiff alleged that defendant's unspecified conduct was in violation of a compliance program that affected federal, state and local government service contracts. Plaintiff's complaint alleged that he was discharged for doing what his job required as a monitor of defendant's compliance program. However, unlike the previously noted case law, plaintiff's complaint fails to allege what defendant's alleged conduct was and how that conduct is in violation of North Carolina public policy.

Any exception to the at will employment doctrine "should be adopted only with substantial justification grounded in compelling considerations of public policy." *Id.* at 334, 493 S.E.2d at 423. Plaintiff failed to allege in his complaint a compelling consideration of public policy as expressed in our state's statutes or constitution that was violated by defendant, or to allege any specific conduct by defendant that violated this same expression of our state's public policy. "In order to support a claim for wrongful discharge of an at-will employee, the termination itself must be motivated by an unlawful reason or purpose that is against public policy." *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). In light of the case law that cites specific conduct by a defendant that violated a specific expression of North Carolina public pol-

icy, we hold that plaintiff's complaint does not state a claim for wrongful discharge. The trial court did not err in dismissing plaintiff's complaint pursuant to Rule 12(b)(6).

Having affirmed the trial court's dismissal of plaintiff's wrongful discharge claim for failure to allege a cause of action, we do not address plaintiff's additional argument that his status as defendant's former in-house counsel does not preclude his wrongful discharge claim grounded in public policy.

Affirmed.

Judge SMITH concurs.

Chief Judge EAGLES dissents.

EAGLES, Chief Judge, dissenting.

I respectfully dissent. I disagree with the majority's conclusion that plaintiff failed to state a cause of action for wrongful discharge. First, I believe the public policy exception to the employment at will doctrine is more broad than the majority has stated.

The discharge of an at will employee generally will not support an action for wrongful termination of employment in North Carolina. However, our courts have developed a public policy exception to this general rule. Public policy has been defined as "the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Johnson v. Mayo Yarns Inc.*, 126 N.C. App. 292, 296, 484 S.E.2d 840, 842-43, *disc. rev. denied*, 346 N.C. 547, 488 S.E.2d 802 (1997).

In *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992), our Supreme Court discussed the limits of the public policy exception, stating that although

> the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," *at the very least* public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

(Emphasis added). Contrary to the majority's opinion, my reading of the case law indicates that the courts of this State have declined to

create a "bright line" test for determining when the termination of an at will employee violates public policy. *Teleflex Information Systems v. Arnold,* 132 N.C. App. 689, 691, 513 S.E.2d 85, 87 (1999). I do not believe we should decree such a "bright line" test in this case, but we should continue to analyze wrongful termination cases on a case by case basis. Therefore, I disagree with the majority's holding that an at will employee may *only* bring a wrongful discharge claim based on a violation of an express public policy declaration contained in our General Statutes or Constitution.

The majority opinion, by affirming the trial court's dismissal of plaintiff's complaint for failure to state a claim under Rule 12(b)(6), has effectively precluded in-house counsel from bringing his claim for wrongful termination in violation of North Carolina public policy. Whether in-house counsel may pursue a claim for wrongful termination under any circumstances is an issue which has yet to be decided in North Carolina. This case presents the opportunity to address this issue of first impression.

"A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation." N.C. Rules of Prof. Conduct, Rule 1.6, Comment. I believe that had plaintiff stated his cause of action for wrongful termination in greater particularity in his complaint, he would have risked breaching client confidences in violation of Rule 1.6.

In a formal ethics opinion approved 18 January 2001, the North Carolina State Bar addressed the following issue: "May Attorney A reveal information and documents of Corporation C to establish a claim for wrongful termination in his own lawsuit against Corporation C?" In answering this question, the State Bar concluded that

> [g]iven the competing public policies . . ., a lawyer may reveal no client confidences in a complaint for wrongful termination *except as necessary to put the opposing party on notice of the claim.* Prior to disclosing any other confidential information of the former employer and client, the lawyer must obtain a ruling from a court of competent jurisdiction authorizing the lawyer to reveal confidential information of the former client, and even then may only reveal such confidential information as is necessary to establish the wrongful termination claim. Requesting in camera review of the confidential information the plaintiff intends to proffer to establish the wrongful termination claim would be an

appropriate procedure for obtaining the court's ruling. There may be other similarly appropriate procedures.

2000 N.C. Eth. Op. 11 (2001) (emphasis added).

I would follow the standard laid out in Ethics Opinion 11, as well as the standard established by a number of other jurisdictions who have addressed this issue and reverse the trial court's order. *See generally, General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994); *GTE Products Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995); *Nordling v. Northern State Power Co.*, 478 N.W.2d 498 (Minn. 1991). Plaintiff should be provided the opportunity to establish the proof necessary to pursue his wrongful discharge claim while plaintiff continues to abide by Ethics rules protecting client confidences.

To decide as the majority has ruled will deny in-house attorney-employees the ability to allege with particularity their wrongful termination of employment claims and will frustrate the possible cessation of employers' conduct which is or may be "injurious to the public or against the public good." While every client, corporate or otherwise, should be able to confer freely and openly with their attorney, clients should not be able to use the shield of attorney-client confidentiality to defend a possibly meritorious wrongful discharge suit by former in-house attorney-employee.

STATE OF NORTH CAROLINA v. SCOTT EVANS

No. COA99-1527

(Filed 7 August 2001)

Constitutional Law— double jeopardy—driving while impaired—revocation of driver's license—civil penalty

The trial court erred in a driving while impaired case by concluding that the 30-day civil revocation of defendant's driver's license under N.C.G.S. § 20-16.5 constitutes a criminal penalty in violation of double jeopardy, because: (1) any deterrent effect a driver's license revocation may have upon the impaired driver is merely incidental to the overriding purpose of protecting the public's safety; (2) the sanctions imposed by the statute are not excessive in relation to the remedial purpose of removing impaired drivers from the highway while they are a risk to them-

selves and others; and (3) N.C.G.S. § 20-16.5 is neither punitive in purpose or effect.

Appeal by the State from order entered 12 July 1999 by Judge Wade Barber in Superior Court, Chatham County. Heard in the Court of Appeals 17 August 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III and Associate Attorney General Stacey T. Carter, for the State.

Amber A. Corbin, P.C., by Amber A. Corbin, for defendant-appellee.

McGEE, Judge.

Scott Evans (defendant) was charged with driving while impaired (DWI) pursuant to N.C. Gen. Stat. § 20-138.1 on 4 April 1998. Following his arrest, an Intoxilizer test was administered to the sixteen-year-old defendant which revealed a blood alcohol concentration of 0.08 or greater. Pursuant to N.C. Gen. Stat. § 20-16.5, the defendant's driver's license was revoked for thirty days and until the payment of a $50.00 restoration fee. At his first appearance before the trial court on 20 May 1998 for the criminal charge of DWI, defendant completed an affidavit of indigency. Counsel was appointed to represent defendant. Defendant paid the $50.00 restoration fee to the Chatham County Clerk of Court on 26 June 1998 to secure the return of his driver's license, pending the outcome of his criminal trial. Defendant did not petition the trial court for a 20-day limited driving privilege as provided by N.C.G.S. § 20-16.5(p).

Defendant's criminal DWI charge was called for trial on 1 July 1998 in Chatham County District Court before Judge Alonzo B. Coleman. The same day, defendant moved to dismiss the DWI charge, arguing that the 30-day revocation of his driver's license was punishment. He contended that the subsequent criminal prosecution and punishment for driving while impaired under N.C.G.S. § 20-138.1 violated his double jeopardy rights. Judge Coleman granted defendant's motion to dismiss. The State filed a notice of appeal on 9 July 1998, pursuant to N.C. Gen. Stat. § 15A-1432(a)(1) in Superior Court, Chatham County.

The State's appeal was heard on 21 September 1998 by Superior Court Judge Wade Barber. At the hearing, the State and de-

fendant agreed that eight pending DWI cases, all raising the same basic issue of double jeopardy, would be heard together and their evidence consolidated.

Judge Barber entered an order on 12 July 1999 reversing the district court's order as to the four non-indigent DWI defendants and remanded those defendants to the district court for a criminal DWI trial. In so doing, the court concluded that criminal prosecution of the non-indigent DWI defendants after the revocation of their drivers' licenses would not violate their double jeopardy rights. Judge Barber, however, affirmed the district court's order to dismiss the DWI criminal charges as to the four indigent DWI defendants, including defendant in this case. The court concluded that the Double Jeopardy Clause of the United States Constitution barred criminal prosecution of indigent DWI defendants whose licenses had been civilly revoked for thirty days because "the effort and expense of obtaining a limited driving privilege were completely unmanageable." The State appealed the 12 July 1999 order, pursuant to N.C. Gen. Stat. § 15A-1445(a)(1), and defendant cross-assigned errors.

On appeal, the State contends that the superior court committed reversible error by concluding that the 30-day revocation of defendant's driver's license pursuant to N.C.G.S. § 20-16.5 constitutes punishment for purposes of double jeopardy analysis under the United States Constitution. The State argues that the 30-day driver's license revocation contained in N.C.G.S. § 20-16.5 is a civil sanction promulgated to support highway safety. Therefore, the State argues, because the license revocation is a civil sanction rather than a criminal penalty, the Double Jeopardy Clause does not bar defendant's subsequent criminal prosecution for DWI. By a cross-assignment of error, defendant argues, *inter alia*, that N.C.G.S. § 20-16.5 is unconstitutional in that it violates the Double Jeopardy Clauses contained in the United States and North Carolina Constitutions. Defendant contends that under *Hudson v. United States*, 522 U.S. 93, 139 L. Ed. 2d 450 (1997), the 30-day driver's license revocation contained in N.C.G.S. § 20-16.5 constitutes a criminal punishment and, therefore, the double jeopardy doctrine is properly invoked to prevent defendant's subsequent criminal prosecution for DWI.

The Double Jeopardy Clause prohibits "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767 (1994). "The Law of the Land Clause incorpo-

rates similar protections under the North Carolina Constitution." *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996) (citing N.C. Const., art. I, § 19). On appeal, defendant relies upon *Hudson v. United States*, 522 U.S. 93, 139 L. Ed. 2d 450 (1997), cited in the trial court's 12 July 1999 order, to support his argument that the civil revocation of his driver's license constituted punishment for double jeopardy purposes under both the United States and North Carolina Constitutions.

In *Hudson*, the United States Supreme Court modified the standard for double jeopardy analysis. According to the *Hudson* Court, "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, 'in common parlance,' be described as punishment." *Id.* at 98-99, 139 L. Ed. 2d at 458 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549, 87 L. Ed. 443, 452 (1943)). Instead, "[t]he [Double Jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense." *Id.* at 99, 139 L. Ed. 2d at 458 (citation omitted). The Court then advanced a two-part inquiry for determining whether a statutory scheme imposes punishment for double jeopardy purposes:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect" as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."

In evaluating the second part of the analysis, the *Hudson* Court counseled in favor of courts applying the factors previously listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 660-61 (1963). *Hudson*, 522 U.S. at 99, 139 L. Ed. 2d at 459. These factors include:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is

assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99-100, 139 L. Ed. 2d at 459. The Court cautioned in *Hudson* that no one factor is controlling. *Id.* at 101, 139 L. Ed. 2d at 460. In *Seling v. Young*, 531 U.S. 250, 262, 148 L. Ed. 2d 734, 746 (2001), the United States Supreme Court also stated that "the clearest proof is required to override legislative intent and conclude that an Act denominated civil is punitive in purpose or effect."

Thus, pursuant to the two-part inquiry articulated in *Hudson*, we must begin by examining the purpose behind N.C.G.S. § 20-16.5, the statute at issue. N.C.G.S. § 20-16.5 was amended by the General Assembly effective 1 December 1997. Prior to the 1 December 1997 amendment, the statute provided for a 10-day pre-trial revocation of an individual's driver's license for operating a motor vehicle with an alcohol concentration of 00.08 or greater or for refusing to submit to a chemical analysis. The amendment to N.C.G.S. § 20-16.5 provides for an immediate 30-day civil license revocation "for certain persons charged with implied-consent offenses." An individual's driver's license is subject to revocation under N.C.G.S. § 20-16.5 if:

(1) A charging officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of G.S. 20-16.2;

(2) The person is charged with that offense as provided in G.S. 20-16.2(a);

(3) The charging officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and G.S. 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and

(4) The person:

a. Willfully refuses to submit to the chemical analysis;

b. Has an alcohol concentration of 0.08 or more within a relevant time after the driving;

c. Has an alcohol concentration of 0.04 or more at any relevant time after the driving of a commercial vehicle; or

d. Has any alcohol concentration at any relevant time after the driving and the person is under 21 years of age.

N.C.G.S. § 20-16.5(b). The statute does, however, provide for a limited driving privilege during the 30-day period of revocation, so long as:

> (1) At the time of the alleged offense the person held either a valid drivers license or a license that had been expired for less than one year;
>
> (2) Does not have an unresolved pending charge involving impaired driving except the charge for which the license is currently revoked . . . or additional convictions of an offense involving impaired driving since being charged for the violation [at issue];
>
> (3) The person's license has been revoked for at least 10 days if the revocation is for 30 days . . .; and
>
> (4) The person has obtained a substance abuse assessment from a mental health facility and registers for and agrees to participate in any recommended training or treatment program.

N.C.G.S. § 20-16.5(p).

In the case before us, defendant argues that although N.C.G.S. § 20-16.5 is entitled "Immediate civil license revocation for certain persons charged with implied-consent offenses," when the General Assembly amended the statute in 1997, the statutory scheme became so punitive, by tripling the revocation period, as to transform the remedy into a criminal punishment.

In support of his contention, defendant presents as evidence a statement by then Governor James B. Hunt, Jr. that the 30-day revocation was introduced as a part of the State's on-going efforts to "crack down on drunk drivers and let them know they'll pay the price." *See* "Gov. Hunt Announces Plans to Toughen Penalties for Drunk Drivers," Press Release, State of North Carolina, Office of the Governor, 16 October 1996. Defendant asserts that this statement, as well as statements from the Governor's Highway Safety Committee, prove that the extension of the 10-day revocation period was intended to be punitive.

When construing statutes, our courts should always give effect to the intent of the General Assembly. *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). However,

> [w]hile the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry

> out the intent of the Legislature . . . . [t]estimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.

Milk Commission v. Food Stores, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967). Thus, "[e]ven the commentaries printed with the North Carolina General Statutes, which were not enacted into law by the General Assembly, are not treated as binding authority by this Court." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991). Accordingly, press releases and commission recommendations offered by defendant as evidence of the punitive purpose behind N.C.G.S. § 20-16.5 are in no manner binding authority on this Court.

In *Henry v. Edmisten*, 315 N.C. 474, 340 S.E.2d 720 (1986) and *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996), our Supreme Court interpreted the prior version of N.C.G.S. § 20-16.5. Both the *Henry* Court and the *Oliver* Court held that the 10-day driver's license revocation did not constitute punishment for purposes of double jeopardy analysis under either the Double Jeopardy Clause of the United States Constitution or the Law of the Land Clause of the North Carolina Constitution.

In *Henry*, our Supreme Court clearly established that the original legislative intent of N.C.G.S. § 20-16.5 was the promotion of highway safety. In *Henry*, the plaintiffs, both of whom were charged with driving while impaired, argued that the 10-day revocation prescribed by N.C.G.S. § 20-16.5 was "not reasonably related to the state's interest in shielding the public from the danger posed by a driver who fails a breath test." *Henry*, 315 N.C. at 489, 340 S.E.2d at 730. The *Henry* plaintiffs further argued that the "ten-day revocation [was] unnecessarily long if the purpose [was] to protect the public from the hazards of an impaired driver on the particular occasion for which he [was] arrested." *Id.* The plaintiffs then suggested that "a twenty-four hour revocation would be sufficient to achieve this purpose." *Id.* Our Supreme Court disagreed, stating:

> Although one purpose of summary license revocation is to safeguard the public from an impaired driver on the particular occasion on which the driver is arrested, the revocation has a broader purpose. The statute authorizing revocation assumes implicitly

> that drivers who have driven impaired on one occasion pose an appreciable risk of repeating their conduct. We cannot say this assumption is so unreasonable as to prevent the state from summarily suspending a person's driving privileges.

Id. The Court then concluded that "the summary revocation procedure of § 16.5 is not a punishment but a highway safety measure . . . the bill as finally enacted reflects an intent by the legislature for the revocation provision to be a remedial measure." *Id.* at 495, 340 S.E.2d at 734.

Ten years later in *Oliver*, our Supreme Court again examined N.C.G.S. § 20-16.5. The *Oliver* Court first noted that "[h]istorically this Court has long viewed drivers' license revocations as civil, not criminal, in nature." *Oliver*, 343 N.C. at 207, 470 S.E.2d at 20. The Court also stated that "[a]n impaired driver presents an immediate, emergency situation, and swift action is required to remove the unfit driver from the highways in order to protect the public." *Id.* at 209, 470 S.E.2d at 21. Because "[s]uch a person . . . represents a demonstrated present as well as [an] appreciable future hazard to highway safety, [t]he safety of the impaired driver and other people using the [S]tate's highways depends upon immediately denying the impaired driver access to the public roads." *Id.* at 208, 470 S.E.2d at 20, (quoting *Henry v. Edmisten*, 315 N.C. 474, 494, 340 S.E.2d 720, 733 (1986)). Moreover, the Court stated,

> [our Court] has long held that a driver's license 'is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked. The ten-day driver's license revocation . . . merely signifies the failure of the driver to adhere to the conditions imposed by the legislature on the driver's license. As such, it is not punishment.

Id. at 210, 470 S.E.2d at 21 (citations omitted).

The only relevant difference between N.C.G.S. § 20-16.5 when it was analyzed and interpreted in *Henry* and *Oliver* and the statute in its present form is that the revocation period has been increased from ten days to thirty days. The function of the legislation, however, did not change. The function and intent of the statute is to remove from our highways drivers who either cannot or will not operate a motor vehicle safely and soberly. The purpose of license revocation in

N.C.G.S. § 20-16.5 is clearly to prevent unsafe and unfit drivers from operating vehicles and endangering the citizens of North Carolina. Moreover, neither *Henry* nor *Oliver* predicated their double jeopardy analysis upon the length of the revocation. Rather, both cases referred to driver's license revocations generally. Defendant has offered no compelling reason on appeal for us to depart from the legislative intent and purpose of N.C.G.S. § 20-16.5 as established by our Supreme Court in *Henry* and *Oliver*. Although we find no punitive purpose on the face of N.C.G.S. § 20-16.5, we are aware that, at some point, a further increase in the revocation period by the General Assembly becomes excessive, even when considered in light of the well-established goals of N.C.G.S. § 20-16.5. Whether it is a further doubling or tripling of the revocation period, there is a point at which the length of time can no longer serve a legitimate remedial purpose, and the revocation provision could indeed violate the Double Jeopardy Clause.

We must next examine whether the effect of N.C.G.S. § 20-16.5 is punitive in that it punishes a defendant twice for the same offense. In examining the effect of the law, the factors articulated in *Kennedy* "provide useful guideposts." *Hudson*, 522 U.S. at 99, 139 L. Ed. 2d at 459; *see State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998). We therefore consider the seven *Kennedy* factors. However, because N.C.G.S. § 20-16.5, as enacted, reflects an "intent by the legislature for the revocation provision to be a remedial measure," *Henry*, 315 N.C. at 495, 340 S.E.2d at 734, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 100, 139 L. Ed. 2d at 459 (citation omitted).

The first *Kennedy* factor requires a review of "[w]hether the sanction involves an affirmative disability or restraint." *Hudson*, 522 U.S. at 99, 139 L. Ed. 2d at 459 (citation omitted). In this case, defendant argues that the 30-day driver's license revocation and $50.00 revocation fee authorized by N.C.G.S. § 20-16.5 amount to an "affirmative disability or restraint." We disagree.

In *Hudson*, the Court stated that an "affirmative disability or restraint" generally is some sanction "approaching the 'infamous punishment' of imprisonment." *Hudson*, 522 U.S. at 104, 139 L. Ed. 2d at 462 (citations omitted). The *Hudson* Court concluded that the sanction at issue, indefinite prohibition from participating in the banking industry, did not involve an "affirmative disability or restraint." *Id.* Likewise, in defendant's case, a 30-day driver's license revocation and

$50.00 revocation fee cannot be said to "approach the 'infamous punishment' of imprisonment." *Id.* (citation omitted).

The second *Kennedy* factor asks whether, from a historical perspective, the sanction has been viewed as punishment. Historically, punishment has taken the forms of incarceration and incapacitation. This form of punishment is available under N.C. Gen. Stat. § 20-138.1, the DWI criminal statute. Incarceration and incapacitation are not available under N.C.G.S. § 20-16.5. Moreover, "revocation of a privilege voluntarily given," such as a driver's license in this case, "is characteristically free of the punitive element." *Hudson*, 522 U.S. at 104, 139 L. Ed. 2d at 462, (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399-400, 82 L. Ed. 917, 922 (1938)); *see also Oliver*, 343 N.C. at 210, 470 S.E.2d at 21 (stating that a driver's license is a conditional privilege for which the General Assembly may prescribe conditions upon which licenses may be issued and revoked). Finally, as previously noted in *Oliver*, our Supreme Court stated that "this Court has long viewed drivers' license revocations as civil, not criminal, in nature." *Id.* at 207, 470 S.E.2d at 20. Accordingly, defendant has failed to establish the second *Kennedy* factor.

We agree with the State and defendant that the third *Kennedy* factor, a finding of scienter, is not an element of the 30-day license revocation under N.C.G.S. § 20-16.5.

The fourth *Kennedy* factor asks whether the sanction promotes the "traditional aims of punishment—retribution and deterrence." *Hudson*, 522 U.S. at 99, 139 L. Ed. 2d at 459 (citation omitted). The Supreme Court in *Hudson* noted, however, that "all civil penalties have some deterrent effect." *Id.* at 102, 139 L. Ed. 2d at 461. "If a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause." *Id.* Moreover, the Court continued, "the mere presence of a [deterrent quality] is insufficient to render a sanction criminal [because] deterrence 'may serve civil, as well as criminal goals.' " *Id.* at 105, 139 L. Ed. 2d at 463 (quoting *United States v. Ursery*, 518 U.S. 267, 292, 135 L. Ed. 2d 549, 570 (1996)).

We acknowledge that N.C.G.S. § 20-16.5 operates as a deterrent to driving while impaired. Certainly, persons who choose to drive while impaired know that if their actions are observed by law enforcement, they will be charged with DWI and face a temporary license revocation. However, "any deterrent effect a driver's license revocation may have upon the impaired driver is merely incidental to the overriding

purpose of protecting the public's safety." *Oliver*, 343 N.C. at 209-10, 470 S.E.2d at 21. Thus, we conclude that although N.C.G.S. § 20-16.5 does operate as a deterrent, the deterrent effect of N.C.G.S. § 20-16.5 is insufficient to implicate double jeopardy. Accordingly, this factor does not weigh in defendant's favor.

The fifth *Kennedy* factor asks "whether the behavior to which [the statute] applies is already a crime." *Hudson*, 522 U.S. at 99, 139 L. Ed. 2d at 459 (citation omitted). Violating the implied consent offense of driving with an alcohol concentration of 0.08 or more is a crime under N.C.G.S. § 20-138.1. However, "[t]his fact is insufficient to render" the 30-day driver's license revocation and $50.00 revocation fee "criminally punitive, particularly in the double jeopardy context." *Id.* at 105, 139 L. Ed. 2d at 462 (citations omitted).

The final two factors under the *Kennedy* analysis require us to decide whether there is a remedial purpose behind N.C.G.S. § 20-16.5, and if so, whether the statute is excessive in relation to the remedial purpose. Defendant concedes that there is a remedial purpose behind the sanctions imposed by N.C.G.S. § 20-16.5, that is, removing impaired drivers from the highway while they are a risk to themselves and others. However, defendant argues that the sanction imposed is excessive in relation to the remedial purpose. We disagree.

As we have stated, N.C.G.S. § 20-16.5 serves the important purpose of protecting the public from impaired drivers. "The carnage caused by drunk drivers is well documented and needs no detailed recitation here." *South Dakota v. Neville*, 459 U.S. 553, 558, 74 L. Ed. 2d 748, 755 (1983). However, we are also mindful of the burdens N.C.G.S. § 20-16.5 places on defendant, burdens which may vary depending upon a defendant's economic status. Nonetheless, given the gravity of the State's interest in protecting the public from impaired drivers, we conclude that the sanctions imposed by N.C.G.S. § 20-16.5 are not excessive in relation to the remedial purpose.

Having examined N.C.G.S. § 20-16.5 in light of the two-part analysis established by *Hudson*, we reject defendant's argument that *Hudson* requires a conclusion that the driver's license revocation found in N.C.G.S. § 20-16.5 constitutes punishment for purposes of double jeopardy analysis under both the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. Because we conclude that N.C.G.S. § 20-16.5 is neither punitive in purpose nor effect, we need not reach

defendant's remaining assignments of error in which he argues that the limited driving privilege provided for in N.C.G.S. § 20-16.5(p) does not negate the punitive nature of the statute because N.C.G.S. § 20-16.5 violates the United States and North Carolina Constitutions. Accordingly, we agree with the State that the trial court erred when it granted defendant's motion to dismiss. We reverse the 12 July 1999 order and remand for trial.

Reversed and remanded.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. QUENTIN LAMONT CARR

No. COA00-760

(Filed 7 August 2001)

1. Evidence— SBI Lab Report—cocaine—motion in limine—notice

The trial court did not err in a possession of cocaine with intent to sell and deliver and sale of cocaine case by denying defendant's motion in limine and allowing the State to introduce an SBI Lab Report regarding the chemical contents of the substance received from defendant into evidence without further authentication under N.C.G.S. § 90-95(g), because: (1) defense counsel's admission that he had received a copy of the SBI Lab Report, coupled with the contentions of the State's attorney that defendant's former attorney had been sent notice of the State's intention to introduce the report into evidence without further authentication, are sufficient to support the factual finding that defendant received notice under N.C.G.S. § 90-95(g); and (2) having received notice, defendant failed to notify the State at least five days prior to trial that defendant objected to introduction of the report into evidence.

2. Drugs— possession of cocaine with intent to sell and deliver—sale of cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of possession of cocaine with intent to sell

and deliver and the sale of cocaine because the evidence taken in the light most favorable to the State shows that defendant exchanged cocaine for three sweatshirts and a video game.

3. Drugs— sale of controlled substance—any transfer in exchange for consideration

The trial court did not commit plain error by instructing the jury that exchanging cocaine for clothing or video games would constitute a sale of a controlled substance under N.C.G.S. § 90-95(a)(1), because the Legislature intended "sale" to encompass any transfer in exchange for consideration, and not just transfers of controlled substances for money.

Appeal by defendant from judgment and commitment entered 6 October 1999 by Judge William H. Freeman in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Donald W. Laton, for the State.

Scott C. Robertson, for defendant-appellant.

CAMPBELL, Judge.

On 14 December 1998 defendant was indicted on one count of felony possession with intent to sell and deliver cocaine and one count of felony sale and delivery of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1). The trial court's instructions to the jury indicate that it treated the sale and delivery count as two separate offenses. Defendant was tried at the 4 October 1999 Criminal Session of Cabarrus County Superior Court. Defendant was found guilty of possession of cocaine with the intent to sell and deliver, sale of cocaine, and delivery of cocaine. Defendant was sentenced to a minimum of 16 months and a maximum of 20 months imprisonment for the selling cocaine conviction, and a minimum of 10 months and a maximum of 12 months imprisonment for the possession with the intent to sell and deliver conviction. The trial court ordered that these terms be served consecutively. The trial court arrested judgment on the delivery of cocaine conviction.

The State's evidence at trial tended to show that on 21 October 1998 Detective Rodriquez of the Concord Police Department was working as an undercover officer on Operation UC-98, an ongoing investigation to combat street level drug sales in the City of Concord.

On this particular day the officers altered their strategy, deciding to acquire drugs in exchange for shirts and video games, instead of purchasing the drugs through a money transaction. Detective Rodriquez and his partner, a confidential informant, drove down Winecoff Avenue ("Winecoff"), stopping at the house located at 244 Winecoff, a known site of drug activity. Detective Rodriquez approached the window of the house, displayed the video games he was carrying and asked the occupants of the house if they were interested in trading drugs for the video games. Defendant and Robert Ford came out of the house, approached Detective Rodriquez' car, and indicated that they were interested in making a trade. Detective Rodriquez testified that defendant traded three rocks of crack cocaine in exchange for three shirts and a video game. Detective Rodriquez made a separate trade with Robert Ford involving two rocks of crack cocaine. As Detective Rodriquez was leaving 244 Winecoff, he placed the cocaine he had acquired from the two men in separate evidence bags, which were marked and sent to the State Bureau of Investigation ("SBI") for laboratory analysis.

Detective Lentz testified that on 21 October 1998 he gave Detective Rodriquez the money used to purchase the merchandise for that day's drug operation. Detective Lentz also provided Detective Rodriquez with plastic evidence bags and a felt pen to be used to mark the evidence bags. Detective Lentz received the evidence from Detective Rodriquez following the exchange with defendant, filled out an evidence sheet, and submitted the evidence to the Concord Police Department's evidence technician, Gloria Hopkins. On direct examination, Detective Lentz was shown the SBI Lab Report and testified that the report indicated that the substances were cocaine base, Schedule II. Defendant moved to dismiss the charges at the close of the State's evidence. The trial court denied defendant's motion.

Robert Ford testified for the defense that he exchanged cocaine for video games with Detective Rodriquez on 21 October 1998, but that defendant was not involved in any way in exchanging cocaine with Detective Rodriquez. Defendant renewed his motion to dismiss at the close of all the evidence, which was again denied by the trial court.

On appeal, defendant assigns error to (1) the trial court's denial of defendant's motion *in limine*, (2) the trial court's denial of defendant's motions to dismiss for insufficiency of the evidence, and (3) the trial court's jury instructions on the issue of sale of a controlled substance.

I.

[1] We begin by addressing defendant's argument related to the issue that arose at the outset of the trial. During jury selection and the State's opening statement, counsel for the State indicated that the witnesses for the State would be Officers Rodriquez and Lentz, and Sergeant Stikeleather of the Concord Police Department. In response, defendant filed a motion *in limine*, seeking to prevent the State's witnesses from making any reference, directly or indirectly, that the items allegedly received from defendant on 21 October 1998 were or looked like cocaine or any derivation thereof, without scientific proof of the chemical contents of the alleged substance. Specifically, defendant argued that the State had not given defendant sufficient notice under N.C. Gen. Stat. § 90-95(g) of its intention to introduce into evidence the SBI Lab Report, which identified the substances allegedly transferred by defendant as cocaine. Defendant further argued that the State had failed to give sufficient notice under N.C. Gen. Stat. § 90-95(g1) of its intention to introduce into evidence the statement establishing the chain of custody of the actual alleged controlled substances. The State argued that appropriate notices had been given to defendant's former attorney. After conducting an evidentiary hearing, the trial court made findings of fact, which included the factual finding that defendant's former attorney had received a copy of the notice of the State's intent to use the SBI Lab Report, as well as a copy of the report itself. Based on its findings of fact, the trial court concluded that the State had complied with N.C.G.S. § 90-95(g). The trial court likewise concluded that the State had complied with N.C.G.S. § 90-95(g1).

We begin by noting that the North Carolina appellate courts have consistently held that rulings on motions *in limine* are not appealable. *State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999); *Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co.*, 136 N.C. App. 695, 526 S.E.2d 197 (2000); *Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999). In reaffirming this rule in *Hayes*, the Supreme Court stated:

> This Court has consistently held 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.' " (citations omitted). Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and "thus an objection to an order granting or denying the motion 'is

> insufficient to preserve for appeal the question of the admissibility of the evidence.' " (citations omitted).

Hayes, 350 N.C. at 80, 511 S.E.2d at 303. Therefore, we must examine the record to determine whether defendant objected when the evidence that was the subject of defendant's motion *in limine* was offered at trial.

The record indicates that the only objection made by defense counsel was made while Detective Lentz was being questioned about the SBI Lab Report. Defendant's objection was overruled by the trial court, and Detective Lentz proceeded to testify that the SBI Lab Report identified the substances allegedly received from defendant as cocaine base, Schedule II. The SBI Lab Report was then admitted into evidence. Therefore, we examine defendant's argument that the trial court erred in denying his motion *in limine* only as it relates to the admissibility of the SBI Lab Report.

N.C. Gen. Stat. § 90-95(g) establishes a procedure through which the State may introduce into evidence the lab report of the chemical analysis conducted on alleged controlled substances without further authentication. N.C.G.S. § 90-95(g) reads in pertinent part:

> (g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:
>
> (1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
>
> (2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

> Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

N.C. Gen. Stat. § 90-95(g) (1999).

In the instant case, after holding an evidentiary hearing, the trial court made the following findings of fact:

> the Court would find as a fact that the Defendant was originally represented by Attorney Steve Grossman; that when he entered the case in January of 1999, he was given a copy of the file, a copy of the lab report, and a copy of the notice of intent to use the lab report without calling the SBI laboratory personnel; and that since that time Mr. Grossman has been permitted to withdraw from the case and Mr. White now represents the Defendant; that there is no copy of the notice of intent in the file; that Mr. Grossman does not remember whether or not he got the notice of intent but that it was not in his file that he turned over to Mr. White; and that no objection has been made before trial, five days before trial, that the Defendant objects to the introduction of the report; and that Mr. White, who is now the attorney, has not seen the notice of intent.

Based on its findings of fact, the trial court concluded that the State had complied with N.C.G.S. § 90-95(g)(1) and denied defendant's motion *in limine*. The trial court then later allowed the State to introduce the SBI Lab Report into evidence without further authentication.

The record indicates that defense counsel had in fact received a copy of the SBI Lab Report, as required by N.C.G.S. § 90-95(g)(1). However, defense counsel disputed whether defendant's former attorney had received notice of the State's intention to introduce the SBI Lab Report into evidence without further authentication. After conducting the evidentiary hearing, the trial court determined that defendant's former attorney had in fact received a copy of the SBI Lab Report, as well as notice of the State's intention to introduce the report into evidence without further authentication. We believe defense counsel's admission that he had received a copy of the SBI Lab Report itself, coupled with the contentions of the State's attorney that defendant's former attorney had been sent notice of the State's intention to introduce the report into evidence without further authentication pursuant to N.C.G.S. § 90-95(g)(1) and the lack of any specific denial of receipt of this notice by defendant's former attor-

ney, are sufficient to support the trial court's factual finding that defendant received notice under N.C.G.S. § 90-95(g)(1). We stress that this determination is strictly limited to the facts of this case, and had defendant not actually received a copy of the SBI Lab Report itself, we would be faced with a much different situation. Having received notice under N.C.G.S. § 90-95(g)(1), defendant failed to notify the State at least five days prior to trial that defendant objected to introduction of the report into evidence. Thus, the State was permitted to introduce the report into evidence without further authentication pursuant to N.C.G.S. § 90-95(g), and defendant's objection at trial was properly overruled.

II.

[2] Defendant next contends that the trial court erred in denying his motions to dismiss brought at the close of the State's evidence and at the close of all the evidence. "In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." *State v. Carr*, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). "All the evidence, whether direct or circumstantial, must be considered by the trial court in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence, being drawn in favor of the State." *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 72.

The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance. *See* N.C. Gen. Stat. § 90-95(a)(1); *State v. Fletcher*, 92 N.C. App. 50, 55, 373 S.E.2d 681, 685 (1988); *State v. Casey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483-84 (1982). To prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both. *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990).

Taken in the light most favorable to the State, the evidence shows that defendant exchanged cocaine for three sweatshirts and a video game. This evidence is sufficient to withstand defendant's motions to dismiss as to both counts of the indictment.

III.

[3] By his final assignment of error, defendant argues that the trial court committed plain error in instructing the jury that exchanging cocaine for clothing or video games would constitute a sale of a controlled substance. We disagree.

N.C. Gen. Stat. § 90-95(a)(1) makes it unlawful "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." N.C.G.S. § 90-95(a)(1) (2000). The intent of the legislature in enacting N.C.G.S. § 90-95(a)(1) was twofold: "(1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another." *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). Pursuant to this legislative intent, the North Carolina Supreme Court has concluded that the language of N.C.G.S. § 90-95(a)(1) creates the following three offenses: "(1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance." *Moore*, 327 N.C. at 381, 395 S.E.2d at 126 (emphasis in original). "By phrasing N.C.G.S. § 90-95(a)(1) to make it unlawful to . . . *sell or deliver* . . . the legislature, *solely for the purpose of this statutory subsection*, has made each single transaction involving transfer of a controlled substance one criminal offense, which is committed by either or both of two acts—sale or delivery." *Id.* at 382, 395 S.E.2d at 126-27 (emphasis in original). Therefore, count two of the indictment in the instant case properly charged defendant with *transfer* of a controlled substance by both sale and delivery.[1]

The North Carolina Controlled Substances Act defines " '[d]eliver' or '[d]elivery' " to mean "the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." N.C. Gen. Stat. § 90-87(7) (2000). It is thus apparent that the Legislature intended the crime of transfer of a controlled substance by *delivery* to be complete upon the transfer or attempted transfer from one person to another of a controlled substance, regardless of whether the

1. We note that the fact the State included in count two as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to defendant. *See State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976). The Supreme Court reiterated this rule in *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990), where it stated that "[a] defendant may be indicted and tried under N.C.G.S. § 90-95(a)(1) in such instances for the transfer of a controlled substance, whether it be by selling the substance, or by delivering the substance, or both." *Moore*, 327 N.C. at 382, 395 S.E.2d at 127.

two persons entered into an exchange of the controlled substance for another item of value, such as money, goods, or services. Consequently, this Court has held that "[t]o prove delivery, the [S]tate is not required 'to prove that defendant received remuneration for the transfer.' " *State v. Thrift*, 78 N.C. App. 199, 201, 336 S.E.2d 861, 862 (1985) (quoting *State v. Pevia*, 56 N.C. App. 384, 387, 289 S.E.2d 135, 137, *cert. denied*, 306 N.C. 391, 294 S.E.2d 218 (1982)).

Unlike the terms "deliver" and "delivery," the term "sale" is not defined under the North Carolina Controlled Substances Act. Therefore, in order to determine the meaning of the term "sale," we must interpret its meaning in the context of the North Carolina Controlled Substances Act. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "When the language of a statute is clear and unambiguous, there is not 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." *State v. Jarman*, 140 N.C. App. 198, 205, 535 S.E.2d 875, 880 (2000) (citing *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978)). The plain meaning of "sale" is "a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." Webster's Third New International Dictionary 2003 (1966). Therefore, we hold that the term "sale," in the context of the North Carolina Controlled Substances Act, means the exchange of a controlled substance for money or any other form of consideration. We believe that this interpretation of the term "sale" is consistent with the legislative intent behind N.C.G.S. § 90-95(a)(1) to prevent the manufacture and transfer of controlled substances. Having defined the terms "deliver" and "delivery" to mean the mere transfer or attempted transfer of a controlled substance, we believe the Legislature intended "sale" to encompass any such transfer in exchange for consideration.

We also find support for our interpretation in the statutory meaning given the term "sale" in the context of this State's regulation of alcoholic beverages. Under Chapter 18B of the North Carolina General Statutes, entitled "Regulation of Alcoholic Beverages," the Legislature has defined "sale" to mean "any transfer, trade, exchange, or barter, in any manner or by any means, for consideration." N.C. Gen. Stat. § 18B-101(13) (2000). We cannot believe the Legislature

intended the term "sale" to have a different meaning in these two similar contexts. Therefore, in the context of the Controlled Substances Act, we interpret the term "sale" to include any barter or other exchange of a controlled substance for consideration.

Defendant argues that "[a] sale is a *transfer* of property for a specified price payable in money." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28 (citing *State v. Albarty*, 238 N.C. 130, 76 S.E.2d 381 (1953)). In support of his argument, defendant relies on the Supreme Court's decisions in *Creason* and *Albarty*. While we recognize that the Supreme Court did state in both *Creason* and *Albarty* that a sale was "a transfer of property for a specified price payable in money," we do not feel that the language used by the Supreme Court in those two cases mandates the conclusion that a "sale," in the context of the Controlled Substances Act, encompasses only transfers of controlled substances for money, to the exclusion of transfers for other forms of consideration.

In *Albarty*, the defendant was charged with violating N.C. Gen. Stat. § 14-291.1, which made it a misdemeanor to "sell, barter or cause to be sold or bartered, any ticket, token, certificate, or order for any number or shares in any lottery, ..." *Albarty*, 238 N.C. at 132, 76 S.E.2d at 382-83 (quoting N.C. Gen. Stat. § 14-291.1). On appeal, the Supreme Court held that the words "barter" and "sell" were not used as synonyms for the purposes of N.C.G.S. § 14-291.1. The Supreme Court proceeded to define "barter" as "a contract by which parties exchange one commodity for another," and "sale" as "a transfer of goods for a specified price, payable in money." *Id.* While we agree with the Court's decision in *Albarty* and acknowledge its precedential effect on this Court, we do not believe that the distinction drawn in *Albarty* between "barter" and "sale" is relevant in the context of the Controlled Substances Act because the General Assembly did not use the term "barter" in N.C.G.S. § 90-95(a)(1). Therefore, the Court's reasoning in *Albarty* does not compel the conclusion that the term "sale," in the context of the Controlled Substances Act, only encompasses transfers of controlled substances for money.

In *Creason* and *Moore*, two cases dealing with the interpretation of N.C.G.S. § 90-95(a)(1), the Court cited the definition of "sale" set forth in *Albarty*. While both *Creason* and *Moore* deal with the Controlled Substances Act, in neither case was the Court presented with the question of the meaning of the term "sale" in that context. Consequently, we believe that the Court's use in *Creason* and *Moore* of the definition of sale set forth in *Albarty* is dicta and thus not bind-

ing on this Court in its consideration of the issue presented here. *See Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.").

Having concluded that the term "sale," in the context of the Controlled Substances Act, encompasses barter or any other exchange for consideration, we hold that the trial court's instructions to the jury in the instant case were a correct statement of the law. Thus, defendant's final assignment of error is overruled.

Based on the foregoing reasons, we conclude that defendant received a trial free from prejudicial error.

No error.

Judges WYNN and BIGGS concur.

BETHANIE C. MASSEY, *ET AL.*, PETITIONERS v. CITY OF CHARLOTTE AND ALBEMARLE LAND COMPANY, LLC, RESPONDENTS

No. COA00-905

(Filed 7 August 2001)

Zoning— conditional use permit—quasi-judicial proceeding not required

The trial court erred by invalidating a conditional use zoning permit allowing a commercial use in a previously residential district where the court held that conditional use zoning requires the issuance of a permit through a quasi-judicial proceeding under N.C.G.S. § 160A-381 and *Chrismon v. Guilford County*, 322 N.C. 611. *Chrismon* does not require a two-step legislative/quasi-judicial proceeding and the City did not engage in illegal contract zoning by virtue of the absence of such a proceeding. N.C.G.S. § 160A-381 states that a city may provide for the issuance of conditional use permits, but clearly does not mandate such a procedure.

Appeal by respondents from judgment entered 17 April 2000 by Judge Ben F. Tennille in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 2001.

Hewson Lapinel Owens, P.A., by H. L. Owens, for petitioners-appellees.

Robinson, Bradshaw & Hinson, P.A. by Frank E. Emory, Jr. and Stephen M. Cox, for respondent-appellant Albemarle Land Company, LLC; Robert E. Hagemann, for respondent-appellant City of Charlotte.

TYSON, Judge.

Albemarle Land Company, LLC ("ALC") and the City of Charlotte ("City") (collectively "respondents") appeal the entry of judgment in favor of Bethanie C. Massey, *et. al* ("petitioners") invalidating the City's approval of ALC's petition for re-zoning. We reverse.

I. Facts

On 18 June 1999, ALC filed an application with the City to rezone approximately 42 acres of "R-3" residential property, to "CC", commercial center on this property. ALC concurrently submitted an application which provided a 100-foot buffer strip between the shopping center and the neighboring landowners. ALC submitted a site plan setting forth all of the conditions restricting the use of the subject property, as required by City ordinance.

Petitioners, the neighboring landowners, filed a written petition with the City opposing the application. A public hearing on ALC's application was held before the City Council on 18 October 1999. On 15 November 1999, a majority of the City Council voted to approve ALC's application and site plan. After its decision to re-zone, the City issued to ALC a "Conditional Use District Permit."

Petitioners filed a petition for writ of *certiorari* and a complaint for declaratory judgment in the Superior Court of Mecklenburg County on 15 December 1999. ALC moved to dismiss the petition on 14 February 2000 for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The City moved to dismiss the petition on 16 February 2000, asserting lack of subject matter jurisdiction "in that the process and decision of the Charlotte City Council . . . was a legislative process and decision and is not subject to review on *certiorari*."

On 17 April 2000, the trial court denied the motions to dismiss and granted the petition for writ of *certiorari*. Upon review of the matter, the trial court concluded as follows:

> The City . . . has attempted to implement a purely legislative system of conditional use zoning. Such a system violates N.C.G.S. § 160A-381, 382, and thus is invalid. Although conditional use zoning has been approved in North Carolina, both the courts and the legislature have limited such approval to systems which utilize a two step process—a legislative rezoning decision followed by a quasi-judicial determination of whether to issue a conditional use permit. No decision of an appellate court in this state has approved a one-step, wholly legislative, conditional use zoning procedure . . . . [T]he conditional use permit may not be written out of a system of conditional use district zoning. The City['s] . . . position . . . that its purely legislative process was proper is erroneous.

The trial court entered an order invalidating the decision of the City Council. Respondents appeal.

II. Issues

The sole issue on appeal is whether the City had authority to engage in conditional use zoning as a purely legislative act. The trial court held that conditional use zoning requires the issuance of a conditional use permit through a quasi-judicial proceeding, and found that to "argue otherwise overlooks both the plain language of the [enabling] statute and the holding in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 [(1988)]." In examining whether the City's decision to re-zone the land and approve ALC's site plan was a valid exercise of its legislative authority, we must determine (1) whether the City's actions fell within the range of permissible conditional use zoning as expressly adopted by our Supreme Court in *Chrismon*, and (2) whether the City acted within the authority of the general zoning enabling statute.

We note that subsequent to the trial court's decision invalidating the legislative process used by the City here, our legislature specifically authorized the City to implement a purely legislative model of conditional zoning. *See* N.C. Sess. Laws. ch. 84 (2000) ("conditional zoning shall not require the issuance of a conditional use or special use permit or permitting process apart from the establishment of the district and its application to particular properties . . . . Conditional

zoning decisions under this act are a legislative process . . . ."). Our decision is limited to the particular facts of this case and to the laws applicable at the time of the filing of this proceeding.

While the City issued a "Conditional Use District Permit" upon its decision to re-zone the property from "R-3" to commercial center, the trial court found that the issuance of the permit was "superfluous" and "a nullity." The trial court also found that the City engaged in a purely legislative act of conditional use zoning. Petitioners have not challenged on appeal the trial court's finding that the issuance of the "Conditional Use District Permit" was "a nullity," or that the City engaged in a purely legislative act. These findings are therefore binding on appeal. *See Moss v. City of Winston-Salem*, 254 N.C. 480, 483, 119 S.E.2d 445, 447 (1961) (citations omitted) ("The findings of fact by the court below are not challenged by any exception or assignment of error, hence they are binding on appeal.").

III. *Chrismon v. Guilford County*

In *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988), our Supreme Court expressly approved conditional use zoning in this State as "one of several vehicles by which greater zoning flexibility can be and has been acquired by zoning authorities." *Id.* at 618, 370 S.E.2d at 583. The Court stated that "conditional use zoning occurs when a government body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning." *Id.* (citation omitted). The Court further held that "it is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district." *Id.* at 625, 370 S.E.2d at 587.

The applicant in *Chrismon* submitted a request for re-zoning, along with an additional description of the desired uses for the property. *Id.* at 615, 370 S.E.2d at 582. Similarly, in this case, ALC submitted a petition for re-zoning, as well as a site plan showing the restrictions that would be applicable to the property. In *Chrismon*, as here, the zoning authority held a public hearing and voted, in a single proceeding, to re-zone the land subject to the proposed restrictions or conditions. *Id.*

The Supreme Court reversed this Court's holding in *Chrismon* that the re-zoning decision was illegal "spot" zoning and illegal "contract" zoning. *Id.* at 613, 370 S.E.2d at 581. The Court held that the

conditional use zoning decision was valid, so long as it was "reasonable, neither arbitrary nor unduly discriminatory, and in the public interest." *Id.* at 622, 370 S.E.2d at 586.

In the present case, the trial court analyzed the *Chrismon* decision to support its position that the City's purely legislative method of conditional use zoning was invalid. The trial court here made the finding that "it is clear that the quasi-judicial aspect of the zoning decision [in *Chrismon*] was central to the court's decision to uphold conditional use district zoning."

We disagree with the trial court's interpretation of *Chrismon*. Nowhere in the *Chrismon* decision does our Supreme Court hold that a quasi-judicial process is *required* in order for conditional use zoning to be valid. To the contrary, the Supreme Court's holding was stated as follows:

> [W]e hold today that the practice of conditional use zoning is an approved practice in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.

Id. at 617, 370 S.E.2d at 583. This standard of review for conditional use zoning adopted by the Supreme Court is the standard of review for a legislative decision. *See, e.g., Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330-31 (1968) (citations omitted) (legislative function of zoning subject only to limitations forbidding arbitrary and unduly discriminatory interference with the rights of property owners and to limitations of enabling statute).

The trial court in this case found, as part of its policy reasons for requiring the quasi-judicial process, that this standard "does not adequately protect neighboring landowners who seek to prevent specific uses of adjacent property." However, the trial court is without authority to disregard the applicable standard of review as set forth by our Supreme Court, as are we. *See, e.g., State v. Nolen*, 144 N.C. App. 172, — S.E.2d — (2001) ("[W]e are bound by the decisions of the Supreme Court.").

The trial court's conclusion that the quasi-judicial process was central to the Supreme Court's holding in *Chrismon* is also erroneous because a review of the procedures used in *Chrismon* does not reveal evidence of the requirements for an independent quasi-judicial hearing. Such a hearing involves all due process requirements,

including: an evidentiary hearing in which parties offer evidence; the cross-examination of adverse witnesses; the right to inspect documents; the giving of sworn testimony; and the right to have written findings of fact supported by competent, substantial, and material evidence. *Devaney v. City of Burlington*, 143 N.C. App. 334, 337, 545 S.E.2d 763, 765 (2001) (citing *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507-08, 434 S.E.2d 604, 612 (1993)).

To the contrary, nothing in *Chrismon* suggests that the local authority made findings of fact, nor did "the trial court [make] . . . findings of fact [or] conclusions of law with regard to the issuance of the conditional use permit." *Id.* at 615, 307 S.E.2d at 582. Further, the Guilford County Zoning Ordinance, under which the re-zoning decision was made and reviewed by the Supreme Court in *Chrismon*, did not require a separate, quasi-judicial proceeding for adoption of the conditional use permit. *Id.* at 638, 370 S.E.2d at 595. Although the ordinance required that an applicant apply separately for re-zoning and a conditional use permit, the ordinance allowed for both to be approved or disapproved in a single, public hearing held before the Board of County Commissioners. *Id.*

Also absent from *Chrismon* is any mention of the appropriate standard of review upon a quasi-judicial decision. That standard of review, based upon review of the whole record, involves the following:

> 1) Reviewing the record for errors in law, 2) Insuring that procedures specified by law by both statute and ordinance are followed, 3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, 4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and 5) Insuring that decisions are not arbitrary and capricious.

Abernethy v. Town of Boone Board of Adjustment, 109 N.C. App. 459, 462, 427 S.E.2d 875, 876-77 (1993) (citation omitted); *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

In *Chrismon*, as in this case, a public hearing was held on the zoning application where the Board of Commissioners was able to hear statements from both sides. Following consideration of the matter, the Board voted to re-zone the land "and as a part of the same res-

olution, they also voted to approve the conditional use permit application." *Id.* at 615, 370 S.E.2d at 582. Nothing in *Chrismon* suggests that the Board engaged in a two-step, part legislative, part quasi-judicial process which would warrant the "competent and material evidence" standard of review. Rather, the re-zoning decision and the decision regarding the conditional uses that would be allowed on the land were determined in a single proceeding. *Id.*

In the case at bar, the City Council approved the re-zoning, and as a part of that same legislative function, made an administrative determination that the site plan submitted by ALC would comply with the permitted uses and required restrictions for that zoning. Nothing in the zoning ordinance required the submission or issuance of a conditional use permit. We hold that nothing in the *Chrismon* decision, or any subsequent authority, required that the City employ a two-step quasi-judicial process in determining whether to re-zone the subject property and adopt ALC's site plan. The trial court's reliance on *Decker v. Coleman*, 6 N.C. App. 102, 169 S.E.2d 487 (1969) is inapposite in that it applies only to general use district zoning and was decided prior to *Chrismon*.

Moreover, we reject the trial court's assertion that absence of the quasi-judicial process would amount to a re-zoning decision being based upon the proposed use of the property, thereby constituting "contract" zoning that was held to be illegal in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971). *Chrismon* defines illegal contract zoning as "a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a bilateral contract." *Chrismon* at 635, 370 S.E.2d at 593.

The *Chrismon* court rejected the underlying decision of this Court which held that the re-zoning decision at issue constituted illegal "contract" zoning because it was done on the assurance that the applicant would submit an application specifying that he would use the property only in a particular manner. *Id.* at 634, 370 S.E.2d at 593 (quoting *Chrismon v. Guilford County*, 85 N.C. App. 211, 219, 354 S.E.2d 309, 314 (1987)). In holding that the re-zoning decision was valid conditional use zoning, the Supreme Court stated:

> In the view of this Court, the Court of Appeals, in its approach to the question of whether the rezoning at issue in this case constituted illegal contract zoning, improperly considered as equals two very different concepts—namely, valid conditional use zon-

> ing and illegal contract zoning. . . . In our view, therefore, the principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.

Id. at 634-36, 370 S.E.2d at 593-94.

In applying this standard to the re-zoning decision before it, the Supreme Court determined that the record failed to show evidence that the zoning authority entered into a bilateral contract with the re-zoning applicant. *Id.* at 636, 370 S.E.2d at 594. Rather, the only evidence of a promise was the unilateral promise from the applicant to the authority in the form of his proposed conditional uses. *Id.* at 637, 370 S.E.2d at 594.

The Supreme Court further concluded that the zoning authority did not abandon its role as an independent decision-maker. In rejecting the holding of this Court that the decision was not a " 'valid exercise of the county's legislative discretion,' " the Supreme Court found that "all procedural requirements [of the ordinance] were observed" and the decision was rendered only after "thorough consideration of the merits." *Id.* at 638-39, 370 S.E.2d at 594-95.

In the present case, we reject the trial court's conclusion that absence of the quasi-judicial element renders the re-zoning decision and concurrent approval of the site plan illegal contract zoning. Applying the standard set forth in *Chrismon*, we conclude that the City acted lawfully. The record does not reveal that the City engaged in any bilateral contract with ALC. Rather, as in *Chrismon*, the only evidence of a promise is the unilateral promise of ALC to abide by the conditions and restrictions as set forth in its site plan. Nor does the record show that the City abandoned its independent decision-making process. The record shows that the City followed the procedural requirements set forth in its ordinance, and that it approved ALC's

application after ample consideration of the merits, and after hearing opposing viewpoints.

We do not interpret *Chrismon* as requiring that the City must employ a two-step legislative/quasi-judicial proceeding in order to engage in conditional use zoning. We further hold that the City did not engage in illegal contract zoning by virtue of the absence of such a proceeding.

IV. Zoning Enabling Statutes

We next determine whether the City's act of legislative re-zoning was in violation of the general zoning enabling statute. G.S. § 160A-4 applies to the interpretation of the zoning enabling statute:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C. Gen. Stat. § 160A-4 (emphasis supplied).

G.S. § 160A-381 is the enabling statute which grants a city the legislative power to regulate the uses of property. *Hall v. City of Durham*, 323 N.C. 293, 305, 372 S.E.2d 564, 572, *reh'g denied*, 323 N.C. 629, 374 S.E.2d 586 (1988). It provides:

> (a) For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes and to provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11. These regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific

> rules therein contained. The regulations may also provide that the board of adjustment or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.

N.C. Gen. Stat. § 160A-381(a) (emphasis supplied).

The plain language of this statute does not require that local ordinances provide for the issuance of conditional use permits. The statute clearly states that a city *may* provide for the issuance of such permits, but it clearly does not mandate such a procedure. Interpreting this statute "broadly," with all grants of power "construed to include any additional and supplementary powers," G.S. § 160A-4, we hold that the City's act of legislative re-zoning was not outside the bounds of authority granted it through G.S. § 160A-381.

The trial court further concluded that "[t]o attempt to eliminate the quasi-judicial aspect of conditional use district zoning runs afoul of the grant of authority contained in N.C.G.S. § 160A-382." We decline to read this statute so narrowly. G.S. § 160A-382 provides a city with the legislative authority to divide its territorial jurisdiction into various zoning districts:

> For any or all these purposes, the city may divide its territorial jurisdiction into districts of any number, shape, and area that may be deemed best suited to carry out the purposes of this Part; and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. Such districts may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit.

N.C. Gen. Stat. § 160A-382 (emphasis supplied).

This statute confers upon local authorities the right to establish and develop zoning districts. The statute clearly provides local

authorities with the right to "regulate and restrict" the "use" of the land in those districts. The City has the authority under this statute to develop a zoning district such as the one at issue here, and to regulate and restrict the uses permitted within that district. We do not interpret this statute as imposing any requirement of a quasi-judicial permitting process as a prerequisite to the exercise of the discretion granted under the statute. The language of the statute is also clear that the types of zoning districts allowed may include "but shall not be limited to" the four types of districts listed.

Having held that the City acted within the power granted it by these enabling statutes, we reverse the decision of the trial court invalidating the City's re-zoning decision and hold that the decision was a valid exercise of the City's legislative authority. A legislative decision is not reviewable upon a writ of *certiorari*. *Gossett v. City of Wilmington Through City Council*, 124 N.C. App. 777, 778, 478 S.E.2d 648, 649 (1996) (quoting *In re Markham*, 259 N.C. 566, 569, 131 S.E.2d 329, 332, *cert. denied*, 375 U.S. 931, 11 L. Ed. 2d 263 (1963)) (" 'the writ of certiorari will lie to review only those acts which are judicial or quasi judicial in their nature' and 'does not lie to review or annul any judgment or proceeding which is legislative, executive, or ministerial rather than judicial.' ").

The trial court's review of this case was limited to petitioner's petition for writ of *certiorari*. We therefore do not address the merits of petitioner's action for declaratory judgment, any mention of which is absent from the trial court's order. This case is therefore reversed and remanded to the trial court for entry of an order dismissing petitioners' petition. In light of this holding, we need not address respondents' additional argument that petitioners lacked standing to bring their petition for writ of *certiorari*.

Reversed and remanded for entry of an order of dismissal.

Chief Judge EAGLES and Judge McGEE concur.

CHESTER M. GOODSON, PETITIONER v. WAYMOND GOODSON AND WIFE, BETTY GOODSON, ARMADIA GOODSON COBB, AND HUSBAND, HAROLD COBB, MARION GOODSON AND WIFE, MILDRED GOODSON, MARJORIE GOODSON POWELL AND HUSBAND, ROBERT POWELL, RESPONDENTS v. MARION GOODSON, THIRD PARTY PETITIONER v. J. GREGORY WALLACE, HENRY D. GAMBLE, JOHN T. FREEMAN, TERESA B. FREEMAN, WADE FREEMAN, SR., MARY H. FREEMAN, THIRD PARTY RESPONDENTS

No. COA00-1042

(Filed 7 August 2001)

1. Partition— judicial sale—negligence by commissioners—relevancy to denial of fees

The trial court's findings when denying a motion to set aside a partition sale regarding negligence by the commissioners in failing to send to petitioners an amended notice of sale was relevant to support the court's decision to deny commissioners' fees. Moreover, irrelevant findings would not warrant a reversal of the trial court's decision.

2. Evidence— property owner's opinion of value—not familiar with nearby land values

There was competent evidence to support the trial court's finding of the value of a tract of land in a contested partition sale where a co-owner testified to its value. There is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property.

3. Partition— judicial sale—amended notice not received—sufficiency of evidence

There was sufficient evidence in a contested partition sale by commissioners to support the court's finding that petitioners did not receive an amended notice of sale reflecting a reduced price where the petitioners testified that they did not receive the notice and one commissioner testified that he had sent the notice to them.

4. Judicial Sales— flawed commissioners' sale—innocent purchasers—deed not set aside

The trial court did not err by refusing to set aside a commissioners' deed where the current landowners purchased the tract with no notice of any dispute. An innocent purchaser takes title free of equities of which he had no actual or constructive notice. Furthermore, the present owners were not joined as necessary parties.

5. Judicial Sales— partitition sale—negligence by commissioners—liability of commissioners

The trial court did not err in a contested partition sale arising from the alleged failure of the commissioners to deliver an amended notice of sale to petitioners by not ruling on the extent of the commissioners' liability and awarding damages. The findings regarding the commissioners' negligence supported the decision to deny commissioners' fees, but the extent of the commissioners' relative liability was not litigated.

Appeal by respondent Mildred Goodson, respondent and third party petitioner Marion Goodson, and third party respondent J. Gregory Wallace from judgments entered 3 December 1998 and 10 February 2000 by Judge Wade Barber, Jr., in Wake County Superior Court. Heard in the Court of Appeals 5 June 2001.

Berman & Associates, by Gary K. Berman, for respondent Mildred Goodson and respondent and third party petitioner Marion Goodson.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Warren T. Savage, for third party respondent J. Gregory Wallace.

Pendergrass Law Firm, by James K. Pendergrass, Jr., for third party respondents John T. Freeman, Teresa B. Freeman, Wade Freeman, Sr., and Mary H. Freeman.

TIMMONS-GOODSON, Judge.

On 10 June 1996, Chester M. Goodson petitioned the Wake County Superior Court for a partition of five parcels of land, including a certain parcel labeled "Tract C," which he and his relatives owned as tenants in common. The trial court ordered such sale by partition and appointed the attorneys representing the parties, third party respondents J. Gregory Wallace (Mr. Wallace) and Henry D. Gamble (Mr. Gamble), as co-commissioners of the court to sell the tracts of land, including Tract C, and to report the sales to the clerk of court for confirmation.

Pursuant to their duties as co-commissioners, Mr. Wallace and Mr. Gamble offered Tract C for private sale through various realtors. A real estate development company, Pittman-Korbin, Inc. (Pittman-Korbin), subsequently submitted an offer to purchase Tract C, and Mr. Wallace negotiated and executed an offer to purchase and con-

tract with Pittman-Korbin for $172,335.00 on 15 May 1997. The offer was expressly contingent upon the property's suitability for residential development. On the same day, Mr. Wallace served upon all parties to the petition a notice of sale of Tract C to Pittman-Korbin for the above-stated price. The notice stated that, pursuant to N.C. Gen. Stat. § 46-28(b), the commissioners would report the sale of Tract C to the court on 5 June 1997, at which time there would be a ten-day period during which upset bids could be submitted.

When Pittman-Korbin conducted soil tests upon Tract C, however, it discovered that a substantial portion of the land did not percolate, and was thus unsuitable for residential development. Pittman-Korbin therefore terminated the offer pursuant to the contingency. Another party, third party respondent John T. Freeman, immediately offered $128,310.00 for Tract C with no contingencies. Mr. Wallace and Mr. Gamble accepted this offer on 2 June 1997. According to Mr. Wallace, he then sent all parties an amended notice of sale for Tract C, reporting the reduced purchase price. Two of the parties to the partition, respondents Mildred Goodson and Marion Goodson (Mr. Goodson) (collectively Mildred and Marion Goodson), testified they never received such notice.

On 18 June 1997, after the proper ten-day period had elapsed with no upset bids submitted, the trial court entered an order confirming the sale of Tract C. The sale closed on 29 August 1997, a final report of sale was filed, and the commissioner's deed to Tract C was recorded with the Wake County Register of Deeds the same day.

Immediately upon purchasing Tract C, John Freeman conveyed the property by general warranty deed to his parents, third party respondents Wade Freeman, Sr. and Mary Freeman, who subdivided the tract and properly deeded five lots to another son, Wade Freeman, Jr., and to his wife, Carol Freeman, on 27 February 1998. Wade Freeman, Jr., and Carol Freeman, who are not parties to this action, subsequently constructed houses on each of the five lots.

On 12 March 1998, Mr. Goodson filed a motion to set aside the commissioner's deed on Tract C, alleging that he had not received the amended notice of sale of such land, and that the sale price was inadequate. On 3 December 1998, the trial court denied the motion to set aside the deed, concluding that, although Marion and Mildred Goodson had not received notice of the sale, respondents Freeman were innocent purchasers for value and entitled to rely upon the public record, and further, that Mr. Goodson had failed to join Wade

Freeman, Jr., and Carol Freeman as necessary parties to the action. The trial court also made findings of fact regarding Mr. Gamble's and Mr. Wallace's negligence in serving the amended notice regarding the sale of Tract C and concluded that both Mr. Wallace and Mr. Gamble breached their fiduciary duties as commissioners. The trial court therefore denied any award of commissioners' fees to Mr. Wallace and Mr. Gamble.

On 18 December 1998, Mr. Goodson filed a motion to amend the 3 December order, seeking to: (1) set a specific amount of damages; (2) determine that the damages incurred were a result of the negligence of Mr. Wallace and Mr. Gamble; and (3) order that Mr. Wallace and Mr. Gamble pay such damages owed. The trial court denied the motion to amend the order, and Mildred and Marion Goodson, as well as Mr. Wallace now appeal to this Court.

The issues presented by this appeal are whether the trial court erred in (1) making findings of fact and conclusions of law regarding the actions of Mr. Wallace and Mr. Gamble as co-commissioners; (2) finding the fair market value of Tract C to be in the range of $180,000.00 to $250,000.00; (3) finding that the Goodsons did not receive the amended notice of the sale of Tract C; (4) refusing to set aside the commissioner's deed to Tract C; and (5) denying the Goodsons' motion to amend the 3 December 1998 judgment. We address these issues in turn.

I. Third-Party Respondent Wallace's Appeal

[1] Mr. Wallace argues the trial court erred in making findings of fact and conclusions of law regarding the co-commissioners' actions. Mr. Wallace contends such findings were irrelevant and unnecessary to the trial court's denial of the motion to reverse the judicial sale. We disagree.

In his *pro se* motion to set aside the commissioner's deed, Mr. Goodson also asked the court to remove Mr. Wallace from his position as commissioner and to grant "such other and further relief" as the court deemed proper, in order to prevent Mr. Wallace's "unjust enrichment." At the hearing on the motion to set aside the commissioner's deed, the trial court considered testimony from both sides concerning the amended notice and found that, in failing to give such notice, Mr. Wallace had been negligent in his duties as a commissioner. The trial court therefore concluded that Mr. Wallace deserved

no compensation for his work as a commissioner in connection with Tract C.

N.C. Gen. Stat. § 1-339.11(a) states "[i]f the person holding a sale is a commissioner specially appointed . . . the judge or clerk of court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale." N.C. Gen. Stat. § 1-339.11(a) (1999). A commissioner appointed by the court is entitled to such compensation as provided by law and may appeal a decision by a trial court fixing such rate. *See Gravel Co. v. Taylor*, 269 N.C. 617, 621, 153 S.E.2d 19, 22 (1967); *Welch v. Kearns*, 259 N.C. 367, 370-71, 130 S.E.2d 634, 636 (1963). It is clear that, as a commissioner, Mr. Wallace would have normally been entitled to compensation for his work on the sale of Tract C. Indeed, Mr. Wallace assigns as error the trial court's conclusion that he is undeserving of compensation for his efforts surrounding Tract C's sale. The trial court's findings regarding Mr. Wallace's negligence are therefore not immaterial, but properly support its decision to deny commissioner's fees to Mr. Wallace.

Furthermore, it is the duty of the trial judge to make findings of fact determinative of the issues raised by the pleadings and the evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 52 (1999); *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). In his pleadings and during the hearing on the motion, Mr. Goodson made numerous allegations against Mr. Wallace and Mr. Gamble concerning their negligence as co-commissioners and requested appropriate relief, which the trial court granted by denying commissioners' fees. Even if the findings of negligence were irrelevant to the court's refusal to set aside the commissioner's deed, irrelevant findings in a trial court's decision do not warrant a reversal of the trial court. *See Harrington v. Rice*, 245 N.C. 640, 644, 97 S.E.2d 239, 242 (1957); *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988); *Lyerly v. Malpass*, 82 N.C. App. 224, 231, 346 S.E.2d 254, 259 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987) (all stating that where there are sufficient findings of fact based on competent evidence, a judgment will not be disturbed because of erroneous findings that do not affect the trial court's conclusions). We therefore overrule this assignment of error.

[2] Mr. Wallace next contends the trial court's finding regarding Tract C's value was based upon incompetent evidence and should therefore

be reversed. The trial court found that "[t]he fair market value of Tract C during the applicable time periods . . . was in the range of $180,000.00 to $250,000.00." "It is well established that where the trial court sits without a jury, the court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings." *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 224-25, 447 S.E.2d 471, 477, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 807 (1994). Further, "[i]n a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971).

In the instant case, co-owner Armadia Goodson Cobb testified the fair market value of Tract C was "in the range of a hundred—close to a hundred eighty or two hundred thousand dollars beyond what . . . had been offered [by Pittman-Korbin]." Pittman-Korbin's original offer for Tract C was $172,335.00. Ms. Cobb stated that she based her opinion about the value of the property "on its location . . . and the type of land that it was," noting further that the land was "not far" from neighboring towns and cities and "in an area that's been developed." No objection was made to Ms. Cobb's testimony, nor did Mr. Wallace offer any evidence concerning the value of Tract C.

"Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value." *Highway Comm. v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974). Mr. Wallace argues that, because Ms. Cobb was unable to state with any certainty the value of other property in the vicinity of Tract C, she did not know the market value of Tract C. We disagree. Although the value of land "similar in nature, location, and condition" to the property in dispute is admissible as independent evidence of that property's value, *see State v. Johnson*, 282 N.C. 1, 21, 191 S.E.2d 641, 655 (1972), there is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property. Rather, an owner " 'is deemed to have sufficient knowledge of the price paid [for his land], the rents or other income received, and the possibilities of the land for use, [and] to have a reasonably good idea of what [the land] is worth.' " *Highway Comm.*, 285 N.C. at 652, 207 S.E.2d at 725 (quoting 5 Nichols, *Law of Eminent Domain*, § 18.4(2) (3rd ed. 1969)). As an owner of Tract C, Ms. Cobb could therefore competently testify as to its value.

Although the trial court found Tract C to be considerably less valuable than Ms. Cobb's assertions, "an offer by the owner . . . to sell his land for a lesser price than he now contends it is worth, is competent to contradict his present contention [of its value]." *Highway Comm.*, 285 N.C. at 655, 207 S.E.2d at 727. It is undisputed that respondents were willing, and indeed, mistakenly believed they were selling Tract C to Pittman-Korbin for $172,335.00. We determine there was competent evidence of Tract C's value before the trial court to support its finding. We therefore overrule this assignment of error.

[3] Mr. Wallace further argues there was insufficient evidence that the Goodsons did not receive the amended notice, and that the trial court erred in finding such. As previously stated, where there is any competent evidence to support the trial court's findings, such findings are conclusive and binding upon this Court, even though there is evidence contra to sustain other findings. *See Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990); *Brooks v. Brooks*, 12 N.C. App. 626, 628-27, 184 S.E.2d 417, 419 (1971). "The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and 'the weight to be given their testimony.' " *Kirkhart*, 98 N.C. App. at 54, 389 S.E.2d at 840 (quoting *Lyerly*, 82 N.C. App. at 225-26, 346 S.E.2d at 256).

Whether or not the Goodsons received proper notice of the sale of Tract C was a central issue in direct conflict before the trial court. Both Marion and Mildred Goodson testified they did not receive the amended notice relating the reduced sale price for Tract C. Marion Goodson further stated that, although he felt the original bid submitted by Pittman-Korbin for $172,335.00 was too low, he had decided against upsetting that particular bid. According to Mr. Goodson, had he received the amended notice relating the reduced sale price of $128,310.00, he would have submitted an upset bid, as he had already done with the sale of Tract B, another piece of the land partitioned by the court. The trial court could properly infer from this testimony that the sale of Tract C was of vital interest to Mr. Goodson, and that had he received the amended notice, he would have promptly submitted an upset bid. Upon consideration of Mr. Wallace's testimony that he personally sent the amended notice to the Goodsons, the trial judge remarked, "There's probably not a lawyer in this courthouse who's practiced law as long as most of us have who hasn't certified mailing something and there was a page missing out of it. There's no question about that." The trial court obviously determined that, under the circumstances, it was more likely for Mr. Wallace to have

neglected to include the amended notice in one of the mailings than for the Goodsons to have overlooked such notice. As the question of notice was a factual issue to be resolved by the trial court, and as there was competent evidence to support its finding that notice was not given, we must affirm the trial court's finding. We overrule this assignment of error.

II. The Goodsons' Appeal

[4] The Goodsons argue the trial court erred in refusing to set aside the commissioner's deed. We disagree.

Because the Freemans purchased Tract C with no notice of any dispute regarding the legitimacy of the sale, they are innocent purchasers and as such, are protected in their purchase. A person is an innocent purchaser for value and without notice when he purchases without notice, actual or constructive, of any infirmity, pays valuable consideration, and acts in good faith. *Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E.2d 174, 182 (1964). In *Morehead*, our Supreme Court held that, when there has been a bona fide purchase for valuable consideration, the deficiencies in the conveyance must be expressly or by reference set out in the muniments of record title, or brought to the notice of the purchaser so as to put him on inquiry. *See id.* at 340-41, 137 S.E.2d at 184. In short, an innocent purchaser takes title free of equities of which he had no actual or constructive notice.

In the instant case, both John Freeman and Wade Freeman, Sr., testified they had no notice of any problems regarding the judicial sale before they purchased Tract C. John Freeman stated: "[W]hen I sold [Tract C] to my father, I had no idea [Mr. Goodson] was going to petition anybody. In other words, I was under the impression that I had bought a farm with a clear title with commissioner's deed." "[I]t is well settled in North Carolina that, in the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale." *Cherry v. Woolard*, 244 N.C. 603, 610, 94 S.E.2d 562, 566 (1956) (holding the purchaser at a judicial sale acquired good title, despite contentions of defective service to minor defendants).

It is undisputed that the Freemans are innocent purchasers without notice. Moreover, there is no evidence that the Freemans engaged

in any sort of fraud or collusion. Thus, the sale should be upheld as long as the trial court had proper jurisdiction over the parties and the subject matter, and the judgment on its face authorized the sale. *See id.* There is no suggestion from any of the parties that the trial court lacked jurisdiction, or that the judgment did not authorize the sale.

Furthermore, the Goodsons neglected to join as necessary parties to the action Wade Freeman, Jr., and Carol Freeman, the present owners of five lots on Tract C. "A 'necessary' party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (citation omitted). In order to declare the deed to Tract C null and void, the trial court needed jurisdiction over all of the current owners of the property, *see Brown v. Miller*, 63 N.C. App. 694, 699, 306 S.E.2d 502, 505 (1983), *disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984), which it did not have. Thus, because the Freemans were innocent purchasers, and because the Goodsons failed to join all of the necessary parties to the action, the trial court correctly denied Mr. Goodson's petition to set aside the deed. We overrule this assignment of error.

[5] The Goodsons also contend the trial court erred in denying the motion to amend the 3 December 1998 judgment. The Goodsons argue that, because the trial court made findings regarding Mr. Wallace's and Mr. Gamble's negligence in their duties as co-commissioners, it should have definitively ruled on the extent of Mr. Wallace's and Mr. Gamble's liability and awarded appropriate damages to the Goodsons based upon such negligence. We disagree. As stated above, we determine that the trial court's findings regarding Mr. Wallace's and Mr. Gamble's negligence support its decision to deny commissioner's fees. Such a decision was appropriate, given the trial court's finding and conclusion that the commissioners had failed to give appropriate notice to the Goodsons. The extent of Mr. Wallace's and Mr. Gamble's relative liability, however, was never litigated before the trial court, and it therefore properly declined to rule upon such issues for which it lacked competent evidence. We overrule this assignment of error.

For the reasons set forth herein, the decision of the trial court is hereby affirmed.

Affirmed.

Judges GREENE and BRYANT concur.

MULTIMEDIA PUBLISHING OF NORTH CAROLINA, INC., D/B/A ASHEVILLE CITIZEN TIMES PUBLISHING COMPANY, A NORTH CAROLINA CORPORATION, PLAINTIFF v. HENDERSON COUNTY AND HENDERSON COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA00-1106

(Filed 7 August 2001)

1. Open Meetings— government body—attorney-client exception—closed session minutes

The trial court erred by concluding that defendant Henderson County Board of Commissioners violated the Open Meetings Law and that their closed meeting was not within the attorney-client privilege under N.C.G.S. § 143-318.11, because: (1) the record reflects no discussion of general policy matters or the propriety of the moratorium at issue; and (2) the Board's minutes of the closed session satisfy both the "full and accurate minutes" and the "general account" requirements of N.C.G.S. § 143-318.10(e).

2. Public Records— government body—closed session minutes

The trial court did not err by concluding that defendant Henderson County Board of Commissioners violated the Public Records Act when it reconvened the public session of its meeting and explained that the county attorney had in the closed session suggested amendments to the draft of the moratorium previously presented, because the Board had a duty to disclose the minutes of the closed session to the public based on the fact that it would no longer frustrate the purpose of the closed session.

Appeal by defendants from an order entered 30 June 2000 by Judge Ronald K. Payne in Henderson County Superior Court. Heard in the Court of Appeals 30 May 2001.

Kelly & Rowe, P.A., by James Gary Rowe, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Tyrus V. Dahl, Jr. and Andrew C. Buckner, for defendant-appellants.

James B. Blackburn, III, for the North Carolina Association of County Commissioners, amicus curiae.

HUNTER, Judge.

Defendant-appellant Henderson County Board of Commissioners (herein representing defendant-appellant Henderson County and collectively referred to as "the Board") appeals the trial court's order finding it had violated the Open Meetings Law and the Public Records Act and, awarding plaintiff-appellee Multimedia Publishing of North Carolina, Inc., d/b/a Asheville Citizen Times Publishing Company, a North Carolina Corporation, (herein "plaintiff") attorney's fees. We affirm in part and reverse in part.

On 12 November 1998, the Board convened a special public session to "consider[] the adoption of a moratorium on race tracks for a sixty to ninety day-time period, during which time a noise ordinance would be researched, drafted, and presented to the Board for its review and consideration." After discussing the proposed ordinance (discussion of which is reflected in the open-session minutes), the Board "met in closed session during a specially called meeting" "to consult with [its] Attorney prior to the decision" it made regarding placing a moratorium on the construction or operation of race tracks in Henderson County. The closed session was held for the purpose of seeking and obtaining confidential legal advice from the County's retained attorney as well as from the County Staff Attorney. The minutes accounting for the closed session stated:

> ITEM DISCUSSED pursuant to NCGS § 143-318.11(a)(3)
>
> CONSULT WITH ATTORNEY
>
> Staff Attorney, Jennifer Jackson informed the Board that we have already been informed that action on a moratorium will be challenged. *She briefly explained the difference between a "Land Use Ordinance" and a "Police Power Ordinance."*
>
> *There was discussion about the legality of making the term longer than 90 days.* It was decided that 90 days would be enough time to give staff time to complete the Noise Ordinance.

> The County Attorney then suggested some wording changes to the Ordinance as follows:
>
> under Moratorium paragraph it will now read "There is hereby imposed a moratorium on the construction or operation of racetracks within the County of Henderson. No permits may be issued by any County department under the control of the Board of Commissioners during the moratorium. This moratorium shall continue in full force and effect for ninety (90) days expiring at midnight on February 9, 1999." (The underlined sentence was the added verbiage.) Also an additional paragraph was suggested entitled Enforcement which read "This Ordinance may be enforced by any legal and equitable remedies including but not limited to injunctive relief."
>
> After conferring with the County Attorney, it was the consensus of the Board to amend the Moratorium Ordinance as recommended by the County Attorney.

(Redacted language italicized.)

Following the closed session the public hearing reconvened and one of the Board's attorneys announced that a couple of amendments were proposed to the draft of the moratorium language previously presented. (The Board had announced at the start that although it was a public meeting, "[w]e will have no public comments received at this meeting . . . . And discussion concerning zoning is inappropriate at this meeting and will not be permitted. The public will be given an opportunity to speak about the racetrack issue in a more general fashion at a subsequent meeting . . . ." Then, "[u]pon motion, the moratorium received a favorable vote by each of the four commissioners present."

Consequently, on 8 December 1998 plaintiff filed a complaint alleging the Board had violated the Open Meetings Law (N.C. Gen. Stat. § 143-318.10 *et seq.*) and the Public Records Act (N.C. Gen. Stat. § 132-1 *et seq.*), and seeking: declaratory and injunctive relief against the Board, a *writ of mandamas* requiring the Board to disclose the minutes of the closed session, and attorney's fees. Although it filed no answer, the Board submitted affidavits in defense of plaintiff's claims arguing that the closed session fell within the purview of its statutory right to attorney-client privilege and consequently, on 25 February 1999 the trial court concluded that the Board had not violated any laws. Thus, it denied plaintiff's claims for relief, *mandamus* and

attorney's fees. Plaintiff filed motions seeking a new trial and/or an amendment of the judgment which were also denied. On 18 March 1999, plaintiff appealed the trial court's rulings to this Court.

N.C. Gen. Stat. § 143-318.11(a)(3) (1999) reads:

> It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:
>
> . . .
>
> (3) 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, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. . . .

On 15 February 2000, an opinion issued as to plaintiff's appeal, *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786, *review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000), in which this Court held

> the record before us is insufficient to determine whether it was appropriate to close the session here. The only information in the record as to the content of the discussions at the closed session comes from the self-serving affidavits of the Board's staff attorney and clerk in attendance. *Without some objective indicia to determine the applicability of the exception here, we are compelled to remand this matter to the trial court for in camera review of the minutes of the closed session. In reviewing the minutes, the trial court must apply the narrow construction of the attorney-client exception articulated herein. Accordingly, the trial court must review the minutes to ensure that neither general policy matters nor the propriety of the moratorium itself were ever discussed during the Board's closed session.* If such matters were in fact discussed, defendants would be in violation of the Open Meetings Law, and plaintiff would be entitled to the minutes of the closed session following a redaction by the

> trial court of any matters that were properly within the attorney-client privilege.

Id. at 576, 525 S.E.2d at 792 (emphasis added). Thus, this Court "vacate[d] the trial court's orders and remand[ed] th[e] matter for a review *in camera* of the minutes of the closed session," to see if the closed session was warranted pursuant to N.C. Gen. Stat. § 143-318.11(a)(3)'s attorney-client privilege exception. *Id.* at 578, 525 S.E.2d at 793 (emphasis added).

Consistent with this Court's opinion, plaintiff filed a motion requesting an *in camera* review of the minutes in question. On remand and following that review, the trial court found that the Board had

> 5. . . . failed to maintain full and accurate minutes of the aforesaid closed session which was held pursuant to G.S. 143-318.11 as required by the provisions of G.S. 143-318.10(e), and therefore it is not possible to make a complete determination on whether the Open Meetings Law or the Public Records Act were violated by the Defendants since the Minutes include conclusory statements of the nature of discussions that were conducted in the aforesaid closed session, rather than a general account of the closed session so that a person not in attendance would have a general understanding of what transpired.
>
> 6. The directives of the North Carolina Court of Appeals in its Opinion rendered in this Case would dictate that any public agency conducting a closed session should keep full, complete and accurate minutes of that closed session rather than a general account of the same in order for the presiding Superior Court Judge to conduct the *in camera* review ordered by the Court of Appeals. To do otherwise would create an impossible task for the reviewing Superior Court Judge.

Therefore, the trial court concluded that the Board had

> violated the Open Meetings Law and the Public Records Act . . . in conducting the closed session held on November 12, 1998, to the extent that the attached copy of the Minutes of such session reflects the discussions which should have been conducted in an open session.
>
> . . .

> [Further, the Board] violated the provisions of G.S. 143-318.10(e) of the Open Meetings Law in failing to keep full and accurate Minutes of the closed session . . . .

However, the trial court did find some evidence of privilege within the minutes reviewed; thus, it ordered the minutes of the closed session redacted consistent with its order and delivered to the plaintiff. Finally, the trial court ordered the "[p]laintiff is deemed to be the prevailing party in this matter and the costs of this action, including a reasonable attorney's fee . . . be taxed against the [Board]."

On 5 July 2000, pursuant to the trial court's order, the Board served plaintiff with: (1) a copy of the Board's resolution unsealing the closed session's minutes; (2) a copy of the unredacted minutes of the closed session, and; (3) a copy of the minutes of the closed session as redacted by the trial court. The Board now appeals to this Court.

[1] We begin by acknowledging, based on the parties' arguments to this Court, that the only violations of the Open Meetings Law and the Public Records Act at issue are the Board's alleged abuse of its attorney-client privilege and whether the Board maintained full and accurate minutes and a general accounting of its closed session meeting. Essentially, the Board makes two arguments to this Court. First, the Board argues that the trial court's order was not in compliance with this Court's prior instructions as to this case and as such, was an error of law. Thus, the Board argues that this Court must review this appeal under a *de novo* standard of review.

To support its argument, the Board states that "[d]etermining whether certain discussions f[a]ll within the attorney-client privilege clearly requires the application of legal principles." Thus, where the trial court found that "some of the discussions conducted in the closed session do fall within the attorney-client exception" and others "do not fall within the attorney-client exception," the Board contends that this "determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law." *In re: Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). Therefore, it is the Board's position that since "[t]he trial court's Order contains absolutely no facts which support the legal conclusions that certain discussions were and were not attorney-client privileged . . . [those conclusions] are fully reviewable upon appeal." We agree.

Where the Board's decision to go into closed session is attacked on the grounds that it violated statutory provisions—as was alleged in plaintiff's earlier appeal to this Court—the trial court was required to apply a *de novo* standard of review because the plaintiff was, in effect, alleging an error of law. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). However, where—as now—the Board appeals the trial court's holding that it did commit statutory violations, the burden is on the Board to show that the attorney-client privilege applied. We believe the Board has met its burden of proof.

In its previous opinion in this case, this Court held (and our Supreme Court denied *certiorari*) that

> in light of the general public policy favoring open meetings, the attorney-client exception is to be construed and applied narrowly. *Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 587 (1976). This is so notwithstanding the countervailing policy favoring confidentiality between attorneys and clients. In this regard, our legislature has explicitly forbidden general policy matters from being discussed during closed sessions. N.C. Gen. Stat. § 143-318.11(a)(3) (1999). Furthermore, the privilege must be viewed in light of the traditional duties performed by attorneys; "public bodies [cannot simply] delegate responsibilities to attorneys and then cloak negotiations and [closed] sessions in secrecy by having attorneys present." *Fisher v. Maricopa County Stadium Dist.*, 912 P.2d 1345, 1353 (Ariz. Ct. App. 1995) . . . . Thus, discussions regarding the drafting, phrasing, scope and meaning of proposed enactments would be permissible during a closed session. Discussions regarding their constitutionality and possible legal challenges would likewise be so included. *But as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends.*
>
> [Finally], and equally as important, the burden is on the government body to demonstrate that the attorney-client exception applies. *Publishing Co.*, 29 N.C. App. at 47, 223 S.E.2d at 587. . . .

Multimedia, 136 N.C. App. at 575, 525 S.E.2d at 791-92 (emphasis added). Therefore, the Board argues:

> The ultimate issue for the trial court to determine from the minutes of the closed session was whether the County was attempt-

> ing to extend the [attorney-client] privilege "as a mere conduit to suppress public observation of the decision-making process," or whether the closed session was justified pursuant to the attorney-client exception.

Multimedia, 136 N.C. App. at 575, 525 S.E.2d at 791.

Upon review of the record of the Board's closed session that is before us, we see that the redacted minutes stated: "Staff Attorney, . . . Jackson informed the Board that we have already been informed that action on a moratorium will be challenged." Then, in its unredacted form, the minutes reveal that there were two sentences added: "She briefly explained the difference between a 'Land Use Ordinance' and a 'Police Power Ordinance,' " and "[t]here was discussion about the legality of making the term longer than 90 days." In reviewing the unredacted minutes, we believe the trial court fulfilled its duty of conducting an *in camera* review. However, we disagree with the trial court's conclusions of law that the closed meeting was not within the attorney-client privilege. *The record reflects no discussion of general policy matters or the propriety of the moratorium at issue.* Thus, we agree with the Board that the discussion above falls completely within the privilege of N.C. Gen. Stat. § 143-318.11, and that the Board minutes sufficiently describe the Board's interaction within the closed session to overcome plaintiff's challenge. Thus, we find the minutes "[]sufficient[ly allow this Court] to determine . . . it was appropriate to close the session here." *Multimedia*, 136 N.C. App. at 576, 525 S.E.2d at 792.

Furthermore, although plaintiff argues that the Board kept only a " 'general account' of what went on in that closed session," we find Professor David M. Lawrence's book, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* (5th ed. 1998), persuasive. In it Professor Lawrence sets out a clear analysis of the difference between minutes and a general account:

> The purpose of *minutes* is to provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no minutes (other than a record that the meeting occurred) are necessary. The purpose of a *general account*, on the other hand, is to provide some sort of record of the discussion that took place in the closed session, whether action was taken or not. A public body must always prepare a general account of a closed session, even if minutes of that closed session are unnecessary. As a practical

> matter, the general account of a meeting at which action is taken will usually serve as the minutes of that meeting as well, if the account includes a record of the action.

Lawrence, *supra*, at 33 (emphasis in original). Based on this standard, we agree with the Board that its minutes of the closed session satisfy both the "full and accurate minutes" and the "general account" requirements of N.C. Gen. Stat. § 143-318.10(e) (1999).

Further, we find the seminal case of *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996) dispositive. There, our Supreme Court opined that:

> Generally, "[the minutes] should contain mainly a record of what was *done* at the meeting, not what was *said* by the members." Henry M. Robert, *Robert's Rules of Order Newly Revised* § 47, at 458 (9th ed. 1990). Their purpose is to reflect matters such as motions made, the movant, points of order, and appeals—not to show discussion or absence of action. *See id.* at 459-60.

Id. at 733, 467 S.E.2d at 631 (emphasis in original). Additionally, we note that in 1997, following the *Maready* case, our General Assembly amended the applicable statute to require a general accounting of closed sessions:

> (e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. *When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings.* Such minutes *and accounts* shall be public records within the meaning of the Public Records Law . . . ; provided, however, that minutes *or an account* of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.

N.C. Gen. Stat. § 143-318.10(e) (added verbiage of 1997 amendment in italics). Thus, we believe the unredacted minutes meet the "general account" statutory requirement. Therefore, we hold that the closed session at issue was proper and protected by the Board's attorney-

client privilege, and the trial court erred in concluding that the Board had violated the Open Meetings Law.

[2] Nevertheless, when the Board reconvened the public session and "explained that the county attorney had [in the closed session] suggested amendments to the draft of the moratorium previously presented," the Board then had a duty to disclose the minutes of the closed session to the public since it "would [no longer] frustrate the purpose of [the] closed session." N.C. Gen. Stat. § 143-318.10(e). Because the Board failed to disclose the closed meeting's minutes, we hold that the Board did violate the Public Records Act.

While the courts strongly support openness in government, public participation, and the free exchange of ideas, it must be noted that in some instances the right to public access must yield in order to protect other important societal interests. The degree of openness is a matter of public policy that must be settled by legislators in their capacity as elected representatives of the people. This determination necessarily involved a balancing of the public's right to know and the government's interest in maintaining confidentiality to protect its citizens. As delineated in N.C. Gen. Stat. § 143-318.11(a)(3), our General Assembly has struck an appropriate balance in permitting closed sessions "[t]o consult with an attorney . . . to preserve the attorney-client privilege," but in prohibiting discussion of "[g]eneral policy matters" in those closed sessions.

Although the trial court erred in its conclusions of law as to the Board's violations of the Open Meetings Law, it did not err in concluding the Board violated the Public Records Act. Therefore, plaintiff may still be deemed the prevailing party, and the trial court may tax the Board with the costs of this action including reasonable attorney's fees. The trial court's order is

Reversed in part, affirmed in part.

Judges MARTIN and HUDSON concur.

DISHNER DEVELOPERS, INC., PLAINTIFF v. VICTORIA BROWN, DEFENDANT

No. COA00-904

(Filed 7 August 2001)

Vendor and Purchaser— purchase of realty—breach of contract—earnest money

The trial court did not err by finding defendant was in breach of contract to purchase certain realty from plaintiff and by allowing plaintiff to retain $6,500 in earnest money when defendant declared the contract null and void just a week after the failed closing, because: (1) the purchase agreement did not provide a time is of the essence clause, thus allowing plaintiff a reasonable time to perform; (2) the contract provided a thirty-day period, after written notice, in which the seller could cure any title defect; (3) plaintiff received oral notice of defendant's unwillingness to close based on a title defect at closing, but did not receive written notice; (4) defendant failed to give plaintiff the thirty days provided under the contract, or a reasonable time, to cure the defect; and (5) a defaulting buyer may not recover any portion of consideration paid prior to his breach.

Judge TYSON dissenting.

Appeal by defendant from order entered 23 March 2000 by Judge Lee Gavin in District Court, Moore County. Heard in the Court of Appeals 23 July 2001.

Lapping & Lapping, by Sherwood F. Lapping, for plaintiff-appellee.

Gill & Tobias, L.L.P., by Douglas R. Gill, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Victoria Brown ("defendant") appeals from the order finding her in breach of contract and allowing Dishner Developers, Inc. ("plaintiff") to retain $6,500 in earnest money. The facts in this case are uncontroverted. Defendant entered into a contract to purchase certain realty from plaintiff on 25 June 1997. The contract included a thirty-day cure provision after written notice of any title defect. The contract also provided that buyer's breach would result in the forfeiture of all earnest money to the seller. The agreement further provided that closing would "occur on or before August 1[,] 1997."

Closing was subsequently held on 28 July 1997. At closing, defendant learned that there were three outstanding deeds of trust encumbering the property. One of the deeds of trust had been paid in full, but not recorded as such. In addition, plaintiff received oral agreements to release the two others. Defendant was unwilling to close under those circumstances. Defendant returned to her home state, Florida, but left, with her attorney in Moore County, documents and funds necessary to complete the transaction at a later date. Thereafter, plaintiff's attorney informed defendant's closing attorney that the deeds of trust would be canceled and that plaintiff was ready to proceed. When the Moore County attorney related this information to defendant's realtor, the realtor informed counsel that defendant wanted to void the contract and requested the return of all earnest money paid. Upon learning of defendant's position, plaintiff's attorney took no further actions to prepare releases since no closing was scheduled. The three deeds of trust were ultimately released in January 1998 and April 1999.

Plaintiff filed suit to retain the earnest money paid by defendant, alleging that as the breaching party to the contract, defendant was not entitled to recover any earnest money. This matter was heard during a non-jury trial, whereupon the court found and concluded that defendant had breached the 25 June 1997 contract and forfeited all earnest money paid. The trial court made some thirteen findings of fact. Pertinently, the court found:

> 6. At closing it was noted that there were three deeds of trust outstanding, which included as security, the property to be demised.
>
> 7. Plaintiff immediately took steps to obtain releases on the subject property and on Monday, August 11th, 1997, notified Defendant[']s attorney . . . that Plaintiff was ready and able to deliver title to Defendant free and clear of any encumbrances.
>
> 8. Defendant on or about August 4, 1997, notified her real estate agent that she declared the contract "null and void", ordered the agent to "halt the deal completely" and requested the return of her down payment. The agent passed this information to Defendant's attorney, who informed Plaintiff's attorney.
>
> 9. As a result, Plaintiff's attorney took no further actions to prepare releases since no closing was scheduled.

10. At no time did Defendant seek to arrange a subsequent closing.

11. Defendant at no time made written objection to Plaintiff regarding defects in the title to subject property proffered Defendant by Plaintiff, as required by [section 6(c)] of the real estate contract.

. . . .

13. Agreement provision Nine provides that in the event of breach by buyer, earnest money shall be forfeited and paid to seller.

The trial court made five conclusions of law, but defendant only takes issue with the following:

2. Defendant unilaterally breached the real estate contract by declaring it to be null and void and ordering her attorney through her real estate agent to halt the deal.

3. Defendant failed to comply with the provisions of the contract which required written notice to the seller of all title defects and exceptions and to allow thirty days for the seller to cure said noticed defects.

. . . .

5. The actions of the defendant in this breach dictate the forfeiture of $6,500 as the specified earnest money to be paid to Plaintiff.

Defendant appeals.

We must first determine whether the findings of fact challenged by defendant are supported by the evidence. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). With the exception of finding number eight, defendant fails to argue in her brief that the trial court's factual findings are not supported by the evidence. Defendant further fails to list any assignments of error concerning the trial court's findings in her brief.[1] It follows that assignments of error relating to the trial court's factual findings are deemed abandoned, *see* N.C.R. App. P.

1. In fact, defendant fails to list any of the pertinent assignments of error after her arguments in violation of North Carolina Rule of Appellate Procedure 28(b)(5). While, as plaintiff contends, such failure subjects this appeal to dismissal, pursuant to North Carolina Rule of Appellate Procedure 2, the Court will entertain the merits of defendant's arguments.

28(b)(5), and those findings are accordingly conclusive on appeal. *See In re Appeal of CAMA Permit*, 82 N.C. App. 32, 40, 345 S.E.2d 699, 704 (1986). We note that even if defendant's reference to finding number eight properly preserves it for appellate review, we find that it is supported by competent evidence, and it is, therefore, also binding on appeal. Our inquiry is, then, whether the trial court's findings support its conclusions of law and, in turn, whether those conclusions are legally proper. *See id.*

In general, a buyer's obligation to pay the purchase price for a piece of realty and the seller's obligation to convey title to that realty are deemed concurrent conditions—meaning, that neither party is in breach of the contract until the other party tenders his/her performance, even if the date designated for the closing is passed. *Fletcher v. Jones*, 314 N.C. 389, 395, 333 S.E.2d 731, 735-36 (1985). It is well settled that absent a time-is-of-the-essence clause, North Carolina law "generally allows the parties [to a realty purchase agreement] a reasonable time after the date set for closing to complete performance." *Id.* at 393, 333 S.E.2d at 734 (citing *Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965)). In *Fletcher*, our Supreme Court quoted, "when time is not of the essence, the date selected for closing can be viewed as 'an approximation of what the parties regard as a reasonable time under the circumstance of the sale.' " *Id.* at 393-94, 333 S.E.2d at 735 (quoting *Drazin v. American Oil Company*, 395 A.2d 32, 34 (D.C. Ct. App. 1978)). Significantly, the parties may waive or excuse non-occurrence of or delay in the performance of a contractual duty. *See id.* at 394-95, 333 S.E.2d at 735-36.

Here, the purchase agreement did not provide a time-is-of-the-essence clause. Accordingly, under existing case law, plaintiff is allowed a reasonable time to perform. More significantly, the contract provided a thirty-day period, after written notice, in which the seller could cure any title defect. Plaintiff received oral notice of defendant's unwillingness to close because of the title defect at closing. Defendant did not provide written notice of the defect. Further, she failed to give plaintiff the thirty days provided under the contract, or "reasonable time" provided by existing case law, to cure the defect. Therefore, when defendant declared the contract null and void on 4 August 1997—just a week after the failed closing—she breached the contract. Furthermore, we note, that upon defendant's breach, plaintiff was relieved of its duty to perform. *See Mizell v. Greensboro Jaycees*, 105 N.C. App. 284, 289, 412 S.E.2d 904, 908 (1992) (stating that "[p]laintiff's offer to perform does not have to be shown where

defendant [has] refused to honor or repudiates the contract[]"). Because of defendant's breach, in accordance with Section 9 of the purchase agreement, she forfeited the $6,500 earnest money paid to plaintiff. *See also Star Fin. Corp. v. Howard Nance Co.*, 131 N.C. App. 674, 676, 508 S.E.2d 534, 535 (1998) (noting that "North Carolina follows the common law rule, which is the majority American view, that a defaulting buyer may not recover any portion of consideration paid prior to his breach[]"), *aff'd per curiam*, 350 N.C. 589, 516 S.E.2d 381 (1999).

We, then, conclude that the trial court's conclusions are supported by its findings and that those conclusions are legally proper. Accordingly, the order of the trial court is affirmed.

Affirmed.

Judge GREENE concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

I respectfully dissent from the majority opinion that affirms the trial court's judgment for plaintiff.

I would hold that plaintiff's prior breach of the contract excused defendant's performance. Alternatively, I would hold that the trial court's conclusions of law that defendant unilaterally breached the contract are not supported by its findings of fact that defendant's conduct was an unequivocal repudiation of the contract. I would hold that defendant is entitled to a refund of her earnest money.

I. NOTICE

In addition to the facts set out in the majority's opinion, I add the following: Plaintiff's attorney was given notice by defendant's attorney of three outstanding deeds of trust recorded against the property, on or about 18 July 1997, ten days prior to the scheduled closing date. Defendant's attorney, Randolph E. Shelton, Jr., Esq., was called at trial *as a witness for plaintiff.* Shelton testified that he gave plaintiff's attorney oral notice of three outstanding deeds of trust against the property as is the custom and practice of the area. Shelton testified that in over 20 years of real property practice, he could not recall

giving or receiving written notice. Shelton explained the custom by stating,

> [w]e see each other all the time. The real estate lawyers see each other all the time in the court house, and the register of deeds office. Between personal contact and telephone, that's the way we handle those. If it were something other than a mortgage . . . Perhaps we would make the discussions more formally in writing. But we're just talking about dealing with the deeds of trust, that's just routine.

Shelton also testified that he did not consider the deeds of trusts to be "defects in title." Plaintiff testified that he was aware of the three deeds of trust long before the closing date of 28 July 1997, and took no steps to get them canceled as of the closing date or any reasonable time thereafter. Plaintiff further testified that the deeds of trust were not canceled or released until January 1998 and April 1999.

Plaintiff knew of the outstanding deeds of trust long before closing and knew it could not transfer title for the property to defendant as required by the contract until the deeds of trust were canceled or released. Plaintiff's attorney was told about the deeds of trust ten days prior to the scheduled closing. Plaintiff never demanded written notice of the outstanding deeds of trust.

During testimony, one of plaintiff's principles, Jess Dishner, was asked the question, "did you ever provide notice to Mrs. Brown saying, 'I have now cleared the title and . . . I will close this sale on a certain date?' " Dishner answered "no." I would hold that plaintiff received any required notice of "defects in title" and took no steps to perform its obligations at closing, or a reasonable time thereafter.

II. NON-PERFORMANCE BY PLAINTIFF

The contract called for closing date on or before 1 August 1997. The closing date was set for 28 July 1997, by mutual agreement of the parties. Defendant drove sixteen hours from Florida to attend the closing. All parties were present at the closing. None of the three deeds of trust had been canceled or released as of the closing date. At closing, contrary to the contract, plaintiff offered defendant a "wrap around mortgage" which was rejected by defendant and her attorney. Notwithstanding these events, defendant signed all required closing documents and left the documents and the remaining funds with her attorney with instructions to complete closing, if plaintiff delivered title in conformity with the contract.

Under section 5 of the contract, plaintiff contracted "to convey fee simple marketable title to the Property by general warranty deed, subject only to the exceptions hereinafter described free and clear of all encumbrances." Plaintiff's failure to deliver the title in accordance with Section 5 of the contract on the closing date, or a reasonable time thereafter, constituted a prior breach, excusing defendant's performance, and allowing defendant to terminate the contract.

Plaintiff argues that performance by one party to a contract is excused, if the other party has repudiated the contract, making a tender of performance by the non-breaching party a futility. *Dixon v. Kinser*, 54 N.C. App. 94, 101, 282 S.E. 2d 529, 534 (1981).

North Carolina recognizes that defendant breaches the contract if she repudiated her obligation under the contract before her performance was immediately due. In order to establish such repudiation and to excuse their own non-performance, plaintiff has the burden of showing by the greater weight of the evidence, that defendant engaged in positive and unequivocal acts and conduct which were clearly inconsistent with the contract. *Bell v. Brown*, 227 N.C. 319, 322, 42 S.E.2d 92, 94 (1947). Since the only evidence communicated to plaintiff was defendant's broker's mid-August note to plaintiff's broker indicating defendant's desire to void the contract, and requesting the refund of the deposit, there is no positive and unequivocal indication that defendant would not perform the contract. The fully executed documents and funds were still being held by defendant's attorney, awaiting plaintiff's performance. Defendant could do nothing more to complete the closing, other than what she had already done.

This Court has held that "in order to constitute anticipatory repudiation, the words or conduct evidencing an intention to breach the contract must be a 'positive, distinct, unequivocal, and absolute refusal' to perform the contract when the time fixed for performance arrives." *Gordon v. Howard*, 94 N.C. App. 149, 152, 379 S.E.2d 674, 676 (1989) (quoting *Nesser v. Laurel Hill Assocs.*, 93 N.C. App. 439, 443, 378 S.E.2d 220, 223 (1989)).

In *Gordon*, after entering into a contract for the purchase of a house, the buyers wrote directly to the seller that "[m]y purpose in writing is to tell you that my wife and I have decided not to purchase lot number 22 in Glenn Kerry . . . therefore, kindly return my $10,000 deposit." *Id.* at 150, 379 S.E.2d at 675. This Court held that the letter was only an offer to withdraw from the contract conditional upon a

return of the earnest money and not unequivocal repudiation of the contract. *Id.* at 152, 379 S.E.2d at 676.

The only finding of fact that bears on the issue of repudiation is that defendant "on or about 4 August 1997, notified *her* real estate agent that she declared the contract null and void, ordered the agent to halt the deal completely and requested the return of her down payment." The trial court further found "[t]he agent passed this information to *defendant's* attorney." (Emphasis supplied). This telephone message to defendant's real estate agent and subsequently to her attorney was not unequivocal notice of repudiation to the plaintiff nor was the letter dated 14 August 1997 from defendant's agent to plaintiff's agent an unequivocal repudiation of the contract. I cannot distinguish the facts in this case from those in *Gordon. Id.*

Assuming defendant did repudiate the contract, the repudiation itself does not *ipso facto* constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party. *Gordon* at 153, 379 S.E.2d at 676. After receipt of the 14 August 1997 letter by its agent, plaintiff continued to demand performance by defendant. However, plaintiff never tendered its performance required by the contract, namely: to present and convey title in fee, free and clear of all encumbrances to defendant as of date of closing, or a reasonable period of time thereafter.

Plaintiff's failure to perform by delivering title free from encumbrances at or within a reasonable period of time after scheduled closing and never tendering the title required by the contract excused defendant's performance under the contract. Due to plaintiff's prior breach of the contract, defendant was justified in terminating the contract and is due return of the earnest money deposit. I would reverse the decision of the trial court.

EDWIN SWAIN, PLAINTIFF v. CAROLYN ELFLAND, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS AN ASSISTANT VICE CHANCELLOR FOR AUXILIARY SERVICES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, JEFFREY MCCRACKEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MAJOR IN THE POLICE DEPARTMENT OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DRAKE MAYNARD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS HUMAN RESOURCES ADMINISTRATOR FOR THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND OTHER UNKNOWN UNIVERSITY OFFICIALS, AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANTS

No. COA00-258

(Filed 7August 2001)

1. Employer and Employee— wrongful discharge—retaliation—conjecture

The trial court did not err by granting summary judgment for defendants on wrongful discharge and conspiracy claims by a UNC police officer who issued an underage drinking citation to the daughter of a University trustee. Plaintiff presented nothing more than conjecture to support his allegations of retaliation and there was no evidence of any agreement to unlawfully discharge plaintiff.

2. Public Officers and Employees— whistleblower claim—failure to exhaust administrative remedies

The trial court did not err by dismissing a UNC police officer's whistleblower claim for failure to exhaust administrative remedies where there was no question that he had unsuccessfully exercised his right to seek relief from the State Personnel Commission under N.C.G.S. § 126-34.1(a)(7) and did not seek judicial review. Although plaintiff contends that he could maintain an administrative action under N.C.G.S. § 126-34.1(a) (7) and an action in superior court under N.C.G.S. § 126-85, the only reasonable interpretation of these statutes is that a state employee may choose to pursue a whistleblower claim in either forum, but not both. Moreover, plaintiff did not include the required allegations that exhaustion of his administrative remedy would be futile, and, even if the two statutory provisions are assumed to be in para materia, N.C.G.S. § 126-34.1(a)(7) controls as the more recent enactment.

3. Constitutional Law— free speech—official capacities—adequate state remedy

A dismissed UNC police officer's state constitutional claim was properly dismissed where plaintiff brought a claim for

alleged constitutional violations against defendants in their official capacities and had an adequate state remedy available to him.

Appeal by plaintiff from order entered 13 December 1999 by Judge James C. Davis in Orange County Superior Court. Heard in the Court of Appeals 22 January 2001.

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

Attorney General Michael F. Easley, by Senior Deputy Attorney General Ann Reed, Assistant Attorneys General Bruce S. Ambrose, and Richard E. Slipsky, for defendant appellees.

SMITH, Judge.

The plaintiff, Lt. Edwin Swain, Jr., is employed as a police officer at the University of North Carolina at Chapel Hill. On 27 September 1997, plaintiff was assigned to an "Interdiction and Arrest" team at a football game at Kenan Stadium. The primary purpose of the team was to enforce the alcohol laws.

After the game, plaintiff observed a young woman, Caroline Hancock, holding what appeared to be a malt beverage. When plaintiff approached Hancock, a member of Hancock's party alerted her to plaintiff's presence. Hancock took the bottle and placed it in the back of a truck. Plaintiff told Hancock he saw her in possession of a malt beverage, asked her if it was a beer, and she replied affirmatively. Plaintiff then requested Hancock's driver's license, which listed her age as eighteen years old. Plaintiff proceeded to write her a citation for underage drinking. Soon thereafter, Hancock's father approached, and plaintiff informed him that he was citing Hancock. Hancock's father, Billy Armfield, was a member of the University Board of Trustees. Armfield asked plaintiff not to issue the citation, but plaintiff declined the request. Plaintiff then left and headed back to the police department.

After the game, Armfield protested his daughter's citation to University officials. Plaintiff's superior, Major Jeffrey McCracken, later communicated to plaintiff that there were questions regarding plaintiff's probable cause to issue the citation. On 29 September 1997, plaintiff reported for duty and entered Hancock's citation into the computer. According to plaintiff, Major McCracken ordered him to

turn over the copies of the citation to him, and tried to persuade him to withdraw the citation. The citation was later pulled from a stack of citations ready for transfer to a magistrate.

Plaintiff accused his superiors of obstruction of justice and refused to cooperate with them. On 31 September 1997, the citation was returned to the "judicial stream" and forwarded to the magistrate. Soon thereafter, plaintiff reported the alleged "coverup" to the media, and several news accounts appeared in the press. Plaintiff later filed a grievance to protest his supervisor's decisions, and requested an investigation into what he believed was improper police procedures and obstruction of justice. Plaintiff's grievances were denied.

On 30 October 1997, Major McCracken received information that plaintiff, while on duty, had visited the offices of the Chapel Hill News. Plaintiff was seen there between the hours of noon and 2:00 p.m., and he was not there on official UNC-CH business. Major McCracken later confirmed this information with Anne England, an employee at the newspaper. Plaintiff had not informed his dispatcher of his location during this time period. Major McCracken did not immediately confront plaintiff with this information and instead decided to wait and see whether plaintiff claimed the time as personal time on his timecard.

After plaintiff submitted his timecard, Major McCracken asked him about the time he spent at the newspaper on 30 October 1997. Plaintiff had not claimed the time as personal leave. Plaintiff's reply was "interesting" without further elaboration. Major McCracken then gave plaintiff the opportunity to change his timecard, but plaintiff refused. A pre-disciplinary conference was held on 17 November 1997, and plaintiff declined to provide any explanation for his timecard. On 19 November 1997, Major McCracken fired plaintiff.

Plaintiff filed the instant lawsuit on or about 2 December 1997 alleging: (1) violation of N.C. Gen. Stat. § 126-85 (1999), the "Whistleblower Act"; (2) wrongful discharge in violation of public policy and racial discrimination in violation of N.C. Gen. Stat. § 143-422.2 (1999); (3) violation of his state constitutional rights to free speech; and (4) a conspiracy by Carolyn Elfland, Major McCracken, and Drake Maynard to unlawfully discharge plaintiff from his employment. Shortly after plaintiff filed this action, his dismissal was rescinded by Chancellor Michael Hooker. Chancellor Hooker adopted the findings of an independent investigation which

found there was just cause for discipline, but that dismissal was too harsh a penalty. Plaintiff was reinstated but suspended for one week without pay.

On or about 23 December 1997, plaintiff filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings. Plaintiff alleged his suspension was without cause, and was the result of racial discrimination and retaliation. A hearing was held on 11-14 May 1998. On 31 July 1998, Judge Fred G. Morrison issued a Recommended Decision concluding that defendants had just cause to discipline plaintiff for unacceptable personal conduct, and that plaintiff was not the victim of illegal discrimination or retaliation. Accordingly, the suspension of plaintiff without pay for one week was affirmed. On 18 November 1998, the State Personnel Commission upheld the Recommended Decision. Plaintiff did not appeal.

On 27 October 1999, defendants moved for summary judgment in the instant case. On 13 December 1999, the trial court granted summary judgment to defendants. The trial court concluded that: (1) plaintiff's Whistleblower claim was dismissed due to plaintiff's failure to exhaust his administrative remedies; (2) plaintiff's wrongful discharge claim was dismissed due to plaintiff's failure to exhaust his administrative remedies; (3) plaintiff's state constitutional claims were dismissed because plaintiff had an adequate state remedy available, and thus his claim was lacking an essential element; and (4) summary judgment on all claims in the complaint was allowed on the ground that there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law. Plaintiff appealed.

I.

[1] We first consider whether the trial court erred in dismissing plaintiff's complaint on summary judgment because there was no genuine issue as to any material fact. Specifically, plaintiff challenges the trial court's dismissal of his claim of wrongful discharge, and his allegation that defendants conspired to unlawfully discharge him.

To establish a cause of action for wrongful discharge or demotion in violation of his right to freedom of speech, plaintiff must forecast sufficient evidence " 'that the speech complained of qualified as protected speech or activity' " and " 'that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or

demotion.' " *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525-26, 410 S.E.2d 232, 234 (1991) (quoting *Jurgensen v. Fairfax County*, 745 F.2d 868, 877-78 (4th Cir. 1984)). " '[T]he resolution of these two critical issues is a matter of law and not of fact.' " *Id. See also Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (1999). The only motivation established by the competent evidence in the case *sub judice* was that plaintiff was dismissed due to the discrepancies in his timecard and his refusal to either amend his timecard or provide an explanation for the discrepancies.

Major McCracken, who was plaintiff's supervisor, and made the decision to dismiss plaintiff, testified that plaintiff's grievances over the ticket had "nothing to do" with the decision to dismiss plaintiff. In fact, Major McCracken testified that he took disciplinary action against plaintiff in spite of the publicity, not because of it. Major McCracken admitted that plaintiff's submission of the falsified timecard created a "terrible timing" problem, but that he "had to act on it." Chancellor Hooker testified that he concluded that plaintiff had violated policies, and although he believed the punishment of dismissal was too severe, there was no evidence to support a conclusion that any UNC-CH official was motivated to retaliate against plaintiff because he had gone to the newspapers. Chancellor Hooker also stated that the disciplinary action against plaintiff was in spite of all the attendant publicity, and not because of it.

"Although evidence of retaliation in a case such as this one may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Lenzer v. Flaherty*, 106 N.C. App. 496, 510, 418 S.E.2d 276, 284, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). Here, plaintiff presented nothing more than mere conjecture to support his allegations of retaliation. Accordingly, we conclude that the trial court properly dismissed plaintiff's retaliatory discharge claim.

Because plaintiff's underlying claims were properly dismissed, his allegation that defendants conspired to unlawfully discharge him must likewise fail. "A claim for conspiracy . . . cannot succeed without a successful underlying claim . . . ." *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). *See Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963) ("A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy . . . .").

Assuming *arguendo* that plaintiff had succeeded on his underlying claims, plaintiff has not pointed to any competent evidence in the record to support his allegations that defendants conspired to unlawfully discharge him, and our review of the record discloses no such evidence. This Court has stated:

> A civil conspiracy claim consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff. Although an action for civil conspiracy may be established by circumstantial evidence, sufficient evidence of the agreement must exist "to create more than a suspicion or conjecture in order to justify submission of the issue to a jury."

Boyd v. Drum, 129 N.C. App. 586, 592, 501 S.E.2d 91, 96 (1998) (citations omitted) (quoting *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)), *aff'd*, 350 N.C. 90, 511 S.E.2d 304 (1999). Where such an agreement exists, " 'all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.' " *Johnson v. First Union Corp.*, 128 N.C. App. 450, 459, 496 S.E.2d 1, 7 (1998) (quoting *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987)). In the case at bar, there is no evidence of any agreement among defendants to unlawfully discharge plaintiff. Carolyn Elfland testified that she did not make the decision to dismiss plaintiff, and did not instruct Major McCracken to dismiss him. Elfland was the Associate Chancellor for Auxiliary Services at the University and Major McCracken's supervisor. Drake Maynard, Senior Director of Human Resources, testified that he provided information about the disciplinary process to Elfland and Major McCracken, but played no role in the decision to dismiss plaintiff. Thus, there is no evidence that defendants acted in concert to willfully and intentionally discredit and discharge plaintiff in violation of his rights, only plaintiff's allegations based on mere suspicion. This assignment of error is overruled.

II.

[2] We next consider whether the trial court erred in dismissing plaintiff's "Whistleblower" claim on the ground that plaintiff failed to exhaust his administrative remedies. Plaintiff argues that N.C. Gen. Stat. § 126-86 (1999) expressly authorizes superior court jurisdiction over a state employee's claim of retaliation for reports of governmental wrongs. Plaintiff asserts that he chose to sue in superior court

pursuant to N.C. Gen. Stat. 126-86, and there is "no exhaustion condition precedent." We are not persuaded by plaintiff's argument.

Two statutes provide avenues to redress violations of the Whistleblower statute. N.C. Gen. Stat. § 126-86 states that "[a]ny State employee injured by a violation of G.S. 126-85 may maintain an action in superior court . . . ." N.C. Gen. Stat. § 126-34.1(a)(7) (1999) provides that a State employee may file in the Office of Administrative Hearings a contested case for "[a]ny retaliatory personnel action that violates G.S. 126-85." Here, plaintiff alleged in his petition for a Contested Case Hearing that he had been retaliated against. Thus, it is without question that he exercised his right under N.C. Gen. Stat. § 126-34.1(a)(7) to seek relief from the State Personnel Commission of the alleged violation of the Whistleblower Act.

Under plaintiff's interpretation of the statutes at issue, he could maintain an administrative action and an action in superior court simultaneously. However, this would allow plaintiff two bites of the apple, could lead to the possibility that different forums would reach opposite decisions, as well as engender needless litigation in violation of the principles of collateral estoppel. *See University of Tennessee v. Elliott*, 478 U.S. 788, 797, 92 L. Ed. 2d 635, 645 (1986) ("[I]t is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity."). The only reasonable interpretation of these statutes is that a state employee may choose to pursue a Whistleblower claim in either forum, but not both. *See Hobbs v. Moore County*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) ("If possible, the language of a statute will be interpreted so as to avoid an absurd consequence. A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms."). *Id.* (citations omitted).

Plaintiff chose to pursue an administrative action, the administrative law judge ruled against plaintiff, and plaintiff did not seek judicial review. *See Huang v. N.C. State University*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992) ("[T]he policy of requiring the exhaustion of administrative remedies prior to the filing of court actions 'does not require merely the initiation of prescribed administrative procedures, but that they should be pursued to their appropriate conclusion and their final outcome awaited before seeking judicial intervention . . . .' "). *Id.* (quoting 2 Am. Jur. 2d *Administrative Law* § 608 (1962)). Additionally, plaintiff did not allege in his complaint that exhaustion of his administrative remedy

would be futile. "The burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a claim must include such allegation in the complaint." *Id.* (citation omitted). Accordingly, we conclude that plaintiff has failed to exhaust his administrative remedies for this claim, and it was properly dismissed.

Even if we were to assume *arguendo* that the two provisions in question here are *in pari materia*, but are in irreconcilable conflict, the provisions of N.C. Gen. Stat. § 126-34.1(a)(7) would control, because it is the more recent enactment. This Court has stated:

> Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each; but if there is an irreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute.

State v. Hutson, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971); *see also Caudill v. Dellinger*, 129 N.C. App. 649, 655, 501 S.E.2d 99, 103 (1998), *aff'd in part, dismissed in part*, 350 N.C. 89, 511 S.E.2d 304 (1999). Thus, N.C. Gen. Stat. § 126-34.1(a)(7) would control and plaintiff's exclusive remedy would be administrative.

III.

[3] We next consider whether the trial court erred in dismissing plaintiff's state constitutional claim on the grounds that plaintiff had an adequate state remedy available to him, and thus, plaintiff was lacking an essential element of his claim. Plaintiff alleged in his complaint that his discharge "was made to chill his free speech rights." Plaintiff contended that "[t]he retaliatory discharge described here violates the public's interest in free expression to make decisions about public funds and policies. If this retaliatory discharge is declared constitutional, it would create a chilling wind against plaintiff, other police officers, and other employees of this and other public institutions." Plaintiff then stated he was bringing his claim directly against defendants, under the North Carolina Constitution, because no other legal remedy was available to him. We disagree with plaintiff's arguments.

Plaintiff's complaint seeks a monetary remedy for alleged state constitutional violations by defendants. "Such a claim is commonly called a '*Corum* claim.' " *Ware v. Fort*, 124 N.C. App. 613, 616, 478

S.E.2d 218, 220 (1996). *See Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied sub. nom. Durham v. Corum*, 506 U.S. 985, 616, 121 L. Ed. 2d 431 (1992). To the extent that plaintiff alleges a *Corum* claim against defendants in their individual capacity, the claim must be dismissed. *See id.* at 789, 413 S.E.2d at 293 (A claim for monetary relief under the North Carolina Constitution can be brought against a person only in their official capacity.).

To the extent that plaintiff sued defendants in their official capacity, we conclude that plaintiff had an adequate state remedy available to him, and in fact pursued that remedy. Plaintiff raised his free speech claim at his administrative hearing, both explicitly and by implication under a "just cause" analysis. Plaintiff alleged he was disciplined in retaliation for speaking out on an issue of public concern, in violation of his state constitutional right to free speech. However, the administrative law judge concluded that there was just cause for the discipline against plaintiff, that plaintiff was not a victim of retaliation, and that plaintiff was not retaliated against for exercising his right to free speech. The State Personnel Commission adopted the administrative law judge's decision, and plaintiff did not appeal. Accordingly, we hold that plaintiff's "*Corum* claim" was properly dismissed by the trial court.

Affirmed.

Chief Judge EAGLES and Judge HUDSON concur.

CHARLES FRANKLIN FULLER, PLAINTIFF v. MICHAEL F. EASLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NORTH CAROLINA, HARLAN E. BOYLES, IN HIS OFFICIAL CAPACITY AS STATE TREASURER OF NORTH CAROLINA, ET. AL., DEFENDANTS

No. COA00-922

(Filed 7 August 2001)

1. Constitutional Law— standing—taxpayer suit—use of public funds for public service announcements by candidate

The trial court did not err by dismissing for lack of standing an action by a taxpayer alleging that the Attorney General had improperly used damages collected for unfair and deceptive

trade practices to fund public service messages while running for governor. An individual taxpayer has no standing to bring a suit in the public interest, but may bring a suit if he can demonstrate that a tax is unconstitutional, that the challenged provision will cause him to personally sustain a direct and irreparable injury, or that he is a member of the class prejudiced by the operation of a statute.

2. Constitutional Law— standing—taxpayer suit—use of lawsuit proceeds by Attorney General

A taxpayer lacked standing to bring an action under N.C. Const. art. IX, § 7 against the Attorney General arising from public service announcements while the Attorney General was running for governor where plaintiff failed to allege that any board of education refused to bring an action to recover funds, that he requested a board of education to do so, or that such a request would be futile.

3. Elections— standing—taxpayer suit—violation of election laws

A plaintiff did not have taxpayer standing to bring an action alleging violation of election laws in the Attorney General's use of lawsuit proceeds for public service advertisements the year before he ran for governor where plaintiff failed to allege that the Treasurer or any state entity refused to file suit to recover the proceeds, that he requested a state entity to do so, or that such a demand would have been in vain.

4. Penalties, Fines and Forfeitures— taxpayer action—qui tam

A taxpayer did not have standing under a qui tam theory to bring an action arising from an attorney general's public service announcements the year before he ran for governor. Qui tam actions are brought under a statute that allows a private person to sue for a penalty, part of which the government or a specified public institution will receive. There is no statute allowing this plaintiff to sue for a penalty based upon alleged constitutional or election law violations as specified in the complaint.

5. Elections— standing—public service announcements by candidate—statement of claim

A taxpayer had standing under N.C.G.S. § 163-278.28(a) to bring claims relating to election laws arising from public service

announcements by a sitting attorney general who was running for governor where the plaintiff alleged that he was a registered voter of Wake County.

6. Elections— declaratory judgment—use of public funds for public service campaign by candidate—no actual controversy

The trial court properly granted defendants' Rule 12(b)(6) motion to dismiss plaintiff's claim for declaratory relief arising from an attorney general's use of lawsuit proceeds to fund public service announcements while he was running for governor. There was no actual controversy because the plain and clear language of the N.C.G.S. § 163-278.16A prohibits advertisements only in years when the candidate's name appears on an election ballot and Council of State candidates were not on the ballot when these ads ran in 1999. Furthermore, plaintiff alleged that the lawsuit proceeds were state funds, which the Attorney General is not required to report to the State Board of Elections.

Appeal by plaintiff from order entered 17 May 2000 by Judge Stafford G. Bullock in Superior Court, Wake County. Heard in the Court of Appeals 22 May 2001.

Hunter, Johnson, Elam & Benjamin, P.L.L.C., by Robert N. Hunter, Jr. and Jason A. Knight, for plaintiff-appellant.

Attorney General Michael F. Easley, by General Counsel Andrew A. Vanore, Jr., and Special Deputy Attorneys General W. Dale Talbert, Norma S. Harrell, and Susan K. Nichols, for defendants-appellees.

TIMMONS-GOODSON, Judge.

On 13 October 1999, Charles Franklin Fuller ("plaintiff") filed an action against then Attorney General Michael F. Easley ("Attorney General Easley" or "the Attorney General"), State Treasurer Harlan E. Boyles ("Treasurer Boyles"), and "unknown Boards of Education to be identified hereinafter." Plaintiff brought the action as "a registered voter and citizen of Wake County." Plaintiff alleged that in his official capacity, Attorney General Easley filed certain lawsuits to collect damages for unfair and deceptive trade practices (hereinafter "the lawsuits"). According to plaintiff, the proceeds recovered in the lawsuits were "state funds or penal funds" which should have been remitted to Treasurer Boyles. Plaintiff also alleged that the lawsuit pro-

ceeds were disguised campaign contributions, which should have been reported to the State Board of Elections.

Plaintiff further claimed that Attorney General Easley improperly used the lawsuit proceeds for a "public service message campaign." According to the complaint, Attorney General Easley appeared in so-called public service messages while a declared candidate for the Office of Governor, and the messages were, in fact, communications to support the Attorney General's candidacy for Governor. Plaintiff contended that in undertaking the above-alleged actions, Attorney General Easley violated the North Carolina State Constitution and state election laws.

Pursuant to his allegations, plaintiff requested a variety of relief, including, *inter alia*, a temporary restraining order, injunctions, restitution and costs, remittance of the lawsuit proceeds to either Treasurer Boyles or "the unknown Boards of Education," and mandamus relief requiring Attorney General Easley to report the lawsuit proceeds to the State Board of Elections. In addition, plaintiff requested a declaratory judgment, asking the trial court to interpret the meaning of the state election laws allegedly violated by the Attorney General and to determine the character of the lawsuit proceeds.

Finding that plaintiff failed to demonstrate a likelihood of success at trial, the trial court denied plaintiff's request for a temporary restraining order. Defendants filed a motion to dismiss based upon Rules 12(b)(1), 12(b)(2), and 12(b)(6) of our Rules of Civil Procedure. Following a hearing, the trial court summarily dismissed plaintiff's complaint, as amended. From this order, plaintiff appeals.

Preliminarily, we note that although defendants moved to dismiss plaintiff's complaint on a variety of grounds, the trial court failed to specify upon which of those grounds it based its dismissal. As such, plaintiff presumes and argues on appeal that the trial court dismissed his complaint due to a lack of standing and/or a failure to state a claim.

Based upon plaintiff's arguments, there are two pertinent issues presented by the present appeal: (I) whether plaintiff had standing to sue; (II) whether plaintiff stated a claim upon which declaratory and other equitable relief could have been granted.

I.

[1] We first address plaintiff's argument that the trial court erred in dismissing his complaint based upon his lack of standing to bring the present action. Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (1999); *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000); N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (1999). Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*. *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998).

Plaintiff first contends that he had standing to sue based upon his status as a Wake County taxpayer. Allegations in plaintiff's complaint which support this argument are those which reference plaintiff's status as a taxpayer, registered voter, and citizen of Wake County.

Generally, an individual taxpayer has no standing to bring a suit in the public interest. *Green v. Eure, Secretary of State*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975). However, the taxpayer may have standing if he can demonstrate:

> [A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury[;] or that he is a member of the class prejudiced by the operation of [a] statute.

Texfi Industries v. City of Fayetteville, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted). Our review of plaintiff's complaint reveals no allegations which allow him to sue as an individual taxpayer.

[2] Nonetheless, plaintiff may have had standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, if " 'the proper authorities neglect[ed] or refus[ed] to act.' " *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996) (quoting *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951)). To establish standing to bring an action on behalf of public agencies and political divisions, a taxpayer must allege

> that he is a taxpayer of [that particular] public agency or political subdivision, . . . [and either,] "(1) there has been a demand on and refusal by the proper authorities to institute proceedings for the

> protection of the interests of the political agency or political subdivision; or (2) a demand on such authorities would be useless."

Id. (citation omitted).

Plaintiff alleged in his complaint that Attorney General Easley violated Article IX, section 7 of the North Carolina Constitution. Article IX, section 7 provides:

> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7. Plaintiff claimed, based upon the aforementioned constitutional provision, that the lawsuit proceeds were to be remitted to "unknown boards of education."

The only allegation indicating plaintiff had a right to sue under Article IX, section 7 was one noting his status as a taxpayer of Wake County. This allegation was insufficient to support his standing to sue on behalf of any Board of Education. Plaintiff failed to allege that the Wake County Board of Education or any other Board of Education refused to bring a suit to recover funds, that he requested the Board do so, or that such a request would be futile. Furthermore, plaintiff admitted in oral argument that there was no evidence in the record indicating that he had complied with the prerequisites for bringing a taxpayer action on behalf of the unknown Boards. We are therefore satisfied that plaintiff did not have taxpayer standing to challenge Attorney General Easley's alleged violation of Article IX, section 7 of our State Constitution.

[3] We likewise find that plaintiff did not have taxpayer standing to challenge the Attorney General's alleged violation of state election laws. In his complaint, plaintiff claimed that the funds recovered in the lawsuits should be remitted to the State Treasurer and further named Treasurer Boyles as a defendant. Given these allegations, we can only assume that plaintiff brought the action to recover the proceeds on behalf of the State Treasurer. However, plaintiff again failed to allege that the Treasurer or any state entity refused to file suit to recover the lawsuit proceeds, that he requested a state entity do so, or that such a demand would have been made in vain. We therefore conclude that plaintiff did not have taxpayer standing to bring the

present action on behalf of either the unknown boards of education or any state entity.

[4] Plaintiff next alleged in his complaint and argues on appeal that he had standing to sue based upon the theory of *qui tam*. We are not so persuaded.

Qui tam actions are those "brought *under a statute* that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Black's Law Dictionary* 1262 (7th ed. 1998) (emphasis added); *see also In re Lancaster*, 290 N.C. 410, 424, 226 S.E.2d 371, 380 (1976). The critical factor allowing plaintiffs to sue under the theory of *qui tam* is the existence of a statute specifically authorizing such suit. *See Lancaster*, 290 N.C. at 424, 226 S.E.2d at 380. There is no such statute allowing plaintiff *sub judice* to sue for a penalty based upon alleged violations of the state election laws or the constitutional provision specified in plaintiff's complaint. Plaintiff's argument is therefore meritless.

[5] Finally, plaintiff argues and we agree that he had standing to sue to enforce state election laws under section 163-278.28(a) of our General Statutes. *See* N.C. Gen. Stat. § 163-278.28(a) (1999). Section 163-278.28(a) provides: "The superior courts of this State shall have jurisdiction to issue injunctions or grant any other equitable relief appropriate to enforce the provisions of this Article upon application by any registered voter of the State." As plaintiff alleged that he was a registered voter of Wake County, section 153-278.28(a) allowed him to sue to enforce state election laws by seeking injunctive and other equitable relief.

Based upon the aforementioned reasoning, we conclude that plaintiff had standing to bring only those claims seeking equitable relief based upon alleged violations of state election laws.

II.

[6] We next address plaintiff's argument that the trial court erred in granting the motion to dismiss based upon Rule 12(b)(6). Plaintiff contends on appeal that he was entitled to relief, as he stated claims for declaratory and other equitable relief based upon Attorney General Easley's alleged violations of state election laws. We disagree.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)

(1999). To survive a Rule 12(b)(6) motion, "the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim." *Taylor v. Taylor*, 143 N.C. App. 664, 668, 547 S.E.2d 161, 164 (2001) (citation and internal quotation marks omitted). In ruling on the motion, the trial court must take the complaint's allegations as true and determine whether they "are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.*

Request for Declaratory Judgment

In his complaint, plaintiff first requested that the trial court declare the parties' rights under sections 163-278.16A of our General Statutes. Where a complaint requesting declaratory relief "alleges the existence of a real controversy arising out of the parties' opposing contentions and respective legal rights," it is normally sufficient. *Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366 S.E.2d 556, 558 (1988). Thus, although plaintiff's position may be wrong, if he alleges "a controversy which *should be settled*" and " 'is entitled to a declaration of rights with respect to the matters alleged[,]' " plaintiff states a claim for declaratory relief. *Walker v. Charlotte*, 268 N.C. 345, 348, 150 S.E.2d 493, 495 (1966) (emphasis added) (citation omitted); N.C. Gen. Stat. § 1-253 (1999) ("Courts . . . shall have power to declare rights . . . whether or not further relief is or could be claimed."). Even where a genuine controversy existed, this Court has found that if plaintiffs have "no basis for the relief they seek," dismissal was proper. *Carter v. Stanly County*, 125 N.C. App. 628, 632, 482 S.E.2d 9, 11 (1997); *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981).

Section 163-278.16A provides:

> After December 31 prior to a general election in which a Council of State office will be on the ballot, no declared candidate for that Council of State office shall use or permit the use of State funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains that declared candidate's name, picture, or voice, except in case of State or national emergency and only if the announcement is reasonably necessary to that candidate's official function. For purposes of this section, "declared candidate" means someone who has publicly announced an intention to run.

N.C. Gen. Stat. § 163-278.16A (1999) (effective date Jan. 1, 1998).

According to plaintiff, section 163-278.16A

> is capable of several distinct interpretations and is in need of construction. One construction is that for any year *after December 31, 1998* no declared candidate may use state funds for campaign like prohibited "public service announcements" and another construction is that after December 31 for any year immediately prior to a general election no candidate may use state funds for campaign like prohibited "public service announcements." . . . . The parties are in need of determination of which construction of the statute is lawful and intended.

The former interpretation advocated by plaintiff would support his claim that the Attorney General violated the statute, as he alleged Attorney General Easley, then a declared candidate for Council of State, appeared in public service announcements on or after December 31, 1998. The latter interpretation supports defendants' position that the Attorney General did not violate section 163-278.16A, because he did not appear in an advertisement after 31 December, prior to election year 2000.

Our *de novo* review of section 163-278.16A reveals that plaintiff was not entitled to declaratory relief concerning the statute's meaning. Section 163-278.16A specifically applies "[a]fter ***December 31 prior to a*** general election in which a Council of State office will be on the ballot." N.C. Gen. Stat. § 163-278.16A (emphasis added). Although the statute was effective on or after 1 January 1998, it does not denote 31 December ***1998*** as the specific date after which it perpetually bars all public service announcements by Council of State candidates. Certainly, if the General Assembly intended section 163-278.16A to apply from 31 December 1998 forward, it would have so specified. *See In Re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994) (noting that "it would have been a simple matter to include [an] explicit phrase" in statute, thus giving it a certain effect).

We hold that section 163-278.16A applies only to prohibit advertisements in years when declared Council of State candidates are on an election ballot. Given that the meaning of section 163-278.16A is plain and clear, we conclude there was no actual controversy between the parties concerning the meaning of section 163-278.16A. *See Walker*, 268 N.C. at 348, 150 S.E.2d at 495.

Plaintiff further requested that the trial court determine the nature of the lawsuit proceeds in relation to the Attorney General's duty to report those proceeds pursuant to section 163-278.36 of our General Statutes. During the pendency of the lawsuits, but prior to the filing of the present action, our General Assembly amended section 163-278.36. Plaintiff's claims concern both section 163-278.36, as it originally appeared and as amended. Prior to May 1999, section 163-278.36 read as follows:

> **Elected officials to report funds:** All contributions to, and all expenditures from any "booster fund," "support fund," "unofficial office account" or any other similar source which are made to, in behalf of, or used in support of any person holding an elective office for any political purpose whatsoever during his term of office shall be deemed contributions and expenditures as defined in this Article and shall be reported as contributions and expenditures as required by this Article. The annual report shall show the balance of each separate fund or account maintained on behalf of the elected office holder.

N.C. Gen. Stat. § 163-278.36 (1995). Section 163-278.36 now provides:

> **Elected officials to report funds:** All donations to, and all payments from any "booster fund," "support fund," "unofficial office account" or any other similar source made or used in support of an individual's candidacy for elective office, or in support of an individual's duties and activities while in an elective office shall be deemed contributions and expenditures as defined in this Article and shall be reported as contributions and expenditures as required by this Article. The reports due in January and July of each year shall show the balance of each separate fund or account maintained on behalf of the elected office holder.

N.C. Gen. Stat. § 163-278.36 (1999) (effective date May 4, 1999).

An examination of plaintiff's complaint, as amended, reveals that he failed to state a claim for declaratory relief concerning the nature of the lawsuit proceeds, as they relate to the alleged violation of section 163-278.36. Although plaintiff claimed that the lawsuit proceeds were disguised campaign contributions, plaintiff also alleged that the lawsuit proceeds were "either state funds or penal funds [which] should be remitted to either the State Treasurer or local school boards." State funds do not fall within the purview of either the orig-

inal or the amended version of section 163-278.36, as "state funds" are neither "contributions" or "donations." *See* N.C. Gen. Stat. § 163-278.6 (1999) (defining "contribution"). It follows that plaintiff failed to allege an actual controversy concerning the lawsuit proceeds and consequently failed to state a claim for declaratory relief.

Other Equitable Relief

Given our resolution of the aforementioned issue, we find that plaintiff likewise failed to state claims for other equitable relief under either section 163-278.16A or section 163-278.36. As noted *supra*, section 163-278.16A prohibits a Council of State candidate from appearing in public service announcements during years when the candidate's name appears on an election ballot. *See* N.C. Gen. Stat. § 163-278.16A. Plaintiff in the case *sub judice* alleged that Attorney General Easley violated the statute by appearing in public service announcements running in 1999. However, Council of State candidates, including Attorney General Easley, were not on an election ballot in 1999. It follows that section 163-278.16A did not prohibit the advertisements, and thus, plaintiff's claim to the contrary must fail.

Concerning plaintiff's claims brought pursuant to section 163-278.36, because he alleged the lawsuit proceeds were, in fact, "state funds," neither version of section 163-278.36 required Attorney General Easley to report the proceeds to the State Board of Elections. We therefore conclude that plaintiff failed to state a claim for which relief could be granted under section 163-278.36.

For the foregoing reasons, we affirm the order of the trial court.

Affirmed.

Judges CAMPBELL and JOHN concur.

RICHARD A. JANNEY, JR., EMPLOYEE, PLAINTIFF-APPELLEE v. J.W. JONES LUMBER COMPANY, INC., EMPLOYER, EBI COMPANIES, CARRIER, DEFENDANT-APPELLANTS

No. COA00-494

(Filed 7 August 2001)

Workers' Compensation— unexplained fall—*Pickrell* presumption inapplicable—injury arising out of employment—insufficient findings

The Industrial Commission erred by concluding that plaintiff's unexplained fall which caused an injury to his ear arose out of his employment as a lumber grader and by awarding compensation to plaintiff because: (1) the Commission found no valid risk attributable to plaintiff's employment that influenced plaintiff's injury; (2) the *Pickrell* presumption of compensability does not apply to an unexplained injury not resulting in death even though plaintiff cannot remember the details of his accident; and (3) even if the *Pickrell* presumption applied, defendant employer presented sufficient evidence to rebut the presumption by offering evidence that plaintiff's fall was due to a seizure or syncope with no work-related cause, which required the Commission to weigh the evidence and make appropriate findings of fact, but the Commission failed to do so. Therefore, the case is remanded for findings as to whether plaintiff's fall resulted from an idiopathic condition and, if so, whether the risks attributable to plaintiff's employment contributed to the fall.

Chief Judge EAGLES dissenting.

Appeal by defendants from opinion and award entered 31 January 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 May 2001.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jaye E. Bingham, for defendant-appellants.

McGEE, Judge.

Defendants appeal an opinion and award by the North Carolina Industrial Commission (Commission) awarding workers' compensation payments to plaintiff for an injury to plaintiff's ear sustained

while working for defendant employer. Plaintiff testified that he had worked as a lumber grader for defendant employer for some four years prior to the injury. Plaintiff's job entailed sitting or standing before a set of chains which carried boards to be graded. A console to control the chains was located behind plaintiff, and plaintiff had to turn around to stop the chains with the console.

Plaintiff testified that, on 19 January 1998, he remembered waiting for a board to come, and the next thing he remembered was lying on the floor of the grading booth, hearing his supervisor calling his name. Plaintiff had no memory of hitting his head on the console or of hitting the floor. When he regained consciousness, plaintiff was lying on his right side, and his left ear was purple and painful. Asked if he could recall whether he had landed face first or on his side, plaintiff answered:

> The only thing I can come up with is when I was sitting, I was sitting on a stool. And the only way it could have happened was me [sic] to fall towards the left, onto the console, and then onto the floor. That's the only way I believe it could have happened.

But plaintiff testified he had no actual recollection of how he had ended up on the floor. Plaintiff had no history of falling down and had no idea why he had done so that day.

Defendant employer's vice-president for administration testified that he was summoned by plaintiff's supervisor shortly after plaintiff fell, and that when he arrived plaintiff was lying on his stomach but moving his head and talking to the supervisor. None of plaintiff's co-workers had seen plaintiff fall. The last board plaintiff had graded was two to three feet from where plaintiff had been standing, which meant that the chains had been stopped a matter of minutes after plaintiff fell. The chains could have been stopped by plaintiff hitting the console as he fell, or by a co-worker when plaintiff was found shortly after his fall. None of plaintiff's co-workers were asked whether they had turned off the chains.

The neurologist who examined plaintiff after the fall testified by deposition that plaintiff's sudden loss of consciousness, combined with the fact that plaintiff had bitten his tongue when he fell, strongly suggested that plaintiff had suffered a seizure. The neurologist believed that plaintiff's diabetes and high blood sugar, as well as possible heart palpitations, might have increased the risk of a seizure, but he could not attribute a seizure to plaintiff's medical conditions

alone. A blow to the head could have caused a seizure, but such a blow would have had to occur before plaintiff fell. The neurologist pointed out that fifty percent of seizures have no determined cause.

The neurologist testified that, if plaintiff did not suffer a seizure, he suffered a syncope, a brief loss of consciousness, eighty to ninety percent of which have no determined cause. The neurologist also concluded that the injury to plaintiff's ear did not in itself indicate that plaintiff hit something before he hit the floor but could very well have been caused by his ultimate contact with the floor.

To be compensable under the North Carolina Workers' Compensation Act, an employee's injury must be "by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (1999). A claimant must therefore prove three elements: accident, arising out of, and in the course of employment. *See Hollar v. Furniture Co.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980). In the present case, the Commission held, and defendants do not dispute, that plaintiff's fall itself was the unusual and unforeseen occurrence that is the accident. Similarly, there is no dispute that, given the time and place of plaintiff's injury, the injury occurred in the course of plaintiff's employment. *See id.*

The issue on appeal, therefore, is whether plaintiff's injury arose out of plaintiff's employment. "Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.' " *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960) (citations omitted). "An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment." *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968). "When the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment. The injury does arise out of the employment if the idiopathic condition of the employee combines with 'risk[s] attributable to the employment' to cause the injury." *Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) (citations omitted).

"The question of whether an injury 'arises out of employment' is a mixed question of law and fact and our review is limited to whether 'the findings and conclusions are supported by competent evidence.' " *Id.* at 284, 468 S.E.2d at 589 (citation omitted). The Commission found that plaintiff, as a lumber grader,

> would sit on a stool in close proximity to a passing conveyor and with a control console immediately behind him. From that stool, plaintiff would have to lean forward to grade and mark the boards as they pass by on a conveyer and lean back to access the control console. The Full Commission finds that this aspect of plaintiff's employment subjects him to a peculiar hazard to which the public is not generally exposed.

The Commission found that, on 19 January 1998, plaintiff was grading boards when he fell off his stool, struck his head on the control console, and lost consciousness. The Commission made no finding as to the cause of plaintiff's fall or whether an idiopathic condition contributed to the fall. Based on its findings of fact, the Commission concluded that, even if plaintiff's fall was due in part to an idiopathic condition, the fall was also a result of the risks attributable to his employment. The Commission further concluded that plaintiff was entitled to a presumption of compensability under *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988). The Commission therefore awarded plaintiff compensation for his injury.

The Commission's finding of fact that plaintiff's work entailed leaning over boards to grade them and leaning back to access the control console is unsupported by competent evidence. In describing his job as a lumber grader, plaintiff made no mention of leaning over the boards to grade them, and specifically stated that he would turn around, not lean backwards, to reach the console behind him if he needed to stop the chains. Consequently, the Commission's finding that plaintiff's job requirement to lean forward and back subjected him to a peculiar hazard is likewise unsupported by competent evidence. Because the Commission found no valid risk attributable to plaintiff's employment that influenced plaintiff's injury, plaintiff is not entitled to compensation if his fall was otherwise due to an idiopathic condition. *See, e.g., Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951).

In the alternative, the Commission concluded that plaintiff was entitled to a presumption of compensability under *Pickrell*. In *Pickrell*, our Supreme Court held that a claimant for workers' compensation death benefits is entitled to a presumption that an unexplained injury resulting in death is compensable. The Supreme Court considered such a presumption fair because

> [e]mployers may be in a better position than the family of the decedent to offer evidence on the circumstances of the death.

> Their employees ordinarily are the last to see the decedent alive, and the first to discover the body. They know the decedent's duties and work assignments.

Pickrell, 322 N.C. at 370, 368 S.E.2d at 586. The same cannot be said for an employee who has survived his injury, even an employee who cannot remember the details of his accident. In the present case, there is no reason to believe that defendant employer could have known any more about the circumstances of plaintiff's fall than did plaintiff himself. Because we see no potential inequality of information, we decline to adopt the *Pickrell* presumption in this workers' compensation case not resulting in death.

Moreover, even were a *Pickrell* presumption applicable to the present case, defendants offered evidence that plaintiff's fall and injury were due to a seizure or syncope with no work-related cause. The *Pickrell* presumption shifts the burden of proving compensability from the plaintiff to the defendant, but it does not eliminate the Commission's duty to weigh all of the evidence before it and make appropriate findings of fact. *Id.* at 371, 368 S.E.2d at 586. A defendant is entitled to rebut a *Pickrell* presumption. *See Bason v. Kraft Food Serv., Inc.*, 140 N.C. App. 124, 128, 535 S.E.2d 606, 609 (2000). We believe that defendants presented sufficient evidence to rebut a *Pickrell* presumption, requiring the Commission to weigh the evidence and make appropriate findings of fact. The Commission did not do so.

Finally, defendants argue that the Commission's conclusion that plaintiff hit his head on the control console as he fell is also unsupported by competent evidence. But while there is no direct evidence that plaintiff hit the console as he fell, there is evidence by which the Commission could reasonably infer that such contact occurred. However, the question of whether plaintiff struck the control console as he fell has no bearing on the issue of the compensability of plaintiff's injury. What happened after plaintiff fell has no effect on the determination of what caused plaintiff to fall in the first place. In addition, there is no evidence by which the Commission could find on remand that the presence of the console, alone, created a peculiar hazard causally related to plaintiff's injury. Plaintiff's neurosurgeon specifically testified that plaintiff's ear injury was no particular indication of contact with the console, indicating that the presence of the console had no aggravating effect on plaintiff's injury.

> "The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position *increasing the dangerous effects of a fall*, such as on a height, near machinery or sharp corners, or in a moving vehicle."

Allred at 557, 117 S.E.2d at 479 (citation omitted) (emphasis added and removed).

We therefore hold that the Commission's conclusion that plaintiff's injury is compensable is unsupported by its findings of fact. We reverse the Commission's opinion and award and remand to the Commission for further findings of fact. The Commission must determine whether plaintiff's fall resulted from an idiopathic condition, or whether the cause of the fall is unexplained. If an idiopathic condition played a role in the fall, plaintiff is entitled to compensation only if risks attributable to his employment contributed to the fall. *See Mills, supra.* If the Commission concludes that the cause of the fall remains unexplained, the Commission may award compensation only if it finds falling while grading boards to be a risk or hazard incident to plaintiff's employment. *See Robbins v. Hosiery Mills*, 220 N.C. 246, 248, 17 S.E.2d 20, 21 (1941).

Reversed and remanded.

Judge TYSON concurs.

Chief Judge EAGLES dissents.

EAGLES, Chief Judge, dissenting.

I respectfully dissent. Our Courts have not previously applied the *Pickrell* presumption to a non-death case. However, consistent with the historically liberal interpretation of the Workers' Compensation Act, I believe that the rationale supporting the *Pickrell* presumption is also applicable here. *See Adams v. AVX Corporation*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citing *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)). The majority notes that the *Pickrell* Court considered the presumption fair in part because "[e]mployers may be in a better position than the family of the decedent to offer evidence on the circumstances of the death." *Pickrell*, 332 N.C. at 370, 368 S.E.2d at 586. The majority, however, declines to adopt the presumption here reasoning that "[t]he same cannot be said

for an employee who has survived his injury, even an employee who cannot remember the details of his accident." I disagree.

The record indicates that the nature of plaintiff's injury prevented him from offering any relevant testimony as to the cause or circumstances surrounding his injury. The plaintiff had no recollection of the events leading up to and resulting in his injury. Plaintiff testified that "[a]ll I can say is one minute I was grading boards and then the next minute I was hearing my supervisor calling my name." Plaintiff could not remember feeling ill, falling or striking his head. Dr. Lloyd Hitchings testified that "it was like a typical light switch. I'm minding my own business, doing my job and then wham—I wake up and there's the ambulance looking at me." This evidence shows that the nature of plaintiff's injury, like the deceased plaintiff, prevents him from offering testimony supporting his claim. Accordingly, I vote to apply the *Pickrell* presumption to factual situations like this one.

Though my research has not disclosed a case where our Courts have determined whether or not this presumption may be applied in a non-death context, I would hold that the plain language in *Pickrell* allows for application in non-death cases. In crafting this presumption, the Supreme Court stated the rule as follows:

> In the absence of evidence to the contrary, the presumption or inference will be indulged in that **injury** or death arose out of employment where the employee is **found injured at the place where his duty may have required him to be, or** where the employee is found dead under circumstances indicating that death took place within the time and space limits of the employment. . . . Such presumptions are rebuttable and they disappear on the introduction of evidence to the contrary.

Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 367, 368 S.E.2d 582, 584 (1988) (quoting 100 C.J.S. *Workmen's Compensation* § 513 (1958) (emphasis added)). By using this language, the Supreme Court clearly indicates that there are situations other than death cases where a presumption would be appropriate. I believe that the facts here present this type of occasion. Accordingly, I would apply *Pickrell* to plaintiff's claim.

The majority also holds that plaintiff's claim would fail even with the benefit of the *Pickrell* presumption. According to the majority, the defendants offered evidence that the plaintiff fell due to a seizure or a syncope. Further, the majority holds that the "question of

whether plaintiff struck the control console as he fell has no bearing on the issue of the compensability of plaintiff's injury." Again, I disagree.

Our Courts have consistently held that "the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of a fall, such as on a height, *near machinery* or sharp corners or in a moving vehicle." *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960) (emphasis added). Notably, the majority concedes that there was sufficient evidence for the Commission to find that plaintiff had hit his head on the control console and the Commission made findings to that effect. Findings of fact made by the Industrial Commission "are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 166, 551 S.E.2d 456, 458 (2001) (citation omitted). In its discussion, the majority seems to hold that the plaintiff's injury may be compensable only if the plaintiff fell due to striking his head on the control console. However, our case law shows that so long as the employment places the employee "in a position increasing the dangerous effects of a fall," the injury is compensable. *Allred*, 253 N.C. at 557, 117 S.E.2d at 479. Here, the employee was required to sit on a stool near the conveyor line with the control console behind him. There was competent evidence to show that plaintiff fell and hit his head on that console. Therefore, plaintiff's employment here exposed him to increased dangers from a potential fall.

For these reasons I would affirm the opinion and award of the Industrial Commission.

STATE OF NORTH CAROLINA v. CALEB ELIJAH WARDRETT, DEFENDANT

No. COA00-774

(Filed 7 August 2001)

1. Robbery— armed—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery because defendant was identified by three witnesses as the perpetrator of the crime.

2. Evidence— hearsay—unavailable declarant—statement against interest—trustworthiness

The trial court did not abuse its discretion in an armed robbery case by excluding the testimony of three witnesses regarding statements allegedly made to them by an unavailable deceased witness regarding the identity of the perpetrator of an attempted armed robbery and murder on the basis that the statements were hearsay that did not fall within the statement against interest exception provided by N.C.G.S. § 8C-1, Rule 804(b)(3), because: (1) it is unclear whether the hearsay statements allegedly made by the unavailable declarant were in fact against his penal interests when the alleged statements indicated that defendant did not kill the victim, but never stated that the unavailable declarant rather than defendant killed the victim; and (2) there were insufficient circumstances to indicate the trustworthiness of the alleged statements.

3. Robbery— armed—erroneous jury instruction—no prejudicial error

Although the trial court erred in an armed robbery case by its jury instructions stating the evidence of the armed robbery was admitted for a limited purpose when it was admitted as substantive evidence, defendant has failed to show prejudicial error because: (1) if this instruction had any impact on the jury, it made a conviction on the charge of armed robbery less likely rather than more likely; and (2) an erroneous instruction that is beneficial to defendant does not constitute reversible error.

Appeal by defendant from judgment entered 27 March 2000 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 17 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

Terry W. Alford, for defendant-appellant.

HUDSON, Judge.

Defendant was indicted and tried on three charges: (1) the murder of James Holloman in 98 CRS 6784; (2) the attempted armed robbery of James Holloman in 98 CRS 6786; and (3) the armed robbery of Timothy Mitchell in 98 CRS 6785. The evidence presented at trial

tended to establish the following facts. On 24 April 1998, at approximately 10:00 p.m., Timothy Mitchell went to the Starling Way shopping center in a jeep driven by his mother, Faye Mitchell, with his two nephews, ages 5 and 9, in the back seat. As they were leaving the shopping center, Timothy asked Faye to stop the car so that Timothy could speak with two individuals, Marcus Powell and a second man. Timothy indicated to the two individuals that he wanted to purchase drugs, and then Powell remained by the jeep while the second individual walked away toward some dumpsters. The second individual returned to the jeep after a very short time, came up to the passenger window, and pointed a revolver at Timothy's head. Timothy pushed the gun away, and the individual hit him in the face with his other hand, cocked the hammer on the gun and threatened to kill Timothy and the others in the jeep if they didn't hand over their money. Timothy handed over his wallet and the individual ran away.

A short while later, James Holloman, the owner of a store in the same shopping center where Timothy Mitchell was robbed, was accosted by an individual as Holloman stood next to his car. An argument ensued between the two, and Holloman hit the individual. The individual then staggered back a step, pulled out a gun and shot Holloman. Holloman died from the gunshot wound.

At trial, the jury was unable to reach a unanimous verdict on either the murder or the attempted armed robbery charge, and mistrials were therefore declared in 98 CRS 6784 and 98 CRS 6786. However, the jury found defendant guilty of robbery with a dangerous weapon in 98 CRS 6785 pursuant to N.C.G.S. § 14-87 (1999), and judgment was entered against defendant. Defendant appeals from this judgment.

Defendant sets forth six assignments of error in the record on appeal. However, three of these are not raised in defendant's brief and are thus taken as abandoned. *See* N.C.R. App. P. 28(b)(5). The three remaining assignments of error are set forth in defendant's brief accompanied by three corresponding arguments.

[1] By his first assignment of error, defendant argues that the trial court erred in denying defendant's motion to dismiss as to the charge in 98 CRS 6785. Defendant moved to dismiss all of the charges against him based upon insufficiency of the evidence at the close of all of the evidence. As such, defendant has properly preserved this issue for review on appeal. *See* N.C.R. App. P. 10(b)(3); *State v. Jordan*, 321

N.C. 714, 716-17, 365 S.E.2d 617, 619 (1988). The standard of review on appeal from a denial of a motion to dismiss has been described as follows:

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, . . . and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.
>
> . . . The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citations omitted). Furthermore, "all evidence favorable to the State is taken as true and conflicts and discrepancies are resolved in favor of the State." *Jordan*, 321 N.C. at 717, 365 S.E.2d at 619. Here, the State presented the testimony of Timothy Mitchell, Faye Mitchell and Marcus Powell, all three of whom identified defendant as the perpetrator of the armed robbery of Timothy Mitchell. Although there was conflicting evidence presented by defendant as to whether defendant committed the crime, the testimony of Timothy, Faye and Powell must be taken as true for purposes of defendant's motion to dismiss. We believe this testimony was sufficient to withstand defendant's motion to dismiss, and therefore find no error in the trial court's denial of the motion. This assignment of error is overruled.

[2] In his second argument defendant contends the trial court erred in excluding the testimony of three particular individuals regarding statements allegedly made to them by Cornell Fields regarding the identity of the perpetrator of the attempted armed robbery and murder of Holloman. At trial, defendant first sought to admit the testimony of Sharice Pitts. Pitts testified on *voir dire* that she has known defendant almost her entire life. Pitts testified that she has known Cornell Fields for five or six years. Pitts found out that defendant had been charged with the murder of Holloman in April of 1998, and thereafter spoke with Fields. According to Pitts, although Fields never directly stated that he had killed Holloman, Fields told Pitts that he knew defendant had not killed Holloman, and that Fields

knew where the murder weapon was located and that the police would never find it.

Defendant also sought to admit the testimony of a second individual, Patricia Arlese Hines. Hines testified on *voir dire* that she lives with Pitts and has known defendant for four years. She testified that she found out defendant had been charged with the murder of Holloman a few days after the incident. She testified that she has also known Fields for about four years, and that she spoke to Fields after defendant had been charged and that Fields told her that defendant had not killed Holloman.

Defendant also sought to admit the testimony of a third individual, Curtis Farmer. Farmer testified on *voir dire* that he had known Fields for about eight years, but that Fields was now deceased. He testified that he had spoken to Fields while they were both in prison after Holloman had been killed, at which time Fields was being held in prison for "safe keeping" on a separate murder charge. Farmer testified that Fields told him that defendant had not killed Holloman, and that Fields described the following details to him regarding the night Holloman was killed: Fields tried to rob Holloman, Holloman was reluctant to give Fields his money, they "tussled," and then the gun Fields was holding went off and shot Holloman. Farmer also testified that he does not know Pitts or Hines and has never spoken with them.

Following the *voir dire* testimony, defendant offered Fields' death certificate as evidence. The trial court then found as fact that Fields was dead at the time of the trial. However, the trial court excluded the testimony of the three witnesses on the grounds that the statements were hearsay and did not fall within the exceptions provided by N.C.R. Evid. 804(b)(3) or 804(b)(5) because there were insufficient circumstances to indicate the trustworthiness of the alleged statements. On appeal, defendant argues that the testimony offered by Pitts, Hines and Farmer, taken together, established sufficient corroborating circumstances to indicate the trustworthiness of the alleged statements by Fields and that the testimony should have been admitted pursuant to Rule 804(b)(3). The State argues that the trial court properly excluded the testimony, and that even if the trial court erred in excluding the testimony, defendant has failed to show that this error prejudiced the result in defendant's armed robbery conviction. We agree with the State that the testimony was properly excluded by the trial court.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). In general, hearsay evidence is not admissible. *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 598 (1988). However, an out-of-court statement by an unavailable witness may be admissible if the statement satisfies the definition of a "statement against interest," which is defined by Rule 804(b)(3) as

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

N.C.R. Evid. 804(b)(3). Our Supreme Court has held that Rule 804(b)(3) requires a two-pronged analysis. *Wilson*, 322 N.C. at 134, 367 S.E.2d at 599. First, the statement must be "deemed to be against the declarant's penal interest." *Id.* Second, "the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability." *Id.*

Here, we first note that it is not clear that the hearsay statements allegedly made by Fields and offered by witnesses Pitts and Hines were, in fact, against Fields' penal interest. In those alleged statements, Fields indicated that defendant did not kill Holloman, but never stated that he, rather than defendant, had killed Holloman. Furthermore, it is not clear that the statement allegedly made by Fields to Farmer, although arguably against Fields' penal interest in a general sense, "at the time of its making, . . . so far tended to subject [the declarant] to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." N.C.R. Evid. 804(b)(3). For example, Fields, who was already in custody for a murder charge at the time he allegedly made the statement, could have made the statement, knowing it to be false, in order to enhance his reputation with other inmates. Regardless, we find no error in the exclusion of the statements offered by the three witnesses because we believe the trial court did not abuse its discretion in ruling that the statements failed to satisfy the second prong of the Rule 804(b)(3) analysis.

As stated above, the second prong of the analysis requires that "*the trial judge must be satisfied that* corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability." *Wilson*, 322 N.C. at 134, 367 S.E.2d at 599 (emphasis added). The determination of whether the trustworthiness of the statement is indicated by corroborating circumstances is a preliminary matter to be decided by the trial judge. *See State v. Brown*, 335 N.C. 477, 484, 439 S.E.2d 589, 594 (1994) (citing N.C.R. Evid. 104). "[A]s with other exceptions to the hearsay exclusionary rule[,] the trial judge (on *voir dire*) must apply a threshold test to determine in his sound discretion whether the declaration bears the indicia of trustworthiness." *State v. Haywood*, 295 N.C. 709, 728, 249 S.E.2d 429, 441 (1978) (internal quotation marks omitted); *see State v. Singleton*, 85 N.C. App. 123, 129, 354 S.E.2d 259, 263 (1987) (stating that, although *State v. Haywood* was decided prior to the enactment of Rule 804(b)(3), most, if not all, of the analysis pertaining to "statements against penal interest" in *Haywood* will carry over under Rule 804(b)(3)), *disc. review denied*, 320 N.C. 516, 358 S.E.2d 530 (1987). The Court in *Haywood* further explained that

> [i]n every case the precise application of the standards of reliability must be left to the discretion of the trial judge who, on *voir dire*, will weigh all the evidence and thereafter admit the declaration only if he determines there is a reasonable possibility that the declarant did indeed commit the crime. It was pointed out in [*Pitts v. State*, 307 So. 2d 473 (Fla. Dist. Ct. App.), *cert. denied*, 423 U.S. 918, 46 L. Ed. 2d 273 (1975)], that "it would be imperative that broad discretion be afforded the trial judge in determining the reliability of the declaration and the declarant by consideration of such factors as spontaneity, relationship between the accused and the declarant, existence of corroborative evidence, whether or not the declaration had been subsequently repudiated and whether or not the declaration was in fact against the *penal interests* of the declarant."

Haywood, 295 N.C. at 729, 249 S.E.2d at 441-42.

Here, the following factors clearly undermined the trustworthiness of the alleged statements by Fields. First, Pitts testified that she has known defendant for almost her entire life. Hines testified that she lives with Pitts and has also known defendant for a number of years. Although both Pitts and Hines testified that they had known Fields for a number of years, the fact that Fields was deceased at the

time of trial means that Pitts and Hines were free to implicate Fields in the crime without fear that their testimony would negatively impact Fields. Second, neither Pitts nor Hines testified that Fields stated that he had committed the murder, but only that he believed defendant had not committed the murder. Third, elements of Farmer's testimony on *voir dire* tended to undermine his credibility as a witness. For example, when asked what crime he had committed for which he was imprisoned at the time Fields allegedly made the statement to him, Farmer stated, "I can't remember." When asked when the alleged statement had been made, Farmer stated, "I can't remember."

Moreover, we are unable to find, and defendant's brief fails to set forth, any other independent evidence offered at trial, aside from the excluded testimony in question, establishing corroborating circumstances which would clearly indicate the trustworthiness of the statements. Contrary to defendant's argument, the fact that there are multiple hearsay statements does not indicate the trustworthiness of any one of the individual statements. *See State v. Artis*, 325 N.C. 278, 305-06, 384 S.E.2d 470, 485 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). "Such bootstrapping does not provide an adequate guarantee of the trustworthiness of [any one of the individual pieces] of evidence." *Id.* at 305, 384 S.E.2d at 485. Rather, there must be "some other independent, nonhearsay indication of the trustworthiness" of the evidence sought to be admitted. *Id.* at 305-06, 384 S.E.2d at 485. Under these circumstances, we believe the trial court did not abuse its discretion in excluding the hearsay statements under Rule 804(b)(3). This assignment of error is overruled.

[3] Defendant's third and final argument relates to the jury instructions given by the trial court. The trial court charged the jury, in part, as follows:

> Evidence has been received tending to show that at an earlier time on the evening of April 24, 1998, the defendant had committed the offense of robbery with a dangerous weapon wherein Timothy Mitchell was the alleged victim. This evidence was received solely for the purpose of showing: the identity of the person who committed the crime charged in this case, if it was committed; that the defendant had a motive for the commission of the crime charged in this case; that the defendant had the intent which is a necessary element of the crime charged in this

> case; that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence you may consider it, but only for the limited purpose for which it was received.

Defendant contends, and the State concedes, that this instruction to the jury constituted error on the part of the trial court because the evidence of the armed robbery of Timothy Mitchell was not admitted for a limited purpose. Rather, the evidence was admitted as substantive evidence in order to prove that defendant committed the armed robbery of Timothy Mitchell, one of the three offenses charged at trial. However, the State contends that defendant has failed to show that this error prejudiced him. We agree.

In order to show prejudice, a defendant alleging error at trial must show 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 out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1999). It is fundamental that the purpose of the jury charge is to provide clear instructions regarding how the law should be applied to the evidence, in such a manner as to assist the jury in understanding the case and in reaching a verdict. *See State v. Higginbottom*, 312 N.C. 760, 764-65, 324 S.E.2d 834, 838 (1985). Clearly the jury charge in this case had the potential to be confusing to the jurors. However, we believe the error does not require a new trial. The instruction charged the jury to use the evidence regarding the armed robbery of Timothy *only* for the limited purpose of showing identity, motive, intent, plan, scheme, system or design with regard to the Holloman charges, and not as substantive evidence that defendant committed the armed robbery of Timothy. If this instruction had any impact on the jury, we can only conceive that it made a conviction on the charge of armed robbery *less* likely rather than more likely. An erroneous instruction that is beneficial to the defendant does not constitute reversible error. *See, e.g., State v. Hageman*, 56 N.C. App. 274, 284, 289 S.E.2d 89, 95, *aff'd*, 307 N.C. 1, 296 S.E.2d 433 (1982). Moreover, had the jury followed this erroneous instruction literally, the jury could not have used any evidence of the armed robbery of Timothy as substantive evidence to convict on that charge; thus, the very fact that the jury did convict on that charge belies the suggestion that the erroneous instruction had any impact on the jury's verdict. This assignment of error is overruled.

For the reasons stated herein, we find no prejudicial error.

No error.

Judges MARTIN and HUNTER concur.

ELENA CHAMBOUS CRIST, PLAINTIFF v. TAKEY CRIST, DEFENDANT

No. COA00-1034

(Filed 7 August 2001)

1. Appeal and Error— appealability—denial of summary judgment—appeal from final judgment

The denial of a motion for summary judgment is not reviewable on appeal from a final judgment on the merits.

2. Evidence— telephone transcript—not entered into evidence—verbatim reading

The trial court did not abuse its discretion in an action on a note by sustaining an objection to defendant's verbatim reading of a telephone transcript that had not been entered into evidence, but the court allowed defendant to ask plaintiff questions about the telephone conversations and indicated that defendant would be allowed to enter the transcripts into evidence after a recess for plaintiff to review the transcripts.

3. Negotiable Instruments— promissory note—consideration

The trial court did not err in an action on a promissory note given in a divorce settlement by not granting defendant's motions for directed verdict or judgment notwithstanding the verdict where defendant alleged that the evidence at trial failed to establish consideration for the promissory note, but evidence that the note was under seal raised a presumption of consideration; there was evidence that plaintiff detrimentally relied on defendant's promise; and there was evidence of the benefit the parties' son would receive from a house purchased after the note was given.

4. Appeal and Error— preservation of issues—issue not raised at trial

The contention that a plaintiff in an action to collect upon a note had fraudulently induced plaintiff to sign the note was not addressed on appeal where it had not been asserted at trial.

5. Costs— travel expenses of party—not allowed

The trial court improperly granted a plaintiff's motion for travel expenses in an action to collect upon a note. The travel expenses of a party are not an assessable cost enumerated in N.C.G.S. § 7A-305 and are not otherwise an assessable cost as provided by law.

6. Costs— attorney fees—action on a note—notice to attorney

The trial court did not err by awarding attorney fees under a provision in a promissory note where defendant contended that he was not notified of plaintiff's intention to demand attorney fees, but the evidence indicated that defendant's attorney received the demand letter. An attorney is in an agency relationship with a client and defendant was placed on notice when his attorney received the letter. N.C.G.S. § 6-21.2(5).

7. Trials— verdict form—question to court

The trial court did not err in an action on a note by refusing to accept the jury's initial verdict where the jury had a question about the verdict form; a figure may have been written on the form, but there was no indication that the jury had submitted a verdict; the judge reread the instructions to the jury; and the jury completed their deliberation.

Appeal by defendant from judgment entered 15 November 1999 and amended 3 March 2000 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Court of Appeals 5 June 2001.

Lea, Clyburn & Rhine, by James W. Lea, III, for plaintiff-appellee.

Georgann Geracos for defendant-appellant.

TIMMONS-GOODSON, Judge.

Elena Chambous Crist (plaintiff) and Takey Crist (defendant), were granted a divorce on 15 May 1998. During their period of separation prior to divorce, they entered into a separation agreement whereby defendant was obligated to pay plaintiff $250,000. Defendant paid a $150,000 installment within thirty days of entering into the agreement. The remaining $100,000 was to be paid on or before 1 May 1998 with 6% interest. On 28 April 1998, defendant paid plaintiff $108,000.

Also during the period of separation, plaintiff moved to New Jersey with the parties' only child, a minor son. Plaintiff found several houses in Denville, New Jersey that she was interested in purchasing. Plaintiff contacted defendant about the houses. She claims that defendant suggested she buy the larger of the two houses, because defendant had hopes of reconciling with plaintiff and the more spacious house would be more desirable should the reconciliation take place. Plaintiff also claims that defendant agreed to pay $50,000 toward the purchase of the house from funds that would be available after defendant sold his gun collection. In July or August 1997, plaintiff provided defendant with a promissory note for defendant to sign. The note stated that defendant would pay plaintiff $50,000 on or before 1 December 1997. Defendant made changes to the promissory note and returned it to plaintiff. Plaintiff did not accept the altered terms of the note. Plaintiff then offered a new promissory note for defendant's approval which defendant signed, executing a promissory note in the amount of $50,000 on 20 August 1997. The note stated that it was due and payable by defendant to plaintiff on or before 31 December 1997. Plaintiff purchased the aforementioned house upon receiving said promissory note, relying on defendant's promise to pay the $50,000 after defendant sold his gun collection at an auction. After defendant failed to pay the promissory note when it became due, plaintiff made a written demand for payment in a 9 March 1998 letter. Defendant still did not pay on the note.

Plaintiff filed an action on 29 July 1998 for the sum of $50,000 plus interest and costs that plaintiff claimed to be owed by defendant on the promissory note. On 12 October 1998, defendant filed an answer, motion to dismiss and counterclaim, alleging that plaintiff owed defendant $2000 that defendant had overpaid to plaintiff as interest on the $108,000 separation agreement payment. On 8 November 1998, plaintiff filed a reply to counterclaim.

Defendant filed a motion for summary judgment on 3 September 1999. The motion was denied prior to trial, and a jury trial began on 13 September 1999. The jury returned a verdict on 23 September 1999, awarding the sum of $50,000 plus interest to plaintiff. Plaintiff filed a motion for attorneys' fees and costs on 1 October 1999. Judgment was then entered on 15 November 1999 in the amount of $50,000 plus interest from the date the complaint was filed, $2007 in costs, and $7500 in attorneys' fees. On 17 November 1999, plaintiff filed a motion to amend judgment so that interest would accrue from the date of the breach, not from the date of the filing of the complaint.

On 29 November 1999, defendant filed a motion for judgment notwithstanding the verdict and a motion for a new trial, both of which were denied at the 3 March 2000 hearing on post-trial motions. An amended judgment was also entered at this time, granting plaintiff's 17 November 1999 motion to amend judgment. Defendant served notice of appeal on 24 March 1999.

The six issues presented by this appeal are whether the trial court erred in (I) denying defendant's motion for summary judgment; (II) restricting defendant's attempts to impeach plaintiff on cross-examination; (III) denying defendant's motion for a directed verdict and for judgment notwithstanding the verdict; (IV) granting plaintiff's motion for travel expenses; (V) granting plaintiff's motion for attorneys' fees; (VI) failing to accept the jury's initial verdict. For the following reasons, we affirm in part and reverse in part.

[1] Defendant first argues that the trial court erred in denying defendant's motion for summary judgment based on plaintiff's answers to defendant's interrogatories. It is well settled in North Carolina that the denial of a motion for summary judgment is not reviewable on appeal from a final judgment on the merits. *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985). This is so because:

> [t]he purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue . . . . After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.

Id. at 286, 333 S.E.2d at 256. Even if the trial court erred in denying summary judgment, we would not reverse the judgment because a final judgment on the merits has already been rendered. *Id.* We therefore do not address whether it was error to deny summary judgment.

[2] Defendant's second argument is that the trial court unreasonably restricted defendant's attempt to impeach plaintiff on cross examination by means of plaintiff's prior statements. We disagree.

Cross-examination is a matter of right, but "the trial court has broad discretion in controlling the scope of cross-examination, and such a ruling may . . . not be disturbed absent abuse of discretion and a showing the ruling was so arbitrary it could not have been the prod-

uct of a reasoned decision." *Fallis v. Watauga Medical Ctr., Inc.*, 132 N.C. App. 43, 62, 510 S.E.2d. 199, 211 (1999).

In the instant case, defendant spent many hours conducting a thorough cross-examination of plaintiff. Defendant additionally attempted to read the transcript of a telephone conversation in order to impeach plaintiff. The trial court sustained plaintiff's objection to defendant's verbatim reading of the telephone transcript as it had not been entered into evidence. The trial court, however, allowed defendant to ask plaintiff questions related to the telephone conversations. Furthermore, the trial court indicated that defendant would be allowed to enter the transcripts into evidence, though a court recess would be necessary in order to give time for plaintiff to review the transcripts. Defendant did not pursue this option. Instead, defendant continued cross-examination subject to the limitations imposed by the trial court. Based on these facts, we are satisfied that the trial court did not abuse its discretion. We therefore overrule this assignment of error.

[3] Defendant's third argument is that the trial court erred by denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict. We disagree.

A motion for directed verdict is appropriately granted only when by looking at the evidence in the light most favorable to the nonmovant, and giving the nonmovant the benefit of every reasonable inference arising from the evidence, the evidence is insufficient for submission to the jury. *Streeter v. Cotton*, 133 N.C. App. 80, 514 S.E.2d 539 (1999). A motion for judgment notwithstanding the verdict represents a renewal, after a verdict is issued, of a motion for directed verdict, and the standards of review for both motions are the same. *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993). A "motion for a directed verdict shall state the specific grounds therefor." N.C.G.S. § 1A-1, Rule 50(a). A trial court's decision to grant or deny a motion for directed verdict or a motion notwithstanding the verdict will not be disturbed on appeal absent an abuse of discretion. *G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc.*, 125 N.C. App. 424, 481 S.E.2d 674 (1997).

Defendant asserts that the trial court erred in not granting the motions for directed verdict or judgment notwithstanding the verdict, because the evidence produced at trial failed to establish consideration for the promissory note. We disagree. While there was evidence presented by defendant that the promissory note was without con-

sideration, there was also evidence presented that the promissory note was under seal, which raises a presumption of consideration. *In re Foreclosure of Blue Ridge Holdings Ltd. Part.*, 129 N.C. App. 534, 500 S.E.2d 446 (1998). Evidence was also presented that plaintiff detrimentally relied on defendant's promise, and that the benefit the son would receive from the house was valid consideration to bind defendant. There was ample evidence, sufficient to go to the jury, that defendant owed plaintiff money on a valid promissory note that was executed by defendant. Thus, the trial court did not abuse its discretion in denying the motions for directed verdict and judgment notwithstanding the verdict.

[4] Defendant also asserts that the trial court erred in denying the motions for directed verdict and judgment notwithstanding the verdict, because plaintiff's testimony amounted to an admission that she had fraudulently procured the promissory note. However, defendant did not assert at trial that fraud was a ground for his motion for directed verdict or judgment notwithstanding the verdict. Defendant "cannot assert this on appeal because [he] failed to raise this issue before the trial court on [his] motions for directed verdict and judgment notwithstanding the verdict." *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 650, 535 S.E.2d 55, 64 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001). *See also Broyhill v. Coppage*, 79 N.C. App. 221, 225, 651 S.E.2d 32, 36 (1986) ("grounds not asserted in the trial court may not be asserted on appeal"); N.C.R. App. P. 10(b)(1) ("to preserve a question for appellate review, a party must have presented to the trial court a . . . motion, stating the specific grounds for the ruling . . . desired"). We therefore decline to address the argument that plaintiff fraudulently induced defendant to sign the promissory note.

[5] Defendant's fourth argument on appeal is that the trial court improperly granted the plaintiff's motion for travel expenses after dismissal of the jury. We agree.

N.C. Gen. Stat. section 6-20 provides for the trial court to allow "costs" in its discretion. N.C.G.S. § 6-20 (1999). Assessable costs in civil cases, however, are limited to those items listed in section 7 A-305. *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 474, 500 S.E.2d 732, 738 (1998), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999). In addition to those costs enumerated in section 7A-305, the trial court is permitted to "assess costs as provided by law." N.C.G.S. § 7A-305(e) (1999); *Sara Lee*, 129 N.C. App. at 474, 500

S.E.2d at 738. The trial court, however, is prohibited from assessing costs in civil cases which are neither enumerated in section 7A-305 nor "provided by law." *Sara Lee*, 129 N.C. App. at 474, 500 S.E.2d at 739.

In the case *sub judice*, the trial court ordered defendant to pay plaintiff $2,007.00 for travel expenses. Travel expenses of a party, however, are not an assessable cost enumerated in section 7A-305 and are not otherwise an assessable cost "as provided by law." *See City of Charlotte v. McNeely*, 281 N.C. 684, 694, 190 S.E.2d 179, 187 (1972) (no statute allows for travel expenses, such as "an allowance . . . for mileage and . . . for meals and hotel bills," as part of costs). Accordingly, as the trial court lacked the authority to assess plaintiff's travel expenses as a cost, we reverse on this issue and remand to the trial court to modify its award of costs to exclude travel expenses.

[6] Defendant next argues that the trial court erred in awarding attorneys' fees to plaintiff, because defendant was not notified of plaintiff's intention to demand attorneys' fees. We disagree.

The trial court's decision to award attorneys' fees is reviewed under the abuse of discretion standard. *Culler v. Hardy*, 137 N.C. App. 155, 526 S.E.2d 698 (2000). As such, the trial court's order will not be disturbed absent a showing that the order was manifestly unsupported by reason or that it was so arbitrary that it could not have been the result of a reasoned decision. *Id.*

N.C.G.S. section 6-21.2 governs the imposition of attorneys' fees in notes and other evidences of indebtedness. The statute mandates, in relevant part, that:

> the holder of an unsecured note . . . shall, after maturity of the obligation by default or otherwise, notify the maker . . . on said obligation that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker . . . has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees.

N.C.G.S. § 6-21.2(5).

It is not disputed that the promissory note in the instant case contained a "provision[] relative to payment of attorneys' fees" sufficient to trigger the imposition of attorneys' fees should proper notification be made. *Id.* The note stated, in pertinent part, that:

> [u]pon default the holder of this Note may employ an attorney to enforce the holder's rights and remedies and the maker, principal, surety, guarantor and hereby agree to pay the holder reasonable attorney's fees not exceeding a sum equal to fifteen percent (15%) of the outstanding balance owing on said Note, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default.

The issue in dispute is whether plaintiff satisfied the requirement of notifying defendant that she would be enforcing the attorneys' fees provision of the promissory note. "[C]ase law is clear that a party seeking to collect attorneys' fees incurred in the enforcement of a note must notify in writing the opposing party of this intent." *Thomas v. Miller*, 105 N.C. App. 589, 592, 414 S.E.2d 58, 60 (1992). Where the record fails to contain any evidence of such notice to the debtor, attorneys' fees are improperly granted. *Northwestern Bank v. Barber*, 79 N.C. App. 425, 339 S.E.2d. 452 (1986). Plaintiff claims to have sent the letter to defendant's attorney. Defendant claims to have never received notice. These two contentions are not mutually exclusive. Defendant's attorney could have received the demand letter without defendant ever having notice of the demand. In fact, the evidence at trial and the arguments in the brief indicate that this is what happened. The question then becomes whether the receipt of the demand letter by defendant's attorney is deemed to satisfy the notice requirement of section 6-21.2(5).

An attorney is in an agency relationship with a client. "North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency . . . Two factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent." *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532-33, 463 S.E.2d 397, 400 (1995). It is generally accepted that an attorney may act on behalf of his or her client. *See e.g. McGowen v. Rental Tool Co.*, 109 N.C. App. 688, 691, 428 S.E.2d 275 (1993) (finding an offer can be accepted through an attorney).

In the case at bar, it is not disputed that defendant was represented by an attorney and that the attorney was authorized to act on defendant's behalf. In fact, the attorney represented defendant throughout the trial and in connection with post-trial motions. Accordingly, defendant was placed on notice when his attorney received the letter from plaintiff asserting plaintiff's intent to seek attorneys' fees from defendant. We find support for our holding in

Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775 (1974). In *Trust Co.*, a letter mailed from plaintiff's attorney to defendant's attorney was deemed sufficient to satisfy the requirements of 6-21.2(5). The issue debated in *Trust Co.* centered around the *date* that the letter was sent; the ability of the plaintiff's *attorney* to directly send the demand letter to the defendant's *attorney* was not questioned by either party.

Thus, in the case at bar, defendant had five days from the mailing of such notice to pay the outstanding balance without incurring attorneys' fees. N.C.G.S. § 6-21.2(5). Defendant failed to do so. We therefore hold that attorneys' fees were properly awarded.

[7] Defendant's final argument on appeal is that the trial court erred in refusing to accept the jury's initial verdict of $2500. Defendant argues that this refusal invaded the province of the jury. The argument is wholly without merit. The transcript of the trial indicates that the jury had a question about completing the verdict form. The $2500 figure may have been written on the verdict form, but the jury did not submit an initial verdict at that time. The jury merely had a point of clarification. The judge re-read the instructions to the jury and the jury completed their deliberations. There is no indication that the jury had submitted a $2500 verdict. Consequently, the argument that the trial court erred in refusing to accept a $2500 verdict has no merit.

Having carefully reviewed defendant's arguments on appeal, we reverse on the issue of travel expenses and remand to the trial court to modify its award of costs to exclude travel expenses, and we affirm on all other issues.

Affirmed in part and reversed and remanded in part.

Judges GREENE and BRYANT concur.

PATTIE CHRISTOPHER, EMPLOYEE, PLAINTIFF-APPELLEE v. CHERRY HOSPITAL, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLANT

No. COA00-700

(Filed 7 August 2001)

Workers' Compensation— disability—credit for payments— restoration of vacation and sick leave balances

Although the Industrial Commission properly concluded in a workers' compensation case that plaintiff's vacation and sick leave payments taken during her period of disability were "due and payable" when made based on the fact that they have been earned by the employee and are not solely under the control of the employer, the Commission erred by concluding that defendant employer is entitled to a credit against compensation payments for those payments and plaintiff employee is entitled to restoration of vacation and sick leave because: (1) the only provision under N.C.G.S. § 97-42 allowing a credit to an employer for payments made to an injured employee is for payments not "due and payable" when made; and (2) for the same reasons that defendant is not entitled to a credit, plaintiff is not entitled to restoration of vacation and sick leave.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission entered 10 March 2000. Heard in the Court of Appeals 17 April 2001.

Barnes, Braswell & Haithcock, P.A., by W. Timothy Haithcock, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General William H. Borden, for defendant-appellant.

McGEE, Judge.

Plaintiff was injured during an employer-mandated self-defense class and was unable to work from 6 June 1998 to 11 June 1998 and from 18 July 1998 to 22 September 1998. Because defendant denied plaintiff's request for workers' compensation, plaintiff used fifty-two days of accrued sick leave and vacation leave while she was out of work. The North Carolina Industrial Commission (the Commission), on 10 March 2000, awarded plaintiff temporary total disability compensation of $532.00 per week for the period that plaintiff was out of work. The Commission also awarded defendant a credit for fifty-two

days at the compensation rate of $532.00 per week, and ordered defendant to restore plaintiff's vacation and sick leave on a dollar-for-dollar basis equal to the amount of defendant's credit, minus plaintiff's attorney's fees.

Defendant timely filed notice of appeal. Defendant assigns error to the failure of the Commission to grant defendant full credit for all payments made to plaintiff during her period of disability. Defendant also challenges the jurisdiction of the Commission to order defendant to restore plaintiff's vacation and sick leave balances.

Plaintiff filed a petition for writ of certiorari on 21 August 2000, seeking to assign error to the Commission's grant to defendant of any credit for vacation and sick leave payments made to plaintiff. Because there is no evidence that plaintiff has filed a copy of the petition with the chairman of the Commission as required by N.C.R. App. P. 21(c), we deny plaintiff's petition. We note, however, that defendant's appeal raises the same issues that plaintiff sought to bring before this Court.

"[A]ppellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Defendant does not bring before this Court a challenge to any of the Commission's findings of fact. Therefore, the sole issue in the present case is whether the Commission's Finding of Fact No. 13 that

> Plaintiff's time sheet from Cherry Hospital shows plaintiff using 27 days of sick leave and 25 days of vacation leave for the work missed due to her compensable injury by accident. These days were not employer-provided sick and disability payments, in that the days had already been earned and accrued by the plaintiff in the course of her employment with the [S]tate of North Carolina. Therefore, the payments made for the vacation and sick leave were due and payable when used by the plaintiff.

supports the Commission's Conclusion of Law No. 7 that

> Defendant is entitled to a credit for the amount of pay received by the plaintiff over the 52 days in which plaintiff received vacation and sick pay, with the credit being based on the $532.00 per week compensation rate. N.C. Gen. Stat. § 97-42.

and Conclusion of Law No. 8 that

> Plaintiff is entitled to have vacation and sick leave restored on a dollar-for-dollar basis to coincide with the credit received by defendant in order to reach a fair and just result, less the attorney fees hereafter awarded. If the attorney fees are not deducted from the amount of vacation and sick leave restored, the plaintiff's attorney fees will, in effect, have been paid by the defendant. The difference in pay received by the plaintiff that is above the $532.00 per week compensation rate shall stand as vacation or sick leave used by the plaintiff in order to maintain her normal salary and shall not be restored.

Defendant first assigns error to the failure of the Commission to grant defendant a credit for all payments made to plaintiff during her periods of disability. The grant of a credit against compensation payments under the Workers' Compensation Act (the Act) is governed by N.C. Gen. Stat. § 97-42 (1999), which provides:

> 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.

Whether the Commission may grant defendant *any* credit thus depends on whether defendant's payments to plaintiff for vacation and sick leave were "due and payable" when made. Although the Commission purported to find as a fact that defendant's payments to plaintiff were "due and payable" when made, that determination was actually a conclusion of law and we review it as such.

In *Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E.2d 844 (1986), the plaintiff-employee was injured on the job and the defendant-employer accepted the injury as compensable under the Act. When the Commission finally specified an award of compensation to the plaintiff, the defendants requested a credit against the compensation that they had already paid to the plaintiff. In affirming the Commission's denial of the credit, our Supreme Court held that:

> Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as* the payments did not exceed the amount

> determined by statute or by the Commission to compensate plaintiff for his injuries.

Id. at 542, 342 S.E.2d at 846 (emphasis in original). However, the Court went on to hold that because the plaintiff had already received more benefits from the defendants than he was entitled to receive by statute, he had been fully compensated for his injury and the defendants owed the plaintiff no additional compensation. *Id.* at 542, 342 S.E.2d at 846-47.

In *Estes v. N.C. State University*, 102 N.C. App. 52, 401 S.E.2d 384 (1991), as in *Moretz*, the defendant-employer accepted the plaintiff-employee's injury as compensable under the Act. However, the plaintiff did not request workers' compensation, and instead used his accumulated vacation and sick leave to receive full pay until he retired. When the plaintiff was subsequently awarded compensation by the Commission, the defendant requested a credit under N.C. Gen. Stat. § 97-42 for the vacation and sick leave payments made to the plaintiff. This Court held that because the defendant had accepted the plaintiff's injury as compensable, any payments made to the plaintiff were "due and payable" under *Moretz* and no credit was available. *Id.* at 58, 401 S.E.2d at 387. We further held that because an employee's accumulated vacation and sick leave could be used by the plaintiff for purposes other than those served by the Act, they were not tantamount to workers' compensation benefits. *Id.* at 58-59, 401 S.E.2d at 387-88.

> Such benefits have nothing to do with the Workers' Compensation Act and are not analogous to payments under a disability and sickness plan. Unlike the employee in *Moretz*, plaintiff in the instant case cannot be held to have received duplicative payments for his injury or to have received more than he was entitled by the Workers' Compensation Act to receive.

Id. at 59, 401 S.E.2d at 388. We held that the plaintiff was entitled to receive the full workers' compensation benefits awarded by the Commission. *See id.*

In *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), unlike *Moretz* and *Estes*, the defendant-employer *denied* that the plaintiff-employee's injury was compensable under the Act. The defendant instead paid the plaintiff pursuant to its Sickness and Accident Disability Benefit Plan, which provided benefits to employees for all disabling injuries, even those not work-related. The plain-

tiff received full pay for her first three months out of work, followed by partial pay until she was able to return to work. When the Commission subsequently granted compensation to the plaintiff, the defendant requested a credit under N.C. Gen. Stat. § 97-42 for the payments already made to the plaintiff. Our Supreme Court held that because the defendant had not acknowledged that the plaintiff's injury was compensable under the Act, the defendant's payments to the plaintiff were not "due and payable" when made and the defendant was entitled to a credit for them. *Id.* at 115-16, 357 S.E.2d at 672. The Court reasoned that:

> In cases such as this one where compensability under the Act is disputed, it may be some time before the injured worker begins to receive workers' compensation benefits. . . . Payment by the employer under a private disability plan accomplishes sound policy objectives by providing immediate financial assistance to the disabled worker *while* she is disabled. Through its plan, defendant affords a much-needed continuity of income to injured employees fully consistent with the expressed policies of workers' compensation.

Id. at 116-17, 357 S.E.2d at 673 (emphasis in original). The defendant's plan functioned as a wage replacement program much like workers' compensation, so denying the defendant a credit for payments under the plan would provide the plaintiff with a double recovery for the same injury. *Id.* at 117, 357 S.E.2d at 673. Besides being disfavored under the Act, a possibility for double recovery would be a disincentive for employers to have such alternate compensation plans in place. *Id.* However, the Court explicitly declined to consider whether payments made under a plan to which an employee had contributed would likewise be within the purview of N.C. Gen. Stat. § 97-42. *Id.*, n1.

In *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 468 S.E.2d 396 (1996), as in *Foster*, the defendant-employer did not accept the plaintiff-employee's injury as compensable under the Act, and instead paid him sick leave compensation. The sick leave plan, like the Sickness and Accident Disability Benefit Plan in *Foster*, provided the plaintiff with three months of full salary, followed by partial salary for the remainder of the plaintiff's time out of work. When the plaintiff was later awarded compensation by the Commission, the defendant requested a credit under N.C. Gen. Stat. § 97-42 for the sick leave payments made to the plaintiff, asserting that they were not "due and payable" when made. This Court held that it was error for the

Commission to deny the credit, citing *Foster* and noting the factual similarity between the two cases. *Lowe* at 576, 468 S.E.2d at 399.

Defendant, in the present case, argues that under the four cases above, whether a payment is "due and payable" when made is determined solely by whether the defendant-employer has first acknowledged that the underlying injury is compensable under the Act. By such reasoning, it would follow that because defendant disputed the compensability of plaintiff's injury, no payment made by defendant during plaintiff's disability was "due and payable" when made and defendant is therefore entitled to a credit for any and all such payments. Such a broad rule clearly was not contemplated by our Supreme Court in *Foster* when it explicitly declined to include within its holding the possibility of a compensation plan with employee contributions. We likewise decline to adopt such a broad *per se* rule in the present case.

Defendant further argues that the analysis in *Estes* in regard to accumulated vacation and sick leave is inapplicable to the present case. Defendant characterizes *Estes* as a two-step analysis, with the first step being whether the employer has acknowledged that the injury is compensable under the Act. Defendant contends that, because it did not acknowledge the compensability of plaintiff's injury, the second step in *Estes* does not apply. It is true that *Estes* held, *not* that accumulated vacation and sick leave payments are "due and payable" when made, but that such payments are not tantamount to workers' compensation and therefore cannot be excess compensation under *Moretz*. However, the reasoning underlying the holding in *Estes* is equally applicable to the present case.

In *Estes*, we held that accumulated vacation and sick leave do not function as a wage replacement program like workers' compensation. We now hold that payments for such vacation and sick leave are "due and payable" when made because they have been earned by the employee and are not solely under the control of the employer. The policy concerns raised in *Foster* are unaffected since, unlike the private disability plan in *Foster*, the use of accumulated vacation and sick leave does not function as a wage replacement program. Accumulated vacation and sick leave are not guaranteed to be available when needed because they must first accumulate. They do not present the possibility of a double recovery because, if not used while injured, such accumulated leave may be used later with no diminished effect. There is no reason that the lack of a credit to an

employer for payments for accumulated vacation and sick leave during a disability, as opposed to any other time, would serve as a disincentive to allowing employees to accumulate such leave. The reasoning behind the *Foster* decision is not diminished by our holding that payments for accumulated vacation and sick leave are "due and payable" under N.C. Gen. Stat. § 97-42 when made.

Defendant finally argues that *Lowe* requires defendant be granted a credit for payments made to plaintiff. However, as in *Foster*, there is no indication in *Lowe* that the "sick leave compensation" granted to plaintiff was anything other than a private disability plan fully funded by the employer. We conclude that, insofar as our holding in the present case is permissible under *Foster*, it is permissible under *Lowe* as well.

Thus, we hold that the Commission's legal conclusion that plaintiff's vacation and sick leave payments were "due and payable" when made is supported by its Finding of Fact No. 13. However, we hold that the Commission's Conclusion of Law No. 7 that defendant is entitled to a credit for those payments is unsupported by Finding of Fact No. 13, as the only provision in N.C. Gen. Stat. § 97-42 allowing a credit to an employer for payments made to an injured employee is for payments *not* "due and payable" when made.

Defendant also assigns error to the Commission's Conclusion of Law No. 8 that plaintiff is entitled to have a portion of her accumulated vacation and sick leave restored, on the grounds that the Commission lacks jurisdiction under the Act to so order defendant. We need not address defendant's jurisdictional argument because, insofar as defendant is not entitled to a credit under Conclusion of Law No. 7, plaintiff is not entitled to restoration of vacation and sick leave under Conclusion of Law No. 8. We therefore dismiss defendant's assignment of error as moot.

We reverse and remand the Commission's opinion and award for appropriate modification of the award in that Conclusions of Law Nos. 7 and 8 are in error.

Reversed and remanded.

Judges GREENE and CAMPBELL concur.

CASSANDRA SMITH, BY AND THROUGH HER MOTHER, MARY E. SMITH, PLAINTIFF v. GEORGE SMITH, DEFENDANT

No. COA00-596

(Filed 7 August 2001)

1. **Appeal and Error— expired domestic violence protective order—mootness—collateral consequences**

   An appeal from an expired domestic violence protective order was not moot because defendant could suffer collateral legal consequences such as consideration of the order in a custody action, as well as the stigma likely to attach to a person judicially determined to have committed domestic abuse.

2. **Domestic Violence— protective order—sufficiency of findings**

   The trial court erred by entering a domestic violence protective order against defendant based upon findings which show that defendant's twelve-year-old daughter felt uncomfortable because of defendant's conduct in touching her buttocks and chest area but did not fear bodily injury.

Judge McGEE dissenting.

Appeal by defendant from order filed 25 February 2000 by Judge William C. Lawton in Wake County District Court. Heard in the Court of Appeals 27 March 2001.

East Central Community Legal Services, by Suzanne Chester, and Legal Services of North Carolina, Inc., by George Hausen, for plaintiff-appellee.

Robert A. Miller, P.A., by Robert A. Miller, for defendant-appellant.

GREENE, Judge.

George Smith (Defendant) appeals from a domestic violence protective order filed 25 February 2000 in favor of Cassandra Smith (Plaintiff) by and through her mother, Mary E. Smith (Smith).

Plaintiff is the twelve-year-old minor child of Defendant and Smith. In February 2000, Plaintiff resided with her parents, her younger brother, Smith's two daughters from a previous relationship,

and Smith's granddaughter. At that time, Defendant, who was recovering from being hospitalized as the result of a manic episode, served as the caregiver of the minor children while Smith worked outside of the home.

On 8 February 2000 and a portion of 9 February 2000, Plaintiff stayed home from school under the care of Defendant because she was sick. Feeling better, Plaintiff returned to school at some time on 9 February 2000. On the evening of 9 February 2000, Plaintiff telephoned her grandmother and reported Defendant had touched her that day in an inappropriate manner. As a result, a complaint was filed with the Department of Human Services (DHS) relating to allegations of abuse by Defendant of Plaintiff and her brother. On 14 February 2000, Defendant voluntarily entered into a child protection plan with DHS, under which Defendant agreed not to be in the presence of Plaintiff without another adult being present.

Based on Plaintiff's allegations of inappropriate touching by Defendant, an ex parte domestic violence protective order was issued on 14 February 2000, requiring that Defendant leave the marital residence. Subsequent to trial, the trial court made the following pertinent findings of fact:

> 12. Plaintiff testified that on perhaps 30 occasions since Defendant's return from the hospital, Defendant has touched her, either on her buttocks or her chest while she was wearing clothes, and that on some of these occasions he rubbed her on the buttocks area, refusing to stop until she pulled away from him and left the room. Plaintiff testified that [Defendant] made statements to her which made her feel uncomfortable. The only statement Plaintiff was able to recall was that [Defendant] "told her how pretty she was and that he couldn't wait for her to grow up and see what a beautiful woman she would become[."] Plaintiff testified [Defendant] had never physically hurt her, nor was she afraid that he would physically hurt her, but that his touching made her feel very uncomfortable and it was "creepy[.]"
>
> 13. In view of the age, size[,] and sexual differences between Plaintiff and Defendant, by inappropriately touching her buttocks and chest area and failing to immediately respond to Plaintiff's request for Defendant to stop, causing Plaintiff to leave the room, Defendant placed Plaintiff in actual fear of imminent serious bodily injury, in the form of an emotional injury arising from Defendant's behavior.

Based on these findings, the trial court made the following conclusion of law:

> 3. . . . The threat of imminent emotional injury to Plaintiff as a result of Defendant's conduct was sufficient to constitute placing Plaintiff in fear of imminent serious bodily injury within the meaning [of] G.S. 50B-1(a)(2).

The trial court, therefore, entered a domestic violence protective order which excluded Defendant from the parties' residence and prohibited Defendant from having any contact with Plaintiff. The order was "effective for six months [and] subject to renewal on or before August 21, 2000."

The issues are whether: (I) issues raised in an appeal from an expired domestic violence protective order are moot and, if not, (II) the trial court's findings of fact support a conclusion that Defendant's actions placed Plaintiff "in fear of imminent serious bodily injury."[1]

I

[1] Generally, an appeal should be dismissed as moot "[w]hen events occur during the pendency of [the] appeal which cause the underlying controversy to cease to exist." *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977). Nevertheless, "even when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance." *Id.*

In this case, a domestic violence protective order was issued against Defendant pursuant to N.C. Gen. Stat. § 50B-1(a)(2). Although the order, which was "effective for six months [and] subject to renewal on or before August 21, 2000," expired prior to the time Defendant's appeal was heard in this Court, Defendant may suffer collateral legal consequences as a result of the entry of the order. Such collateral legal consequences may include consideration of the order by the trial court in any custody action involving Defendant.

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1. Plaintiff filed a motion in this Court to dismiss Defendant's appeal on the ground Defendant filed his notice of appeal in this Court while a motion to set aside the judgment pursuant to Rule 59 was pending in the trial court. Assuming, without deciding, that Defendant's notice of appeal was not timely, we treat Defendant's appeal as a petition for writ of 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); N.C.R. App. P. 2.

See N.C.G.S. § 50-13.2(a) (1999) (trial court must consider "acts of domestic violence" when determining the best interest of the child in custody proceeding). Thus, Defendant's appeal has continued legal significance and is not moot.

In addition to the collateral legal consequences, there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. For example, a Maryland appellate court in addressing an appeal of an expired domestic violence protective order, noted that "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order]." *Piper v. Layman*, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999). The *Piper* court, therefore, held appeals from expired domestic violence protective orders are not moot because of the "stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse." *Id.*; *see also Wooldridge v. Hickey*, 700 N.E.2d 296, 298 (Mass. App. Ct. 1998) (holding the defendant's appeal of expired domestic violence protective order was not moot). Based on the rationale of *Piper*, in addition to the continued legal significance of an appeal of an expired domestic violence protective order, we hold the issues raised by an appeal from such an order are not moot.

II

[2] Defendant argues the trial court's findings of fact do not support a conclusion Defendant's actions placed Plaintiff "in fear of imminent serious bodily injury." Thus, the trial court erred by entering a domestic violence protective order against Defendant. We agree.

A trial court may grant a protective order "to bring about the cessation of acts of domestic violence." N.C.G.S. § 50B-3(a) (Supp. 2000). An act of domestic violence is defined, in pertinent part, as "[p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury." N.C.G.S. § 50B-1(a)(2) (1999). The test for whether the aggrieved party has been placed "in fear of imminent serious bodily injury" is subjective; thus, the trial court must find as fact the aggrieved party "actually feared" imminent serious bodily injury. *Brandon v. Brandon*, 132 N.C. App. 647, 654, 513 S.E.2d 589, 595 (1999).

In this case, the trial court found as fact that Plaintiff testified Defendant's actions made her feel "uncomfortable" and " 'creepy.' "

The trial court also found as fact that "Plaintiff testified [Defendant] had never physically hurt her, nor was she afraid that he would physically hurt her." These findings of fact which show Defendant's conduct caused Plaintiff to feel uncomfortable but did not place her in fear of bodily injury do not support a conclusion Defendant placed Plaintiff "in fear of serious imminent bodily injury."[2] Accordingly, the trial court's 25 February 2000 domestic violence protective order is reversed. Although Defendant's conduct did not fall within the definition of an act of domestic violence under section 50B-1(a)(2), we note that Defendant's conduct may fall within the elements of one or more criminal statutes, such as taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1.

Reversed.

Judge CAMPBELL concurs.

Judge McGEE dissents.

McGEE, Judge, dissenting.

Defendant argues in his assignment of error on appeal that the trial court's conclusion of law that defendant placed plaintiff in fear of imminent serious bodily injury is unsupported by the trial court's findings of fact. The majority agrees, relying on the trial court's finding that plaintiff testified she was not afraid defendant would physically hurt her and discounting the trial court's subsequent finding that plaintiff was in actual fear of serious bodily harm. Because I believe the trial court's conclusion of law is supported by its findings of fact, I dissent.

Defendant does not challenge on appeal the trial court's conclusion that the requirement of serious bodily injury under N.C. Gen. Stat. § 50B-1(a)(2) may be satisfied through emotional injury. Defendant instead attacks the trial court's finding of fact that plaintiff was in actual fear of imminent serious bodily injury in the form of emotional injury arising from defendant's behavior. However, because defendant did not assign error to the trial court's findings of

2. We acknowledge the trial court found as fact that "Defendant placed Plaintiff in actual fear of imminent serious bodily injury"; however, this finding by the trial court was based on actions by Defendant that Plaintiff herself testified did not cause her fear of physical harm. Thus, this finding by the trial court cannot support its conclusion Plaintiff was placed "in fear of imminent serious bodily injury."

fact on appeal, we must presume those findings of fact to be correct. *See Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235-36, 506 S.E.2d 754, 758 (1998). I would therefore hold that the trial court's challenged conclusion of law is supported by its finding of fact that defendant placed plaintiff in actual fear of imminent serious bodily injury, in the form of an emotional injury arising from defendant's behavior.

The majority has instead apparently concluded that the trial court's finding that plaintiff testified she was not afraid defendant would physically harm her conflicts with and overrules the trial court's finding that plaintiff actually feared imminent serious bodily injury. I find no such conflict between the two findings. Insofar as serious bodily injury may be suffered through emotional injury, a lack of fear of physical injury in no way precludes fear of emotional injury. Plaintiff could very well have one fear and not the other.

Moreover, the trial court did not actually find that plaintiff lacked fear of physical injury. The trial court found only that plaintiff, a twelve-year-old child, testified to that effect. As our Court stated in *State v. Sessoms*, 119 N.C. App. 1, 6, 458 S.E.2d. 200, 203 (1995), *aff'd per curiam*, 342 N.C. 892, 467 S.E.2d 243, *cert. denied*, 519 U.S. 873, 136 L. Ed. 2d 129 (1996),

> the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.
>
> The trial judge's findings, therefore, which turn in large part on the credibility of the witnesses, must be given great deference by this Court.

(citing *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990)). In applying that reasoning in *Brandon v. Brandon*, 132 N.C. App. 646, 652, 513 S.E.2d 589, 594 (1999), we stated:

> We emphasize that the trial court was present to see and hear the inflections, tone, and temperament of the witnesses, and that we are forced to review a cold record. We cannot say that the inferences drawn by the trial court from the evidence were unreasonable; therefore we are bound by this portion of the trial court's finding.

I see no reason why a trial court could not listen to a minor plaintiff testify that she was not afraid of a defendant but, after observing her demeanor and hearing the rest of her testimony, nonetheless conclude that the minor plaintiff was indeed afraid. I therefore see no inherent contradiction between two findings of fact, one which finds that a twelve-year-old child testified she had no fear of her father and the other finding that she in fact feared him. Where, as in the present case, the sufficiency of the evidence to support the trial court's findings of fact is not an issue before us on appeal, only an inherent contradiction between findings of fact should lead us to discount one in favor of another.

For the above reasons, I would overrule defendant's assignment of error and affirm the trial court's order.

STATE OF NORTH CAROLINA v. GABRIEL HILBERT

No. COA00-368

(Filed 7 August 2001)

1. Sentencing— burglary—aggravating factor—presence of young victim

The trial court erred by aggravating a first-degree burglary sentence based on the alleged presence of a very young victim where there was no evidence that defendant targeted the victims' home because of the presence of young children, that he knew the age of the occupants before breaking into the residence, that he entered the children's rooms, or that they were aware that he was in the house. N.C.G.S. § 15A-1340.16(d)(11).

2. Sentencing— burglary—mitigating circumstance—completion of drug treatment program

In a case remanded on other grounds, the trial court erred when sentencing defendant for first-degree burglary by not finding the statutory mitigating factor that defendant had completed a drug treatment program where the court was informed that defendant had entered himself in a program while awaiting trial, a certificate verifying successful completion of the program was handed to the trial court, no objection was made by the

State, and no evidence to the contrary was presented. N.C.G.S. § 15A-1340.16(e)(16).

3. Probation and Parole— anticipatory violation bond

A probationary term requiring defendant to be arrested and placed under a $100,000 cash bond upon a positive drug or alcohol test was not properly before the Court of Appeals where the convictions for which probation was imposed were not included in the petition for certiorari in a burglary conviction or in the order allowing the petition, defendant failed to object at sentencing, defendant failed to cite authority other than generalized constitutional references, and the issue was not within the categories previously accorded plain error review. However, the trial courts were urged to exercise caution in setting anticipatory probation violation appearance bonds.

Appeal by defendant from judgment entered 18 November 1996 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 26 March 2001.

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

Keith A. Williams for defendant-appellant.

JOHN, Judge.

Pursuant to this Court's 16 March 1998 grant of defendant's Petition for Writ of Certiorari (Petition), defendant appeals the trial court's judgment entered in case 96 CRS 13960 upon defendant's conviction of first degree burglary. Defendant further assigns error to a term of the probationary judgments entered in cases 96 CRS 113788-90, 13959, 14027-29, 14353-57 and 14382. We vacate the judgment in case 96 CRS 13960.

At defendant's sentencing hearing, the State's evidence regarding the first degree burglary offense in case 96 CRS 13960 tended to show the following: On or about 22 May 1996 during the nighttime hours, defendant entered the home of Paul and Margaret Gemporline (Mr. & Mrs. Gemporline) by cutting a screen door at the rear of the residence and making his way through a locked back door. Upon entry, defendant stole money from Mrs. Gemporline's purse as well as checks from her checkbook, credit cards, camera equipment and keys to the couple's home and automobiles. Defendant also stole a

minivan parked in the driveway at the residence. In addition, Mrs. Gemporline testified that she, her husband and their two young children were at home during the burglary. According to Mrs. Gemporline, she was not aware defendant was in the house and she and her family slept throughout the entire incident.

In sentencing defendant in case 96 CRS 13960, the trial court found as an aggravating sentencing factor that "the victim was very young," but found no mitigating factors. Based upon these determinations and its further finding that defendant had no prior convictions and that his prior record level was level I, the trial court sentenced defendant to a minimum eighty month and a maximum one hundred-five month active term of imprisonment.

[1] On appeal, defendant first contends the trial court erred by "aggravating [his] first degree burglary sentence based on the alleged presence of a 'very young' victim." In response, the State concedes the evidence presented at defendant's sentencing hearing was insufficient to sustain the aggravating factor found by the trial court. We agree.

Prior to imposing a sentence other than the presumptive term for a particular offense, the trial court is required to consider the statutory list of aggravating and mitigating sentencing factors listed in N.C.G.S. § 15A-1340.16 (2000),

> to make written findings of fact concerning the factors, and to determine whether one set outweighs the other or whether they are counterbalanced.

State v. Harrington, 118 N.C. App. 306, 307, 454 S.E.2d 713, 714 (1995). "The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists." N.C.G.S. § 15A-1340.16(a) (2000).

In the case *sub judice*, the trial court utilized the aggravating factor set out in N.C.G.S. § 15A-1340.16(d)(11) (2000), *i.e.*, that "[t]he victim was very young, or very old, or mentally or physically infirm, or handicapped." This Court has observed that

> [t]he policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of his age or mental or physical infirmity.
>
> *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997). However,

> age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already [would be] as a result of committing a violent crime against another person.

State v. Hines, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985) (citations omitted).

A criminal may "take advantage," *Deese*, 127 N.C. at 540, 491 S.E.2d at 685, of the age of a victim in two different ways:

> First, he may 'target' the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself.

Id. (internal citations and quotations omitted). Appellate review of a trial court's finding of the aggravating factor at issue thus necessarily focuses upon

> whether the victim, by reason of his years, was more vulnerable to the [crime] committed against him than he otherwise would have been.

Id. at 541, 491 S.E.2d at 685.

As the State has acknowledged, the instant case is strikingly similar to *State v. Styles*, 93 N.C. App. 596, 379 S.E.2d 255 (1989). In *Styles*, this Court held the victim's age was improperly found as an aggravating factor during sentencing of a defendant convicted of first-degree burglary. *Id.* at 607, 379 S.E.2d at 262. In so holding, we observed

> there [was] no evidence tending to show [the victim's] home [had been] targeted for burglary because of her old age. In fact, there is no evidence at all that defendant knew the age of the occupants of the house before he broke into it. Furthermore, there is no evidence in the record that [the victim], because of her old age, was more vulnerable to having her home burglarized than anyone else, or that she had a more difficult time recovering from the effects of the crime. [The victim] was not taken advantage of dur-

> ing the actual commission of the crime as there was evidence that she was asleep during the entire burglary.

Id.

Likewise, no evidence was presented at the sentencing hearing herein which tended to show defendant targeted the home of Mr. and Mrs. Gemporline for burglary because of the presence of young children, nor even that he knew the age of the occupants before breaking into the residence. In addition, the uncontradicted testimony of Mrs. Gemporline was that she was not acquainted with defendant nor did she have any information that defendant knew her children. Finally, no evidence was introduced indicating defendant entered the rooms of the children or that the latter were aware defendant was in the residence. As in *Styles*, therefore, the trial court's finding that the victim's youth "was an aggravating factor of burglary was inappropriate," *id.*, and the judgment in case 96 CRS 13960 must be vacated and the matter remanded for resentencing.

[2] As it may recur upon remand, we address defendant's additional argument in case 96 CRS 13960 that the trial court erred "by refusing to find the existence of an uncontroverted mitigating factor." Once again, the State recognizes the trial court "may have erred" in failing to find the statutory mitigating factor set out in N.C.G.S. § 15A-1340.16(e)(16) (2000), *i.e.*, that

> [t]he defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

At sentencing, a criminal defendant has the burden of proving the existence of any mitigating factors by a preponderance of the evidence. *State v. Noffsinger*, 137 N.C. App. 418, 429, 528 S.E.2d 605, 612 (2000). The failure of a trial court to find a mitigating factor upon presentation of evidence in support of that factor which is "uncontradicted, substantial and there is no reason to doubt its credibility[,] constitutes reversible error." *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 412 (1985) (internal citation and quotation omitted).

At defendant's sentencing hearing, the trial court was informed defendant had "voluntarily entered himself into that 21-day program out at Walter B. Jones" while awaiting trial. Although the exhibit has not been included in the record on appeal, it appears from the hearing transcript that a certificate verifying defendant's successful com-

pletion of the local drug treatment program prior to trial was simultaneously handed to the trial court. No objection was interjected by the State and no evidence to the contrary was presented. Accordingly, as the State concedes, there "may have" been before the trial court uncontroverted, "uncontradicted, [and] substantial evidence," *id.*, of the mitigating factor at issue and there [wa]s no reason to doubt its credibility," *id.* Under such circumstances, failure of the trial court to acknowledge the statutory mitigating factor in its sentencing findings would constitute prejudicial error requiring resentencing. *See id.*

[3] As previously indicated, defendant also attempts to challenge a probationary term imposed in cases 96 CRS 113788-09, 13959, 14027-29, 14353-57 and 14382 following the usual condition that the defendant "supply a breath, urine and/or blood specimen for analysis of the possible presence of a prohibited drug or alcohol" when instructed by his probation officer. To this testing condition, the trial court added the following:

> First positive test he is to be immediately arrested and placed under $100,000.00 cash bond to await the probation violation hearing.

Defendant's arguments challenging inclusion of this term as a condition of probation are not properly before us.

First, save for case 96CRS 13960, defendant's convictions were neither included in his Petition nor in our order allowing certiorari. In addition, defendant failed to object at sentencing to the probationary condition at issue and his present challenge thereto has not been preserved for our review. *See* N.C.R. App. P 10(b) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection or motion, stating the specific grounds for the ruling the party desired the court to make . . ."). Further, other than generalized constitutional references, defendant cites no authority in support of his opposition to inclusion in the judgment of an appearance bond in anticipation of defendant's violation of a probation condition. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error . . . in support of which no . . . authority [is] cited[] will be taken as abandoned. Finally, although defendant also suggests "the bond requirement was plain error," the issue is not within the categories previously accorded plain error review by our appellate courts. *See State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550,

563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998) (appellate courts have chosen to review "unpreserved issues for plain error [only] when Rule 10(c)(4) of the Rules of Appellate Procedure has been complied with and when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence"); *see also State v. Diehl*, 353 N.C. 433, 439, 545 S.E.2d 185, 189 (2001), Martin, J., dissenting ("plain error analysis does not govern [appellate] review of jury arguments").

Notwithstanding, although not addressing this assignment of error for the foregoing reasons, we feel compelled to urge caution on the part of our trial courts regarding the setting of anticipatory probation violation appearance bonds similar to that *sub judice*. *See* N.C.G.S § 15A-1345(b) (1999) (probationer arrested during period of probation for violation of any condition of probation "*must* be taken without unnecessary delay before a judicial official *to have conditions of release* pending a revocation hearing *set* in the same manner as provided in G.S. 15A-534" (emphasis added). Should a sentencing court imposing a probationary judgment seek to address the matter of appearance bond in the event of the defendant's arrest for alleged violation of conditions of probation, we perceive the better practice to be that the court "recommend" bond in a certain amount upon issuance of a probation violation warrant.

Finally, the State points out in its brief a clerical error in the judgment imposed in case 96 CRS 13957 upon defendant's conviction of second degree burglary. Said judgment reflects that findings of factors of aggravation and mitigation purportedly were rendered by the trial court. However, the sentencing hearing transcript contains no recitation of such findings by the court in case 96 CRS 13957. In any event, defendant was sentenced in that case to a term of imprisonment from the presumptive range. Pursuant to N.C.R. App. P. 2 (2001) (appellate court may "upon its own initiative" "suspend or vary the requirements" of Appellate Rules), therefore, we consider case 96 CRS 13957 for the limited purpose of ordering remand of the judgment therein for correction of the clerical error by striking the unsupported notation that the trial court rendered findings of factors in aggravation and mitigation. *See generally State v. Lineman*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (internal quotation and citation omitted) ("court of record has the inherent power and duty to make its records speak the truth").

96 CRS 13960: Judgment vacated and case remanded for resentencing; 96 CRS 13957: Case remanded for correction of clerical error in judgment.

Chief Judge EAGLES and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. WOODIE LOCKLEAR, DEFENDANT

No. COA00-875

(Filed 7 August 2001)

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

The use of a short-form indictment in a first-degree murder case was not erroneous even though it failed to cite the elements of premeditation and deliberation and lying in wait, because our Supreme Court has consistently upheld the constitutionality of this indictment.

2. Jury— selection—reopening examination—number of peremptory challenges

The trial court erred in a first-degree murder case by denying defendant the full number of peremptory challenges during jury selection as required by N.C.G.S. § 15A-1217 when it reopened examination of a juror previously accepted by the parties and ruled that defendant had no peremptory challenges remaining with which to excuse this juror because: (1) N.C.G.S. § 15A-1217(a)(1) allows defendants tried capitally to have fourteen peremptory challenges, and N.C.G.S. § 15A-1217(c) allows each party one peremptory challenge for each alternate juror in addition to any unused challenges; (2) defendant exercised eleven peremptory challenges in seating the regular jury and then exercised three peremptory challenges in seating the two alternate jurors for a total of fourteen challenges, meaning defendant had two peremptory challenges remaining; and (3) defendant was not required to exhaust his supply of peremptory challenges left over from regular jury selection until he had used both of the challenges allotted for alternate jurors.

3. Evidence— defendant's oral and written statements given to police—pretrial motion to suppress

Although a defendant in a first-degree murder case assigns error to the trial court's denial of his pretrial motion to suppress evidence of the oral and written statements defendant gave to police shortly after his estranged wife's death, the ruling will not be addressed because: (1) the Court of Appeals vacated the judgment and determined that defendant is entitled to a new trial; (2) rulings on motions in limine are merely preliminary and subject to change during the course of the trial; and (3) defendant may appeal from the ruling in the event he is convicted at the second trial if he properly preserves this issue at the second trial.

Appeal by defendant from judgment entered 3 September 1999 by Judge James R. Vosburgh in Harnett County Superior Court. Heard in the Court of Appeals 7 June 2001.

Attorney General Michael F. Easley, by Assistant Attorney General John F. Maddrey, for the State.

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

HUDSON, Judge.

Defendant was convicted of the first degree murder of his wife, Peggy Locklear, in a capital trial. He contends he was denied the full number of peremptory challenges due to him in jury selection under N.C.G.S. § 15A-1217 (1999). We agree and remand for a new trial on this basis.

The State presented evidence tending to show that defendant was seen hanging around a convenience store near the trailer of his estranged wife, Peggy Locklear (Locklear), on 22 October 1998. Locklear left for work at 3:30 p.m. that day and returned after 1:00 a.m., being driven by her co-worker, Kona Scott (Scott). As Locklear exited Scott's car, defendant ran up and began stabbing Locklear with a knife. Scott honked her car horn and defendant ran away, but Locklear did not survive the attack.

Defendant was convicted of first degree murder by virtue of lying in wait and premeditation and deliberation. The jury recommended a sentence of life without parole, and the trial court entered judgment accordingly. Defendant filed notice of appeal to this Court.

[1] Defendant contends his first degree murder conviction must be vacated, because the indictment in which he was charged with murder failed to cite the elements of premeditation and deliberation and lying in wait in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments of the federal constitution and Article I, §§ 19, 22, and 23 of the state constitution. Defendant was charged using the short-form indictment authorized by N.C.G.S. § 15-144 (1999). Our Supreme Court has consistently ruled that the use of the short-form indictment based upon this statute is not violative of defendants' rights under the United States and North Carolina Constitutions. *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, — U.S. —, 148 L. Ed. 2d 498 (2000). Defendant's assignment of error is without merit.

Defendant next contends the trial court committed several errors during jury selection. The parties began selecting a jury on 17 August 1999. On August 18, defendant accepted Virginia Slaughter to be a juror. On August 24, defendant challenged prospective juror Hilary Britt for cause, on the grounds that Britt's daughter had already been seated as a juror and Britt stated on *voir dire* that he strongly believed family members should not serve together on a jury. The trial court denied defendant's challenge for cause, and defendant proceeded to exercise a peremptory challenge against Britt. Between August 17 and August 24, defendant used a total of eleven peremptory challenges against prospective jurors for seats one through twelve. On August 25, the parties began selecting two alternate jurors. Defendant used a total of three peremptory challenges against prospective jurors for alternate seat one. By August 26, defendant had accepted two alternate jurors.

On the morning of August 27, juror Virginia Slaughter did not report for duty. A court clerk called Slaughter's daughter to try to locate her, and Slaughter's daughter allegedly told her that Slaughter had memory problems. The judge said that this surprised him, but recalled that Slaughter had appeared at the courthouse on two occasions when she had not been instructed to come. He then suggested that they move one of the alternates into Slaughter's position on the jury and select a new alternate. Before this selection took place, Slaughter appeared for jury duty.

The judge then asked her a number of questions regarding her reasons for not coming to court earlier that morning and her fitness to serve, and allowed both the prosecutor and defense counsel to question her as well. Slaughter indicated that she had had a light

stroke, but that she felt able to serve on the jury. At the close of the questioning, defendant made a motion to excuse Slaughter for cause, which motion was denied.

Defendant then moved to exercise a peremptory challenge against Slaughter. The trial court stated that defendant had exercised all of his peremptory challenges for the regular jury and that he only had challenges remaining for alternate jurors. Defendant then asked the judge to revisit his ruling refusing to dismiss juror Hilary Britt for cause, in an effort to gain back the peremptory challenge he had exercised to excuse Britt. The court again denied defendant's challenge to Britt for cause. The jury was then impaneled.

[2] Defendant contends the trial court erred in denying his challenges for cause against Slaughter and Britt, and in ruling that he had no peremptory challenges remaining with which to excuse Slaughter. We will first address the issue of defendant's peremptory challenge against Slaughter. The applicable statute, N.C.G.S. § 15A-1214(g) (1999), provides:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during *voir dire* or that some other good reason exists:
>
> (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
>
> . . . .
>
> (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

In the present case, after Slaughter was chosen as a juror but before the jury was impaneled, the judge examined and allowed counsel to examine Slaughter with regard to whether good reason existed to excuse her. When the judge rejected defendant's challenge for cause, defendant was entitled by statute to exercise a peremptory challenge against Slaughter if he had any remaining. The judge determined he had none remaining. We disagree.

Under G.S. § 15A-1217(a)(1), defendants tried capitally are allowed fourteen peremptory challenges. Furthermore, under G.S. § 15A-1217(c), "[e]ach party is entitled to one peremptory challenge

for each alternate juror in addition to any unused challenges." In the present case, defendant exercised eleven peremptory challenges in seating the regular jury. He then exercised three peremptory challenges in seating the alternate jurors, for a total of fourteen challenges. He thus used twelve of the peremptory challenges allotted under G.S. § 15A-1217(a)(1) and two challenges allotted under G.S. § 15A-1217(c) in seating the jury. As such, he had two peremptory challenges remaining at the time he attempted to exercise a peremptory challenge against Slaughter.

It appears from the record that the trial court believed that defendant was required to use the three peremptory challenges he had remaining after seating the regular jury before being able to use the additional challenges allotted for alternate jurors. We do not believe the statute so requires. Defendant was not required to exhaust his supply of peremptory challenges left over from regular jury selection until he had used both of the challenges allotted for alternate jurors in G.S. § 15A-1217(c). The latter statute specifies that a defendant is entitled to two peremptory challenges for alternate jurors "*in addition to* any unused challenges" (emphasis added).

The decision whether to reopen examination of a juror previously accepted by the parties is within the discretion of the trial court. *State v. Freeman*, 314 N.C. 432, 437, 333 S.E.2d 743, 747 (1985). However, once the court has decided to reopen the examination, the parties have "an absolute right" to exercise any remaining peremptory challenges. *Id.* at 438, 333 S.E.2d at 747. "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . ." *Id.* (citation omitted). Thus, defendant was denied his fundamental right to exercise the full number of peremptory challenges allotted to him by statute and must have a new trial. *See id.*; *see also State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992) (defendant deprived of right to peremptory challenge and awarded new trial).

In that we have decided defendant was denied full use of his peremptory challenges, we need not address the propriety of the court's denial of his challenges for cause against jurors Slaughter and Britt.

[3] Defendant next assigns as error the trial court's denial of his motion to suppress evidence of the oral and written statements he gave to police shortly after Locklear's death. Because we have determined that defendant is entitled to a new trial, we believe it is in the

interest of conserving judicial resources not to address the trial court's pretrial ruling at this juncture. Rulings by a trial court on motions *in limine*[1] "are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial." *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (quoting *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997)), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998); *see also State v. Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988) ("A ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary.").

Furthermore, an objection to an order granting or denying a motion *in limine* "is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). In order to preserve the issue for appeal, "[a] party objecting to an order granting or denying a motion *in limine* . . . is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)." *T&T Development Co.*, 125 N.C. App. at 602, 481 S.E.2d at 349. Thus, when a party purports to appeal the granting or denying of a motion *in limine* following the entry of a final judgment, the issue on appeal is not actually whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead "whether the evidentiary rulings of the trial court, made during the trial, are error." *Id.* at 602-03, 481 S.E.2d at 349.

Here, because we have vacated the judgment and have determined that defendant is entitled to a new trial, the trial court's ruling on defendant's pretrial motion to suppress has, once again, become "preliminary" in nature because (1) the ruling may change during the second trial depending on the evidence offered by the parties, and (2) the ruling may ultimately not be appealable at all if, at trial, the State does not seek to admit the evidence, or if, when the State seeks to admit the evidence, the defendant fails to object. Moreover, not only is it possible that the ruling may change during the second trial, but

1. Here, defendant's motion is both a motion to suppress and a motion *in limine*; the fact that it is a motion to suppress denotes the type of motion that has been made, while the fact that it is a motion *in limine* denotes the timing of the motion (prior to trial) regardless of its type. *See State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980).

the defendant (or the State) may request a rehearing on the motion to suppress prior to the second trial based on new evidence, at which time the trial court may modify the ruling made prior to the first trial. *See State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991); *see also State v. Bates*, 343 N.C. 564, 473 S.E.2d 269 (1996) (implicitly approving the trial court's denial of the defendant's motion for a rehearing on his motion to suppress prior to the second trial because the defendant failed to show additional pertinent facts, discovered since the first hearing, which could not have been discovered with reasonable diligence prior to the first hearing), *cert. denied*, 519 U.S. 1131, 136 L. Ed. 2d 873 (1997).

Finally, we note that the trial court's ruling on defendant's motion to suppress prior to the first trial continues to stand following remand for a new trial by this Court, and, provided it is not modified prior to or during the second trial, and provided the issue is properly preserved during the second trial, defendant may appeal that ruling in the event he is convicted at the second trial. *See State v. Grogan*, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Defendant last argues the trial court erred by admitting into evidence as corroborative a statement Kona Scott gave police, in that it did not tend to corroborate the testimony Scott gave at trial. We decline to address this issue, as it will not likely recur on retrial.

New trial.

Judges MARTIN and HUNTER concur.

KENT D. ANDERSON, PLAINTIFF v. VICKY C. ANDERSON, DEFENDANT

No. COA00-1008

(Filed 7 August 2001)

1. Divorce— equitable distribution—military retirement pension—notice—waiver

The trial court did not err by granting summary judgment in favor of plaintiff husband on defendant wife's counterclaim for an equitable distribution of plaintiff's military retirement pension

even though defendant contends she had no notice of the hearing, because: (1) defendant waived procedural notice required by N.C.G.S. § 1A-1, Rule 56 by attending and participating in the hearing without raising any objection regarding improper notice, and she did not request any additional time to prepare or to produce evidence; and (2) defendant made no showing that if she had received separate notice of the summary judgment motion, she would have been more prepared or able to present additional authority.

2. Divorce— equitable distribution—separation agreement—military retirement pension—failure to hold evidentiary hearing

The trial court did not err by dismissing defendant wife's counterclaim for an equitable distribution of plaintiff's military retirement pension without an evidentiary hearing, because: (1) the parties' separation agreement bars defendant's claim as a matter of law so that no additional evidence was required for the trial court to determine the legal effect of the agreement when the agreement establishes an intention by the parties to resolve for themselves any and all matters arising from their marriage; and (2) defendant made no showing that the separation agreement was not intended to be the final agreement of the parties or that the military pension was excluded from the initial agreement.

3. Appeal and Error— preservation of issues—failure to raise issue before trial court

Although defendant wife contends the trial court erred by failing to deem defendant's counterclaim for equitable distribution of plaintiff husband's military pension as admitted under N.C.G.S. § 1A-1, Rule 8(d) based on plaintiff's failure to file a reply to defendant's counterclaims, defendant did not preserve this issue because she did not raise it before the trial court as required by N.C. R. App. P. 10(b)(1).

Appeal by defendant from an order entered 2 May 2000 by Judge Robert J. Stiehl, III in Cumberland County District Court. Heard in the Court of Appeals 7 June 2001.

Reid, Lewis, Deese, Nance & Person, LLP, by Renny W. Deese, for plaintiff-appellee.

Beaver, Holt, Sternlicht, Burge, Glaizer, Carlin & Britton, P.A., by F. Thomas Holt, III, for defendant-appellant.

HUNTER, Judge.

Vicky C. Anderson ("wife") appeals an order for summary judgment granted in favor of Kent D. Anderson ("husband") on wife's claim for an equitable distribution of husband's military retirement pension. Wife argues that the trial court erred: (1) by granting summary judgment in husband's favor without her receiving proper notice of the hearing; (2) by dismissing her claim for equitable distribution without an evidentiary hearing; and, (3) by not deeming her claims for equitable distribution as admitted when husband failed to file a reply to her counterclaims. After a careful review of the record and briefs, we affirm the trial court's order.

Husband and wife married on 8 January 1987, in Ridgeland, South Carolina. During the course of the marriage, the couple had three children. Then, on or about 7 October 1997, the parties separated, and prior to divorcing, executed a "Marital Settlement Agreement" (hereinafter, "separation agreement"). On 8 October 1998, husband filed a complaint against wife for absolute divorce, and shortly thereafter, wife filed an answer and counterclaims for equitable distribution of husband's military benefits, incorporation of the separation agreement, and specific performance. Subsequently, on 22 December 1998, husband filed a motion for summary judgment. By order signed 8 February 1999, Judge Robert J. Stiehl, III granted husband an absolute divorce and severed wife's counterclaims for later determination.

Judge Stiehl heard wife's claims for equitable distribution, incorporation of the separation agreement, and specific performance on 21 February 2000. At the beginning of the hearing, Judge Stiehl announced in open court that "husband . . . filed for summary judgment pursuant to Rule 56, alleging that the separation agreement entered into between the parties was a property settlement and that the wife's claim for [equitable distribution] was thus barred." Husband then notified the court that the parties settled all other issues except for wife's counterclaim for equitable distribution of the military retirement pension, and both parties stipulated to the settlement. The court then noted that it had considered legal authority pre-

viously given to him by the parties on the equitable distribution issue. At the close of the parties' arguments, the court granted husband's motion for summary judgment holding that the separation agreement barred wife's claim for an equitable distribution of husband's military pension. Wife now appeals.

[1] Wife first assigns as error the trial court's entry of summary judgment in husband's favor without proper notice of the hearing to wife. Specifically, she contends that husband's motion for summary judgment applied only to his verified complaint and not to her counterclaims, and as such, she argues that she had no notice of the hearing on the equitable distribution issue. We disagree.

Rule 56 of the North Carolina Rules of Civil Procedure states that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). Wife cites *Tri City Building Components v. Plyler Construction*, 70 N.C. App. 605, 320 S.E.2d 418 (1984) for the proposition that such notice is mandatory and that this Court has found reversible error when a party fails to give the required notice.

While Rule 56 notice is mandatory, the very case that wife cites in support of her argument also recognizes that notice can be waived: "dismissing a party's claim or defense by summary judgment is too grave a step to be taken on short notice; unless, of course, the right to notice that those opposing summary judgment have under Rule 56(c) is waived." *Tri City*, 70 N.C. App. at 608, 320 S.E.2d at 421. This waiver is possible because "[t]he notice required by [Rule 56] is procedural notice as distinguished from constitutional notice . . . ." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667, 248 S.E.2d 904, 907 (1978). A party waives notice of a motion by attending the hearing of the motion and by participating in the hearing without objecting to the improper notice or requesting a continuance for additional time to produce evidence. *Raintree*, 38 N.C. App. at 668, 248 S.E.2d at 907; *Messer v. Laurel Hill Associates*, 102 N.C. App. 307, 310-11, 401 S.E.2d 843, 845 (1991); *Westover Products, Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 163, 166, 380 S.E.2d 375, 377 (1989); *Story v. Story*, 27 N.C. App. 349, 352, 219 S.E.2d 245, 247 (1975).

In the present case, prior to the hearing on the motion, wife proffered legal authority to the trial court in support of her position that the agreement did not preclude her equitable distribution claim. Additionally, wife attended and participated in the hearing; she failed to raise any objection regarding improper notice or to the proceed-

ings; and, she did not request any additional time to prepare or to produce evidence. Moreover, wife has made no showing that if she had received separate notice of the motion that she would have been more prepared or able to present additional authority. Therefore, wife, by attending the hearing and participating without objection, waived the procedural notice otherwise required by Rule 56. Consequently, we find no error with the trial court's hearing the summary judgment motion.

[2] Next, wife assigns error to the trial court's dismissal of her claim for equitable distribution without an evidentiary hearing. She contends that the separation agreement was not intended to settle all property claims arising out of the marriage. Particularly, she argues that the separation agreement did not contemplate husband's military retirement benefits. Again, we find no error.

Wife has made no contention, either before this Court or at the hearing, that any issue of material fact exists as to the disposition of this issue. Furthermore, she did not contend that the separation agreement was executed under coercion, duress, or other disability. Therefore, the trial court needed only to determine the legal effect of the separation agreement.

Husband and wife, upon divorce, may determine for themselves how to divide their marital estate by entering into a valid separation agreement in lieu of an equitable distribution by judicial determination. *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987). Further, "[N.C. Gen. Stat. §] 52-10 allows [a] husband and wife to enter a separation agreement which 'release[s] and quitclaim[s]' any property rights acquired by marriage, and . . . a release will bar any later claim on the released property[, and such an agreement] is an enforceable contract between husband and wife." *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984).

The trial court determines as a matter of law the construction of a clear and unambiguous contract. *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234. " '. . . When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. . . .' " *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985) (quoting *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624-25 (1973)). In construing a separation agreement, the same rules used in contract interpretation generally apply, thus, "[w]here the terms of a separation agreement are plain

and explicit, the court will determine the legal effect and enforce it as written by the parties." *Blount*, 72 N.C. App. at 195, 323 S.E.2d at 740.

"It is a well-settled principle of legal construction that '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.' " *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234 (quoting *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

> "Whether . . . the language of a contract is ambiguous or unambiguous is a question for the court to determine. . . ."
>
> *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (1986). In making this determination, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.*

Hartman v. Hartman, 80 N.C. App. 452, 455, 343 S.E.2d 11, 13 (1986). Manifestly, whether the separation agreement barred wife's equitable distribution claim is a question of law susceptible to summary disposition, and as such, no additional evidence was required for the trial court to determine the legal effect of the agreement. Therefore, based on the plain and unambiguous language of the separation agreement, we hold wife's claim for an equitable distribution of husband's military pension is barred as a matter of law.

We note that "the very existence of the agreement evinces an intention by the parties to determine for themselves what their property division should be and what their future relationship is to be, rather than to leave these decisions to a court of law." *Hagler*, 319 N.C. at 293, 354 S.E.2d at 233. Here, the agreement clearly establishes an intention by the parties to resolve for themselves any and all matters arising from their marriage. The separation agreement plainly states that the parties intended to "settle by agreement *all* of their marital affairs with respect to *property*" and that the agreement is intended to constitute the "*full* and *entire* contract of the parties." (Emphasis added.) Moreover, the separation agreement provides a section expressly for the division of property which, taken in light of the conclusive language used elsewhere in the agreement serves as the sole and complete division of the marital estate.

Furthermore, the separation agreement evinces an intent by the parties to resolve all issues arising from the marriage by pre-

cluding any future actions and by expressly making the agreement binding "upon the heirs, assigns, executors, administrators, successors in interest and representatives of each party." Also, the separation agreement proves that the parties meant for neither to interfere with the other thereafter and that they are to "permanently live separate and apart from the other party, free from any control, restraint, or interference, direct or indirect, by the other party, and in all respects to live as if he or she were sole and unmarried."

Wife made no showing that the separation agreement was not intended to be the final agreement of the parties or that the military pension was excluded from the initial agreement. In fact, the separation agreement's child support provision considers husband's military retirement benefits pursuant to a plan for support reduction stating that the support "shall be reduced . . . to the amount of 50% of the *husband[']s military retirement benefits* . . . ." (Emphasis added.) For these reasons, we conclude that the trial court did not err in finding as a matter of law that the separation agreement constitutes the final and full contract of the parties and bars wife's counterclaim for an equitable distribution of husband's military pension.

[3] Finally, wife assigns error to the trial court's failure to deem her claim for equitable distribution as admitted. Here, wife primarily argues that husband's failure to file a reply to her counterclaims should carry the same sanctions for failure to file an answer to a complaint. Specifically, wife cites N.C. Gen. Stat. § 1A-1, Rule 8(d) (1999), which requires the filing of a reply to a claim or else the claim is deemed admitted. This assignment is dismissed.

N.C.R. App. P. 10(b)(1) provides, "[i]n 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 . . . ." *See Hieb v. Lowery*, 121 N.C. App. 33, 39, 464 S.E.2d 308, 312 (1995). Wife did not raise this issue before the trial court, nor did she bring it up at any other time except that it appears as an assignment of error in the record and as an issue in her brief. Since wife failed to raise this issue before the lower court, we refuse to address the issue for the first time on appeal. This assignment of error is therefore dismissed.

For the reasons set out above, this Court affirms the trial court's grant of summary judgment in husband's favor.

Affirmed.

Judges MARTIN and HUDSON concur.

PERRY G. BENTLEY, SR., PLAINTIFF v. WATAUGA BUILDING SUPPLY, INC., DEFENDANT

No. COA00-849

(Filed 7 August 2001)

1. Process and Service— service on corporate agent—defendant clearly identified

The trial court erred by dismissing a retaliatory discharge action for lack of jurisdiction where the summons was directed to Betty Koontz and sent via certified mail to Ms. Koontz as registered agent. Plaintiff complied with the statutory requirements for service upon the registered agent and the officer of a corporation because Ms. Koontz was the president and registered agent of defendant-corporation. The service upon defendant was sufficient even though the summons did not indicate the capacity in which Ms. Koontz was being served because the summons clearly named Watauga Building Supply, Inc. as defendant.

2. Process and Service— summons—president and registered agent—capacity not identified on summons

A summons was not fatally defective where it did not identify the person served (Ms. Koontz) as the registered agent or president of defendant-corporation. The return of service shows that copies of the summons and complaint were delivered to Ms. Koontz and there is no evidence to contradict the affidavit of service identifying Ms. Koontz as the president and registered agent of defendant. While it is the better practice to identify the capacity in which the person receiving service is acting, such failure is not fatal.

Appeal by plaintiff from judgment entered 31 May 2000 by Judge Lotto Caviness in Watauga County Superior Court. Heard in the Court of Appeals 25 April 2001.

McElwee Firm, PLLC, by Elizabeth K. Mahan, for plaintiff-appellant.

Miller & Johnson, PLLC, by Linda L. Johnson, for defendant-appellee.

WALKER, Judge.

The plaintiff filed an action for retaliatory discharge against his former employer, Watauga Building Supply, Inc. (defendant), on 23 February 2000. The clerk of superior court issued a civil summons naming "Watauga Building Supply, Inc." as defendant in its caption. Its directory section stated "TO: Name & Address of First Defendant: Betty G. Koontz, 587-105 Ext., Boone, N.C. 28607." Plaintiff's attorney filed an affidavit verifying the complaint and summons were mailed via certified mail, return receipt requested and addressed to Ms. Koontz as registered agent. Thereafter, the Sheriff of Watauga County served "Betty G. Koontz" with the summons and complaint.

On 23 March 2000, defendant filed a motion to dismiss the complaint for lack of personal jurisdiction, insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(2), (4), (5) and (6) of our Rules of Civil Procedure. N.C.R. Civ. P. 12(b)(2), (4)-(6) (1999). On 31 May 2000, the trial court granted defendant's motion to dismiss for insufficiency of process, insufficiency of service of process and lack of jurisdiction over defendant pursuant to Rules 12(b)(2), (4) and (5). N.C.R. Civ. P. 12(b)(2), (4) and (5).

[1] In his sole assignment of error, plaintiff contends the trial court erred in granting defendant's motion to dismiss for lack of jurisdiction since: (1) naming defendant in the directory paragraph of the summons is not required and failure to do so does not amount to insufficient process; and (2) failure to identify Ms. Koontz as defendant's registered agent or president is not fatally defective and does not amount to insufficiency of service of process. Plaintiff further states it was clear from the caption of the summons that defendant, rather than Ms. Koontz, was the one being sued and that the record shows that Ms. Koontz was defendant's registered agent and president.

In order to obtain personal jurisdiction over a defendant, it is well established that the issuance of summons and service of process must comply with one of the statutorily specified methods. *Glover v.*

Farmer, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997), *disc. review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998), *citing Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E.2d 355 (1982). "Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Id.*, *citing Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974). Here, plaintiff complied with our statutory requirements for service of process upon the registered agent and the officer of a corporation. *See* N.C.R. Civ. P. 4(j)(6) (1999). However, we must determine if service of process was sufficient upon defendant.

Plaintiff cites *Wiles v. Construction Co.*, 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978), *abrogated on other grounds*, *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 539 S.E.2d 669 (2000) for the proposition that Rule 4(b) does not require naming the corporate defendant in the directory paragraph of the summons. In that case, the directory paragraph of the summons was directed "[t]o each of the defendants named below at the indicated addresses-GREETING: Mr. T.T. Nelson, Registered Agent, Welparnel Construction Company, Inc.," and Welparnel Construction Company was the only defendant named in the complaint. *Id.* at 84, 243 S.E.2d at 757. Welparnel complained the process was insufficient because it was directed to the corporation's registered agent rather than to the corporation. Our Supreme Court, in re-evaluating its narrow interpretation of our service of process statutes, cited with approval the following broader reasoning from a federal case in the United States Court of Appeals for the Fourth Circuit:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Id. at 84-85, 243 S.E.2d at 758, *quoting United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947).

In *Wiles*, our Supreme Court concluded that the service of process on Welparnel was proper because "any confusion arising from the ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons which clearly indicate[d] that the corporation and not the registered agent

was the actual defendant in this action." *Id.* at 85, 243 S.E.2d at 758. The Court further reasoned:

> Since, under Rule 4, a copy of the complaint must be served along with the summons, and the corporate representative who may be served is customarily one of sufficient discretion to know what should be done with legal papers served on him, the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic. Under the circumstances, the spirit certainly, if not the letter, of N.C.R. Civ. P. 4(b) has been met.

Id. at 85, 243 S.E.2d at 758. The Court therefore concluded:

> [W]e feel that the better rule in cases such as this is that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction.

Id. at 85, 243 S.E.2d at 758.

Likewise in *Wearring v. Belk Brothers*, 38 N.C. App. 375, 248 S.E.2d 90 (1978), this Court reversed the trial court's determination that there had been insufficient service of process where the caption of the summons stated: "Dorothy Wearring, Plaintiff Against Belk Brothers, Inc., Defendant," but the summons was directed to "Mr. Leroy Robinson, Exec. V.P., Belk Uptown, 115 East Trade Street, Charlotte, North Carolina." *Id.* This Court reasoned the caption of the summons and the complaint showed the corporation rather than the individual was being sued, so that process was sufficient. *Id.* at 377, 248 S.E.2d at 91. In doing so, this Court stated:

> Fundamental fairness requires that a summons should be of sufficient particularity so as to leave no reasonable doubt as to whom it is directed. However, this requirement does not force the courts to overlook the obvious when determining the validity of a summons . . . . '[W]hen the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified

in N.C.R. Civ. P. 4(j)(6) is adequate to bring the corporate defendant within the trial court's jurisdiction.'

Id. at 376-77, 248 S.E.2d at 90-91 (citations omitted).

In the instant case, while the summons did not indicate in what capacity Ms. Koontz was being served, it did name Watauga Building Supply, Inc. as defendant. Therefore, the summons and complaint clearly show defendant is Watauga Building Supply, Inc. and not Ms. Koontz. The trial court erred in granting defendant's motion to dismiss on the basis of insufficient process.

[2] We next consider whether plaintiff's failure to identify Ms. Koontz as the registered agent or president of defendant on the summons was fatally defective. Plaintiff argues Rule 4(j)(6) "does not on its face require that the particular capacity of the officer or agent be stated in the directory paragraph of the [s]ummons, on the certified mail card or receipt, or on the return of service." Plaintiff further contends the record shows Ms. Koontz was the registered agent and president of defendant, who was served with the summons and complaint by certified mail and personal service.

On the other hand, defendant contends service of process in this case is insufficient under *Fulton v. Mickle*, 134 N.C. App. 620, 518 S.E.2d 518 (1999). In that case, plaintiff served defendant insurance company by mailing a copy of the summons and complaint by regular mail to defendant's claims examiner. *Id.* at 621, 518 S.E.2d at 519. This Court held that under Rule 4(j)(6)(c) of the Rules of Civil Procedure, this method of service failed in two respects: (1) process was not sent by certified or registered mail, return receipt requested; and (2) process was not addressed to an officer, director or agent authorized to receive service of process. *Id.* at 624, 518 S.E.2d at 521, N.C.R. Civ. P. 4(j)(6)(c). This case is distinguished from the instant case, as Ms. Koontz was authorized to receive service of process on behalf of defendant.

Defendant further points out the return of service section on the summons does not indicate Ms. Koontz' title nor that defendant is a corporation. Defendant concludes that since Ms. Koontz was listed on the summons only as an individual, defendant received insufficient notice of the lawsuit and therefore service of process did not comply with Rule 4(j)(6)(a) or (b). N.C.R. Civ. P. 4(j)(6)(a)-(b).

This case is analogous to *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 265 S.E.2d 633 (1980), where plaintiff filed an action

against the corporate defendant, Burroughs Wellcome Co., and against its personnel manager, James Rostar, individually. The sheriff's return indicated that each summons was served on Burroughs and Mr. Rostar by leaving a copy with Carol Allen in the corporation's office. *Id.* at 460, 265 S.E.2d at 634. The trial court denied defendant corporation's motion to dismiss for insufficiency of service of process. *Id.* at 461, 265 S.E.2d at 634. Defendant contended the summons was defective on its face because it failed to recite in what capacity, if any, Carol Allen was acting when service was made upon her. *Id.* at 462, 265 S.E.2d at 635. This Court did not find this to be a fatal error and stated:

> Assuming that this return is incomplete in that it fails to specify in detail the agency of Carol Allen and the manner in which service upon her constituted compliance with G.S. 1A-1, Rule 4(j)(6), the significant factor in determining whether the court acquired jurisdiction over the corporate defendant here is whether the manner of service itself, rather than the return of the officer showing such service, complied with the applicable statute. 'It is the service of summons and not the return of the officer that confers jurisdiction.'

Id. at 462, 265 S.E.2d at 635, *quoting State v. Moore*, 230 N.C. 648, 649, 55 S.E.2d 177, 178 (1949). This Court then remanded the case to the trial court to determine whether Carol Allen was apparently in charge of the office as a "managing agent" which would comply with the service of process requirement. *Id.* at 464-65, 265 S.E.2d at 636-37.

As stated in *Williams*, it is the better practice to identify in what capacity the person receiving service is acting; however, such failure is not fatal. The question is whether the manner of service complies with Rule 4(j)(6). Proper service of process upon a corporation can be made by "delivering a copy of the summons and of the complaint to an officer," or by "delivering a copy of the summons and complaint to an agent authorized by appointment or by law to be served or to accept service." N.C.R. Civ. P. 4(j)(6)(a)-(b). Every corporation in our State must maintain a registered office and registered agent in the State. Ms. Koontz was the registered agent of defendant.

Here, the return of service shows that copies of the summons and complaint were delivered to Ms. Koontz and there is no evidence to contradict the affidavit of service filed by plaintiff's attorney identifying Ms. Koontz as the president and registered agent of defendant.

We conclude that plaintiff sufficiently complied with the requirements of Rule 4(j)(6) by delivering a copy of the summons and complaint to Ms. Koontz.

Thus, the trial court erred in granting defendant's motion to dismiss this action based on insufficient service of process and lack of jurisdiction over defendant.

Reversed.

Judges HUNTER and TYSON concur.

AUDIE E. TREXLER, PLAINTIFF v. NORFOLK SOUTHERN RAILWAY COMPANY, A CORPORATION; THOMAS L. LYNCH; JAMES H. FORREST; C.L. CRABTREE; AND NORFOLK SOUTHERN CORPORATION, A CORPORATION, DEFENDANTS

No. COA00-346

(Filed 7 August 2001)

Employer and Employee— wrongful discharge claim—collective bargaining contract

The trial court did not err by granting summary judgment for defendants on a wrongful discharge claim by a railroad employee subject to a collective bargaining agreement which provided that he could not be removed or disciplined except for just and sufficient cause after a preliminary hearing. The proper claim for this plaintiff was breach of contract.

On writ of certiorari to review order entered 16 March 1999 by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 24 January 2001.

Wallace & Graham, by Richard Huffman, and C. Marshall Friedman, P.C., by Kenneth E. Rudd, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Allison M. Grimm, and Gibbes & Burton, L.L.C., by Frank H. Gibbes, III, for defendant-appellees.

JOHN, Judge.

Plaintiff Audie E. Trexler seeks review of the trial court's entry of summary judgment in favor of defendants Norfolk Southern Railway Company, Thomas L. Lynch, James H. Forrest, C.L. Crabtree and Norfolk Southern Corporation (collectively defendants). We affirm the trial court.

The record reflects the following generally uncontroverted factual and procedural backgroung information: Plaintiff was hired by defendant Norfolk Southern Railway Company (NSRC) on or about 12 November 1979 and worked at NSRC's Linwood, North Carolina facility. As a Carman for NSRC, plaintiff was represented by his labor organization, the Transportation Communications International Union, Brotherhood of Railway Carmen Division (the Union). Plaintiff was also subject to the terms of a Collective Bargaining Agreement (the Agreement) between NSRC and the Union. Rule 34(a) of the Agreement specified as follows:

> [a]n employee will not be removed from service or disciplined (including discharge) except for just and sufficient cause after a preliminary hearing.

On or about 5 December 1995, plaintiff testified under oath in a case brought by the Union and a co-worker against defendants Norfolk Southern Corporation (NSC) and NSRC in United States District Court for the Eastern District of Tennessee, Knoxville Division. In his sworn statement, plaintiff related he had heard defendant Thomas L. Lynch (Lynch), a NSRC Master Mechanic, state to employees of NSRC that he "did not recommend that we vote Jack [Wright] in as local chairman because . . . Jack always stirred up problems" and that "we did not need Jack in there, because he would cause problems." At the time, Wright was a candidate for election as local chairperson of the Union.

Shortly thereafter, Timothy T. Malloy, Assistant Director of Labor Relations for NSRC, contacted Lynch and inquired if Lynch had indeed made such a statement. Lynch denied having done so.

Defendant J.H. Forrest (Forrest), Senior General Foreman at NSRC's Linwood facility and plaintiff's supervisor, reviewed a copy of plaintiff's sworn testimony at the request of Lynch. According to Forrest, he subsequently interviewed employees and supervisors "who could have been in the meeting or gathering where [plaintiff]

alleged [Lynch] made the statement in question," but each of the "individuals [interviewed] indicated they had not heard any supervisors at Linwood tell anyone not to vote for Jack Wright."

Pursuant to Rule 34 of the Agreement and on behalf of NSRC, Forrest wrote plaintiff a letter dated 4 January 1996. Plaintiff was directed therein to report "for a formal investigation to determine [plaintiff's] responsibility for conduct unbecoming an employee" in connection with plaintiff's sworn statement regarding Lynch. Defendant C.L. Crabtree (Crabtree), a NSRC official, presided over the 23 January 1996 investigation. Plaintiff, accompanied by his duly authorized Union representatives, presented testimony from five witnesses and documented polygraph test results.

By letter dated 31 January 1996, Crabtree returned the documentation to plaintiff, indicating the polygraph results had been deleted from the record and would not be considered because such evidence was prohibited under the provisions of "the federal Employee Polygraph Protection Act, 29 U.S.C., Section 2001, *et seq.*" By separate letter the same date, Crabtree also informed plaintiff the evidence presented at the investigation "clearly reflect[ed] that [plaintiff was] guilty of the charge brought against [him,]" and that plaintiff was "dismiss[ed] from all services" of NSRC. Pursuant to the Agreement, plaintiff subsequently appealed to a Public Law Board which upheld his termination.

Seeking compensatory and punitive damages, plaintiff instituted the instant action 31 January 1996, alleging claims of wrongful discharge in violation of public policy, defamation, negligent and intentional infliction of emotional distress, tortious interference with an employment contract and civil conspiracy. The case initially was removed to federal court and then remanded to Rowan County Superior Court. *See Trexler v. Norfolk Southern Ry. Co.*, 957 F. Supp. 772 (M.D.N.C. 1997). Defendants' subsequent motion for summary judgment was granted 16 March 1999 and all claims were dismissed with prejudice.

Plaintiff's appeal was dismissed by the trial court 11 October 1999 for failure to comply with the N.C. Rules of Appellate Procedure. On 3 December 1999, plaintiff filed a "Petition for Writ of Certiorari" (Petition) with this Court, which Petition was conditionally allowed and referred to this panel. We elect to entertain plaintiff's appeal. *See* N.C.R. App. P. 21.

Although plaintiff originally assigned error to dismissal of each of his six claims, his Petition sought review solely of the claim for wrongful discharge and only that cause of action has been addressed by plaintiff in his appellate brief. Plaintiff's remaining assignments of error are thus deemed abandoned and we do not address them. *See* N.C.R. App. P. 28(b)(5) (assignments of error "in support of which no . . . argument is stated . . . will be taken as abandoned").

In short, plaintiff maintains on appeal that the trial court erred in granting defendants' summary judgment motion regarding plaintiff's claim for wrongful discharge. We do not agree.

Summary judgment is properly granted when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.G.S. § 1A-1, Rule 56 (1999). A summary judgment movant bears the burden of establishing the lack of any triable factual issue. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). The movant may meet its burden by: (1) demonstrating that an essential element of the plaintiff's claim is nonexistent; (2) establishing through discovery that the plaintiff's cannot produce evidence to support an essential element of the claim; or (3) showing that plaintiff cannot survive an affirmative defense, such as governmental immunity. *Bernick v. Jurden*, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982).

Plaintiff asserts he was entitled to sue in tort for wrongful discharge in violation of public policy "even though he was employed pursuant to a collective bargaining agreement." Previous decisions of our appellate courts indicate plaintiff's argument must fail.

North Carolina's first appellate decision adopting the tort of wrongful discharge in violation of public policy was *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). The plaintiff nurse in *Sides* alleged her at will employment with the defendant had been terminated in retaliation for her refusal to commit perjury in a medical malpractice action against her employer. In upholding the plaintiff's claim, this Court reasoned that:

> while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. . . . We hold, therefore, that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case as plaintiff alleges happened here.

Id. at 342, 328 S.E.2d at 826.

Our Supreme Court subsequently adopted a public-policy exception to employment at will in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (employer's alleged discharge of plaintiff for refusal to violate U.S. Department of Transportation regulations by driving excessive hours and falsifying records "offend[s] the public policy of North Carolina"). Three years later, *in Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), the Court considered a claim that three employees had been ordered to work for reduced pay, below the statutorily prescribed minimum wage, or suffer termination of their employment. *Id.* at 350, 452 S.E.2d at 168. In rejecting the defendants' assertion that they had not violated public policy because the "alleged acts [we]re peculiar to the plaintiff[s]," *id.* at 352, 416 S.E.2d at 169, the Court observed that:

> [a]lthough the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Id. at 353, 452 S.E. 2d at 169 (footnote omitted).

Plaintiff relies heavily upon the foregoing cases. Unlike plaintiff, however, we do not read these decisions to entitle all terminated employees to assert the tort of wrongful discharge. Rather, in each of the cited instances the tort was recognized solely in the context of employment at will. *See id*, 331 N.C. at 350, 416 S.E.2d at 167 (1992) (noting *Coman* explicitly adopted a public policy exception to the well-entrenched employment at will doctrine), and *Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 39, 370 S.E.2d 423, 425 (1988)

(observing *Sides* created "an exception to the general rule that an employee at will has no tort claim for retaliatory discharge").

In addition, this Court has expressly stated that:

> [w]rongful termination may be asserted "only in the context of employees at will," *and not by an employee* "employed for a definite term or . . . *subject to discharge only for 'just cause.'* "

Houpe v. City of Statesville, 128 N.C. App. 334, 343, 497 S.E.2d 82, 88, (citations omitted) (emphasis added), *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998).

Further, in rejecting a schoolteacher's claim she had been wrongfully "constructively discharged by Defendants in violation of public policy," this Court reasoned as follows:

> Breach of contract is the proper claim for a wrongfully discharged employee who is employed for a definite term *or an employee subject to discharge only for "just cause."* Plaintiff is not an employee at will because she had attained the status of a career teacher under § N.C. Gen. Stat. 115C-325(c) and could not be dismissed or demoted *except for reasons specified in Section 115C-325(e)(1).*

Wagoner v. Elkin City Schools' BD. of Education, 113 N.C. App. 579, 588-89, 440 S.E.2d 119, 125, (citations omitted) (emphasis added), *disc. review denied*, 336 N.C. 615, 447 S.E.2d. 414 (1994).

Finally, in *Claggett v. Wake Forest University*, 126 N.C. App. 602, 486 S.E.2d 443 (1997), this Court affirmed the trial court's dismissal of a university professor's tort claim for wrongful discharge, reiterating that

> [b]reach of contract is the remedy for a wrongfully discharged employee who is employed for a definite term or who is subject to discharge only for just cause. Plaintiff alleges that he was employed pursuant to teaching appointments of definite duration; he was not, therefore, an at-will employee.

Id. at 611, 486 S.E.2d at 448.

In the case *sub judice*, the Agreement explicitly provided that plaintiff might not be "removed from service or disciplined (including discharge) except for just and sufficient cause after a preliminary hearing." As with the plaintiffs in *Wagoner* and *Claggett*, therefore, "breach of contract [w]as the proper claim, *Wagoner*, 113 N.C. App. at

588, 440 S.E.2d at 125, by which plaintiff herein might have challenged termination of his employment in that he was "an employee subject to discharge only for "just cause," *id.* Accordingly, an essential element of plaintiff's wrongful discharge claim was "nonexistent," *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342, and the trial court did not err in granting summary judgment in favor of defendants regarding that claim. In light of this holding, we further hold the trial court properly allowed summary judgment as to plaintiff's claim for punitive damages. *See Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984) (before punitive damages may be awarded, "jury must find that the defendant committed an actionable legal wrong against the plaintiff").

Affirmed.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. STANLEY LORENZO WILLIAMS

No. COA00-658

(Filed 7 August 2001)

1. Search and Seizure— cocaine defendant found in cellar— search of cellar

The trial court did not err by denying a defendant's motion to suppress cocaine seized from a cellar where an officer responded to a domestic call from a woman who reported that she had previously sworn out a warrant for defendant's arrest for assaulting her and that defendant was in the cellar of the house they shared; officers approached the cellar and called for defendant to come out; he came up the steps with his hands up within a few seconds; officers arrested him for assault on a female, placed him in the custody of another officer, and searched the cellar; and they found broken crack pipes, marijuana, $3,641 in a bank bag in a hole in the duct work, and a plastic bag containing rocks of cocaine that was partially covered by dirt. The officers had the consent of the woman living in the house with defendant and were in a place they had a right to be to conduct a search incident to arrest.

2. Criminal Law— speedy trial—no prejudice

The trial court did not err by refusing to dismiss cocaine charges based upon failure to provide a speedy trial where the trial court properly determined that defendant suffered no prejudice.

3. Drugs— destruction of evidence after initial plea agreement—no prejudice

A cocaine defendant did not establish prejudice from the destruction of the drug evidence after a plea agreement which was later set aside. The record indicates that defendant was only seeking to confirm by independent analysis the weight and composition of the substance found in plastic bags in the cellar where he was found and the State introduced a lab report without objection.

Appeal by defendant from judgment entered 3 September 1999 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 25 April 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for the State.

Hartsell, Hartsell & White, P.A., by H. Jay White, for defendant-appellant.

WALKER, Judge.

Defendant was convicted of possession with intent to sell and deliver cocaine and being an habitual felon. The State's evidence tended to show the following: On 9 February 1998, Office Todd Harrington (Harrington) with the Kannapolis Police Department (police department) responded to a domestic call from Wendy Shackleford (Shackleford) who reported that she had previously sworn out a warrant for defendant's arrest for assaulting her. She further stated that defendant had just left the house where they lived together and that he had drugs and several thousand dollars in his possession. After Harrington arrived at Shackleford's residence, he waited awhile and then drove around. He was waved down by Shackleford who informed him that defendant was in the cellar of the house which was referred to as a basement. The cellar was approximately ten feet by fifteen feet in size and rested on a cement slab. It appeared to be for storage and not for living purposes. It was acces-

sible only from the outside by steps leading down a narrow stairway from the yard at the rear of the house.

Harrington called Officer Harrison (Harrison) from the police department for assistance. When Harrison arrived, both officers drew their weapons, approached the cellar and called for defendant to come out. Within a few seconds, defendant came up the cellar steps to the door with his hands up. The officers arrested him for assault on a female and placed him in the custody of another officer who had arrived.

Harrington and Harrison then searched the area of the cellar where they observed the following items: broken crack pipes; an unsmoked marijuana joint on top of a hot water heater; $3,641.76 in cash in a bank bag secured in a hole in the ceiling duct work; and a plastic bag partially covered by dirt containing 70 individually wrapped rocks of cocaine. Harrington and Harrison next exited the cellar and advised defendant that he was also being charged with possession of cocaine.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress evidence of the cocaine seized from the cellar. He contends that because the cocaine was obtained during a search without a warrant or probable cause, its admission at trial violated his constitutional rights.

At the outset, we note "[o]ur review of a denial of a motion to suppress is limited to determining whether the trial court's findings of facts [sic] are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct." *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993).

Our Supreme Court has held " '[a] governmental search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement.' " *State v. Hardy*, 339 N.C. 207, 226, 451 S.E.2d 600, 610 (1994), *quoting State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982). One such exception is a search made incident to an arrest when limited "to the area from which the arrested person might have obtained a weapon or some item that could have been used as evidence against him." *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980) (citations omitted). For

example, "[a] warrantless search of a dwelling following an arrest outside the dwelling will be upheld where the circumstances provide the arresting officers with reason to believe that a serious threat to their safety is presented." *State v. Taylor*, 298 N.C. 405, 416, 259 S.E.2d 502, 509 (1979), *citing McGeehan v. Wainwright*, 526 F.2d 397 (5th Cir.), *cert. denied*, 425 U.S. 997, 48 L. Ed. 2d 823 (1976). Another exception exists when the law enforcement searches by the consent of third party with " '. . . common authority over or other sufficient relationship to the premises or effects sought to be inspected.' " *State v. Barnett*, 307 N.C. 608, 615-16, 300 S.E.2d 340, 344 (1983), *quoting United States v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 250 (1974). Under any one of these exceptions, "whether a search and seizure is unreasonable must be determined upon the facts and circumstances surrounding each individual case." *Cherry* at 92-93, 257 S.E.2d at 556 (citation omitted).

Defendant contends Harrington and Harrison's search of the cellar was unlawful and unreasonable for the following reasons: (1) the cellar was a "small area" which did not require a "thorough search[;]" (2) "the only thing the officers were able to do upon entering the cellar would be to observe if anyone were hiding" there; and (3) defendant was handcuffed outside the cellar at the time the cellar was searched.

In its order denying defendant's motion to suppress, the trial court made extensive findings and conclusions. It found that Harrington and Harrison made a protective sweep of the cellar to make certain that no one else was there. Based on the findings, the trial court concluded in part:

> 1. [Harrington and Harrison] acted prudently and properly in entering the cellar immediately after taking custody of the defendant pursuant to a lawful arrest. The officers were legally justified in making a protective sweep of the cellar from which the defendant had emerged to make certain that no one else was hiding there with a weapon, particularly since this occurred at 3:45 o'clock A.M. Therefore, exigent circumstances existed which justified, for the protection of the officers, a limited warrantless search of the cellar area of the house. If someone else did live in the cellar, as contended by the defendant, then this fact would add further weight to the justifiable concern of the investigating officers for their own safety, and therefore give additional justification for immediately entering the cellar.

The trial court also concluded that Harrington had obtained consent to enter the cellar from Shackleford, since she and defendant lived at this residence. The trial court further concluded that Shackleford "clearly wanted [Harrington] to enter the [cellar], and therefore he entered the limited area in question with the permission of an occupant of the house."

The exceptions to the search warrant requirement were established in that the officers were in a place where they had a right to be with the consent of Shackleford to conduct a search incident to arrest. The trial court found that all of the items of evidence were located as a result of "a cursory examination of the cellar within five minutes or less." The trial court's findings and conclusions support its decision to deny defendant's motion to suppress the evidence seized from the cellar.

[2] Defendant next assigns error to the trial court's refusal to dismiss the charges based on the failure of the State to provide him a speedy trial. He contends his constitutional rights have been violated pursuant to our Supreme Court's decision in *State v. Jones*, 310 N.C. 716, 314 S.E.2d 529 (1984), and the following facts in this case: (1) defendant filed a motion for a prompt trial on 4 May 1999; however, his trial did not begin until one hundred and twenty days later; and (2) the trial date of 30 August 1999 was eight months after a new trial had been ordered.

In *Jones*, our Supreme Court utilized the following four-pronged test for deciding whether a defendant has been deprived of his constitutional right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to defendant resulting from the delay. *Jones* at 721, 314 S.E.2d at 532-33, *quoting State v. Smith*, 289 N.C. 143, 148, 221 S.E.2d 247, 250 (1976). *See also Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972). Defendant thus asserts that in addition to the significant length of his delay, this Court should consider the actions he took to shorten the delay by filing motions for a speedy trial, the prejudice the delay caused him by disrupting his employment, finances, status in society and freedom. Further, defendant asserts his inability to defend himself by reason of the delay since drug evidence in the initial trial was destroyed by court order.

The burden is on the defendant to show the reason for the delay of trial was the neglect or willfulness of the prosecution. *State v.*

Marlow, 310 N.C. 507, 521, 313 S.E.2d 532, 541 (1984). Here, the trial court found defendant had initially entered a plea to charges; however, his plea agreement was set aside. He was later tried on unrelated charges in May 1999 and had been in custody since then. We also note the length of time a defendant's trial was delayed, standing alone, is not sufficient in this State to constitute unreasonable delay. *See State v. Kivett*, 321 N.C. 404, 364 S.E.2d 404 (1988) (holding that delay of four hundred and twenty-seven days, standing alone, is insufficient to constitute unreasonable delay). Here, the trial court properly determined that defendant suffered no prejudice, as he "offered no evidence as to any possible detriment" by reason of the trial not being set until 30 August 1999.

[3] Defendant next assigns as error the destruction of the drug evidence ordered by the trial court following his initial plea agreement to the charges. Defendant contends this action deprived him of the right to have the evidence tested by an impartial testing agency and "confirm the conclusions reached by the State Bureau of Investigation's officer who testified for the State."

Defendant points to the United States Supreme Court's ruling in *California v. Trombetta*, 467 U.S. 479, 81 L. Ed. 2d 413 (1984), in which it held the State must preserve "evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488, 81 L. Ed. 2d at 422. That case further held the evidence must: (1) "possess an exculpatory value that was apparent before the evidence was destroyed" and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 81 L. Ed. 2d at 422.

The record indicates defendant was only seeking to confirm by independent analysis the weight and composition of the substance found to be cocaine in the plastic bags seized from the cellar. At trial, the State introduced the lab report without objection which established the weight of the contents and identified it as cocaine. Defendant has failed to establish how he has been prejudiced by the trial court's denial of his motion. *See State v. Anderson*, 57 N.C. App. 602, 609, 292 S.E.2d 163, *disc. review denied*, 306 N.C. 559, 294 S.E.2d 372 (1982). This assignment of error is therefore overruled.

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

In sum, defendant received a fair trial free of prejudicial error.

No error.

Judges HUNTER and TYSON concur.

ANTOINETTE M. VADALA, PLAINTIFF v. RICHARD R. VADALA, DEFENDANT

No. COA00-205

(Filed 7 August 2001)

Divorce— alimony—relative earnings and earning capacities—accustomed standard of living—established pattern of savings

The trial court erred by denying plaintiff wife's claim for alimony under N.C.G.S. § 50-16.3A(c) based on the fact that she was able to meet all of her monthly bills without the aid of alimony, because: (1) the trial court failed to make sufficient findings of fact regarding the relative earnings and earning capacities of the spouses; and (2) the trial court improperly felt it was unable to consider the parties' established pattern of savings in determining the standard of living to which the parties had grown accustomed during the marriage.

Appeal by plaintiff from judgment entered 6 August 1999 by Judge Lee Gavin in Moore County District Court. Heard in the Court of Appeals 26 February 2001.

Staton, Perkinson, Doster, Post, & Silverman, P.A., by Jonathan Silverman, for plaintiff-appellant.

Cheshire, Parker, Schneider, Wells, & Bryan, by Jonathan McGirt, for defendant-appellee.

CAMPBELL, Judge.

We note that plaintiff's brief fails to comply with our Rules of Appellate Procedure in several respects, and is therefore subject to dismissal for these violations. Nonetheless, as we feel that the issues in this case warrant our attention, we elect to review the matter pursuant to our discretionary powers under N.C.R. App. P. 2.

Plaintiff and defendant were married for 34 years. During the marriage, the couple put significant amounts of their income toward

their retirement, as they were hoping to retire in their early sixties. Over the years, the couple acquired approximately twenty-two different retirement accounts, to which they consistently contributed. Since their divorce, defendant has continued to put a substantial amount of his income into his retirement accounts. Plaintiff, however, contends that due to her lower income (which is approximately one-third of defendant's net income per month), and to her expenses (which account for all but approximately $170 of her net monthly pay), she is unable to retain the lifestyle to which she had been accustomed, namely: she will be forced to work much longer than she would have, had she continued to enjoy the standard of living to which she had become accustomed during her marriage, since she is unable to accumulate savings of an amount that would allow her to retire. As plaintiff was able to meet all of her monthly bills without the aid of alimony, the trial court denied her claim. Plaintiff appealed to this Court for further review.

The duties of the trial court regarding a claim for alimony can be found in N.C. Gen. Stat. § 50-16.3A(c) (1999), entitled "Findings of Fact." This section specifically states that the trial court "*shall* set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount" and, with the exception of motions where the Rules of Civil Procedure do not require specific findings, that "the court *shall* make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(c) (emphasis added).

This provision is mandatory, and it is a vital part of the trial court's order. The trial court must make findings of fact that are sufficiently detailed to allow review. *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000). "The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award." *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986), quoted in, *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000). " 'In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings.' " *Rhew*, 138 N.C. App. at 470, 531 S.E.2d at 473 (quoting *Talent v. Talent*, 76 N.C. App. 545, 548-49, 334 S.E.2d 256, 258 (1985)).

We conclude that the trial court did not make sufficient findings of fact in regards to the alimony portion of the order, and therefore, that we are unable to sufficiently review these findings of fact and the court's subsequent conclusions of law.

As stated above, N.C. Gen. Stat. § 50-16.3A(c) requires the trial court to make sufficient findings on each of the factors listed in subsection (b). At the time of this trial, subsection (b) contained factors one through fifteen, with factor number sixteen taking effect in 1998. Therefore, our analysis is confined to the first fifteen factors.

The trial court must make sufficiently specific findings of fact on each factor listed in subsection (b) for which evidence is offered. N.C. Gen. Stat. § 50-16.3(c). While we find evidence in the record to support findings on several factors in subsection (b), since we remand the case due to insufficient findings, we will not address each of these factors. Two of these factors, however, do merit further instruction.

Specifically, under factor (2), the trial court must consider the relative earnings and earning capacities of the spouses. The trial court did make findings as to plaintiff's income in its finding of fact number 1, however, this finding is not sufficiently detailed. Finding of fact number 1, reads: "The Plaintiff has been employed as a medical transcriptionist for fifteen years, and has a gross income of $2,075 per month; and, after taxes, her net income is $1,572 per month." This may be so, but we have no way to confirm or deny this finding as it gives no indication as to how it was calculated. Indeed, the parties themselves dispute this finding of fact with each arguing different methods for calculating this income. In addition, the trial court found no facts regarding defendant's income whatsoever.

The second factor that we need to address is factor number (8), which examines the standard of living to which the parties had grown accustomed during the marriage.

In order to be entitled to alimony, the party seeking alimony must establish that: "(1) that party is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). A dependent spouse is one who is "actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat.

§ 50-16.1A(2) (1999). As this Court has said before, "[i]n other words, the court must determine whether one spouse would 'be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other.' " *Rhew*, 138 N.C. App. at 470, 531 S.E.2d at 473 (quoting *Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E.2d 256, 258-59 (1985)).

In its finding of fact number five, the trial court stated: "[t]he Court considered the Plaintiff's contention that she needs to save for her retirement; however, the Court did not consider this 'need' in determining her status as a dependent spouse for purposes of alimony." Further, in its conclusion of law number four, the court concluded that "[t]he Plaintiff's alleged 'need' to save for her retirement *is not properly considered by the Court* in accessing [sic] the Plaintiff's needs for alimony, nor in determining her status as a dependent spouse." (Emphasis added.)

It appears from these statements that the trial court felt it was unable to consider the parties' pattern of saving for their retirement. Recent case law, however, has determined that a pattern of savings *may* be considered by the court in determining alimony.

This Court recently held in *Glass v. Glass*, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239 (1998), that an established pattern of contributing to a retirement or savings plan may be considered by the trial court in determining the parties' accustomed standard of living. *Glass* cautioned, however, that a party's savings should not be used to "reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans," nor should a spouse be able to "increase an alimony award by deferring a portion of his or her income to a savings account," emphasizing that "the purpose of alimony is not to allow a party to accumulate savings." *Glass*, 131 N.C. App. at 790, 509 S.E.2d at 239-40.

Then, in *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000), (a case which we note, was decided by this Court after the trial court in the case *sub judice* had entered its order denying alimony), we clarified our holding in *Glass*, finding that although the parties' pattern of savings may not be determinative of a claim for alimony, the trial court must at least consider this pattern in determining the parties' accustomed standard of living.

We find *Rhew* analogous to the case now before us in several respects. In *Rhew*, the parties were found to have "enjoyed a com-

fortable standard of living," and had "budgeted a sizeable portion of their income to savings and retirement accounts," as had the parties in the case at hand. *Id.* at 468, 531 S.E.2d at 472. Likewise, the trial court in *Rhew* had declined to consider the parties' pattern of savings in determining whether to award alimony. However, soon after the trial court had entered its order, *Glass* was decided, which found that the trial court could " 'properly consider the parties' custom of making regular additions to savings plans *as a part of their standard of living* in determining the amount and duration of an alimony award.' " *Rhew*, 138 N.C. App. at 473, 531 S.E.2d at 475 (2000) (quoting *Glass*, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239 (1998)).

The *Rhew* Court went on to say:

> Although the Court in *Glass* properly identified the difficulty that might arise when a party increased or decreased his or her contribution to savings in order to manipulate an alimony award, no such problem exists here. Evidence was presented that established an historical pattern of such contributions, which satisfied the requirement in *Glass* that there be a custom of regular savings. Therefore, the trial court erred when it found in . . . its order that "it appears that defendant has the ability to provide 'reasonable subsistence' for herself *consistent with the parties' accustomed standard of living*" without considering contributions to savings.

Id. at 473, 531 S.E.2d at 475.

Similarly, inasmuch as it appears the trial court here felt it was unable to consider the parties' established pattern of savings in determining plaintiff's claim for alimony, the judgment of the trial court must be reversed and remanded for reconsideration of this claim.

Upon remand, the trial court shall review all relevant factors under N.C. Gen. Stat. § 50-16.3A(b), including the parties' pattern of retirement savings as it pertains to the parties' accustomed standard of living pursuant to N.C. Gen. Stat. § 50-16.3(b)(8), and make sufficient findings of fact as to the same.

Reversed and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. WILLIAM BUIE GRAHAM, DEFENDANT

No. COA00-883

(Filed 7 August 2001)

1. Criminal Law— burden of proof—greater weight of evidence—beyond a reasonable doubt

Although the trial court erred in a first-degree rape, first-degree sexual offense, and taking indecent liberties case by its preliminary instruction to the jury explaining the law of circumstantial evidence that the jury could convict defendant based upon the greater weight of the evidence, the trial court did not commit plain error when it properly instructed the jury fifty times that the State had to prove its case beyond a reasonable doubt for all fifteen charges brought against defendant.

2. Constitutional Law— double jeopardy—acting in concert jury instructions

The trial court committed plain error in a first-degree rape, first-degree sexual offense, and taking indecent liberties case by its jury instructions on those counts where defendant was convicted on the theory of acting in concert with his coparticipant, because: (1) use of the pattern jury instruction without amendments allowed the jury to convict defendant based on acting in concert regardless of whether the jury believed that defendant had acted together with his coparticipant as the coparticipant committed the offense, or whether defendant committed the offense acting alone; and (2) since defendant was separately convicted for all of the same offenses based on his own actions, the instructions allowed defendant to be convicted twice for the same offense in violation of his right to be free from double jeopardy. U.S. Const. amends. V and XIV; N.C. Const. art. I, § 19.

3. Rape; Sexual Offenses— short-form indictments—constitutionality

Although defendant contends the short-form indictments charging him with first-degree rape and first-degree sexual offense were deficient based on a failure to allege the elements that distinguished the crimes as first-degree, our Supreme Court has already upheld the constitutionality of these indictments.

Appeal by defendant from judgment entered 20 April 1998 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Sylvia Thibaut, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

HUDSON, Judge.

Defendant was convicted of two counts of first degree rape, five counts of first degree sexual offense, and six counts of taking indecent liberties with a child. He contends the trial court gave the jury improper instructions regarding the State's burden of proof and on the theory of acting in concert. Because we agree the trial court committed plain error in its instructions on the charges for which defendant was convicted on the theory of acting in concert, we hold that defendant is entitled to a new trial for those crimes, identified in case numbers 97 CRS 25655 (count #2), 25658, 25661, and 25662.

The State presented evidence at trial tending to show the following: on 12 June 1997, Melissa Robertson (Robertson), Brandy Jo Boyd (Boyd), and Lori Mark (Mark), all fourteen years old, decided to try to get a ride to Rock Hill, South Carolina, in order to visit Boyd's boyfriend. Mark, who was at a Harris Teeter store that evening, approached defendant and Ashley Burnette (Burnette), who were sitting in a pick-up truck in the store parking lot. Mark asked the men if they would be willing to give the girls a ride to Rock Hill for thirty dollars. Defendant, twenty-one years old, agreed to do so and proceeded with Burnette and Mark to pick up Robertson and Boyd at pre-arranged sites.

After driving on Highway 51 for a distance, defendant pulled onto a dirt road and stopped at a barn. He forced the girls out of the back of the truck and into the barn. Once everyone was inside the barn, he forced Boyd to have oral, vaginal, and anal sex with him, and made both Mark and Robertson fellate him. Burnette also forced Boyd to have oral and vaginal sex and made Mark fellate him. After these sexual assaults, defendant forced the girls to curl up into balls on the floor, covered them with straw, and the girls were struck with hard objects. Defendant told the girls not to move or he would kill them. After defendant and Burnette left, the girls escaped, found a telephone, and called the police.

At a trial commencing 30 March 1998, defendant was convicted of the following crimes: first degree rape of Boyd, first degree rape of Boyd by acting in concert with Burnette, taking indecent liberties with Boyd by having sexual intercourse with her, taking indecent liberties with Boyd by acting in concert with Burnette who had sexual intercourse with her, first degree sexual offense against Boyd by forcing her to perform oral sex, first degree sexual offense against Boyd by acting in concert with Burnette who forced her to perform oral sex, taking indecent liberties with Boyd by forcing her to perform oral sex, taking indecent liberties with Boyd by acting in concert with Burnette who forced her to perform oral sex, first degree sexual offense against Boyd by having anal sex with her, first degree sexual offense against Mark by forcing her to perform oral sex, taking indecent liberties with Mark by forcing her to perform oral sex, first degree sexual offense against Robertson by forcing her to perform oral sex, and taking indecent liberties with Robertson by forcing her to perform oral sex. Judge Robert P. Johnston entered judgment in accordance with the jury's verdicts on 20 April 1998. Defendant filed a petition for writ of certiorari to this Court on 29 September 1999, which petition was allowed.

[1] Defendant first argues on appeal that the trial judge instructed the jury that it could use the wrong burden of proof in convicting defendant. The judge gave the jury an instruction on the law of circumstantial evidence as follows:

> The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. The law simply requires the party having the burden of proof on a particular issue to satisfy the jury as to that issue by the greater weight of the evidence in the case.

Clearly, the judge erred in instructing the jury that it could convict defendant based upon "the greater weight of the evidence." *See State v. Blue*, 138 N.C. App. 404, 415, 531 S.E.2d 267, 275 (2000), *aff'd in part, rev'd in part on other grounds*, 353 N.C. 364, 543 S.E.2d 478 (2001) (where judge gave the exact instruction given in this case). In a criminal trial, the State must prove its case "beyond a reasonable doubt." *Id.*

The State points out that the court instructed the jury using the correct "beyond a reasonable doubt" standard numerous times else-

where in its charge. Defendant correctly responds that "an erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point." *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976). However, there are exceptions to this rule. In *State v. Harris*, 46 N.C. App. 284, 288, 264 S.E.2d 790, 792 (1980), this Court considered a case where the trial court had given an improper instruction on the burden of proof one time, but had given the correct instruction fifteen times and had instructed the jury properly in the "all-important mandate on each charge." In that case, we determined that "[t]he charge as a whole presented the law of burden of proof to the jury in such a manner as to leave no reasonable cause to believe that the jury was misled." *Id.* at 289, 264 S.E.2d at 793.

In the present case, although the trial court gave an erroneous preliminary instruction regarding the burden of proof while explaining the law of circumstantial evidence, it instructed the jury properly that the State had to prove its case beyond a reasonable doubt repeatedly for all fifteen charges brought against defendant. In total, the court instructed the jury that the State's burden of proof was "beyond a reasonable doubt" fifty times. As in *Harris*, we do not believe there is reasonable cause to believe the jury in this case was misled regarding the State's burden of proof. Certainly, the trial court's single erroneous jury instruction on the burden of proof does not amount to plain error, which defendant must show given that he did not object to the instruction at trial. *See* N.C.R. App. P. 10(c)(4).

[2] Defendant next argues the trial court erred in its instructions to the jury on those counts where he was convicted on the theory of acting in concert with Ashley Burnette, specifically, in 97 CRS 25655 (count #2), 25658, 25661, and 25662. For example, in charging the jury on the crime of first degree sexual offense against Boyd by acting in concert with Burnette when Burnette forced Boyd to fellate him, the judge stated:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about June 13th, 1997, the defendant acting *either by himself* or acting together with Ashley Burnett [sic] committed these offenses, then you would find him guilty.

(emphasis added).

The court gave similar instructions in the other three instances where defendant was convicted on the theory that he acted in con-

cert with Burnette, including for the first degree rape of Boyd and two counts of taking indecent liberties with Boyd.

The State contends the foregoing instruction was proper because it was taken from the pattern jury instruction for acting in concert. *See* N.C.P.I.—Crim. 202.10. However, defendant correctly asserts that the cited instruction allowed the jury to convict him twice for the same crime. To be precise, the jury instruction allowed the jury to convict defendant based on the theory of acting in concert regardless of whether the jury believed that defendant had acted together with Burnette as Burnette committed the offense, or believed that defendant committed the offense acting alone. Since defendant was separately convicted for all of the same offenses based on his own actions, the cited jury instructions allowed defendant to be convicted twice for the same offense, and thus violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, § 19, of the North Carolina Constitution to be free from double jeopardy. *See State v. Murray*, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984) (defendant subjected to double jeopardy if convicted twice for same offense). Thus, use of the pattern instructions without appropriate amendment under the circumstances of this particular case rendered the charge confusing.

Defendant did not object at trial to any of the erroneous jury instructions discussed above. He is thus limited to arguing the trial court committed plain error. *See* N.C.R. App. P. 10(c)(4). Plain error may be found where the trial court has committed "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis in original) (citation omitted). In this case, where the trial court instructed the jury in a manner such that the jury was allowed to convict defendant twice for the same offense, fundamental error occurred. Defendant is therefore entitled to a new trial with corrected jury instructions for the crimes with which he was charged on the basis of acting in concert with Ashley Burnette.

[3] Defendant finally objects that he was charged with first degree rape and first degree sexual offense using the short-form indictments set forth in N.C.G.S. § 15-144.1 (1999) and N.C.G.S. § 15-144.2 (1999), respectively. Defendant asserts these indictments were deficient in that they failed to allege the elements that distinguished the crimes as first degree. Defendant acknowledges that the North Carolina

Supreme Court has upheld the use of such short-form indictments in *State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). This assignment of error is thus overruled.

In conclusion, we find no error in defendant's conviction of charges in 97 CRS 25655 (count #1), 25656, 25657, 25660, 25663, 25664, 25665, 25666, and 25667; however, he is due a new trial in 97 CRS 25655 (count #2), 25658, 25661, and 25662.

No error in part; new trial in part.

Judges MARTIN and HUNTER concur.

WILLIAM ALAN LOVE, GUARDIAN AD LITEM FOR CHRISTINE AMELIA LOVE, AND DAVID ALEXANDER LOVE, MINORS; SHARON ELSIE LOVE AND HUSBAND, WILLIAM ALAN LOVE, PLAINTIFFS V. CLARENCE SINGLETON AND JANICE MARIE SINGLETON, DEFENDANTS

No. COA00-631

(Filed 7 August 2001)

Motor Vehicles— negligence—left turn at stoplight

The trial court erred in an automobile accident case by granting summary judgment for plaintiff on the issue of liability where a reasonable juror could have found that plaintiff-Love was contributorily negligent in proceeding into an intersection without keeping a proper lookout, and that defendant-Clarence Singleton proceeded with due care in making his left turn in that the sun was in his eyes, the stoplight was yellow, and plaintiffs' van was at least 20 feet from the intersection. Even if Love had the benefit of a green light, which is in dispute, she had an obligation to maintain a proper lookout and should not have relied blindly on the green light.

Appeal by defendants from partial summary judgment filed 20 March 2000 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2001.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for plaintiff-appellees.

Golding Holden Cosper Pope & Baker, L.L.P., by Tricia Morvan Derr and C. Byron Holden, for defendant-appellants.

GREENE, Judge.

Clarence Singleton (C. Singleton) and Janice Marie Singleton (J. Singleton) (collectively, Defendants) appeal a judgment filed 20 March 2000 granting partial summary judgment in favor of William Alan Love, guardian *ad litem* for Christine Amelia Love and David Alexander Love, Sharon Elsie Love (Love), and husband, William Alan Love (collectively, Plaintiffs).

Plaintiffs filed a complaint against Defendants on 18 February 1998, alleging negligence, loss of consortium, and property damage as a result of an accident occurring between C. Singleton and Love. Defendants filed an answer and counterclaim denying Plaintiffs' claims for relief, alleging Love was contributorily negligent, and counterclaiming for contribution.[1] On 7 February 2000, Plaintiffs filed a motion for summary judgment and submitted deposition excerpts of various witnesses. Defendants, in response, placed the full deposition of Love in the trial court file.

The deposition testimony of Charles Dwayne Stephens (Stephens) reveals that between 7:00 a.m. and 7:15 a.m. on 7 January 1998, his vehicle was stopped behind C. Singleton's vehicle on W.T. Harris Boulevard (Harris Blvd.) in Charlotte, North Carolina. C. Singleton, along with other drivers preparing to make a left turn onto Robinson Church Road from Harris Blvd., had to yield to those drivers traveling in a northerly direction on Harris Blvd. Stephens testified he saw C. Singleton's vehicle come to a complete stop at the intersection and that the sunlight may have impaired C. Singleton's vision. Love's van was traveling in a northerly direction in the left lane of Harris Blvd., and as she approached the intersection of Harris Blvd. and Robinson Church Road, the stoplight changed from green to yellow. Love's van, traveling "about forty miles an hour," was approximately twenty feet away from C. Singleton's vehicle as he began making the left turn onto Robinson Church Road.

1. In the event Defendants were found negligent and Love was found contributorily negligent, Defendants sought contribution from Love for any damages suffered by Christine and David Love.

As C. Singleton's vehicle entered the intersection, it collided with Love's van. Stephens did not hear anyone blow the horn on their vehicle and only heard Love's tires and brakes squeal immediately before impact.

In Love's deposition, she testified she was traveling approximately 35 miles per hour as she approached the Harris Blvd. and Robinson Church Road intersection. As she approached the "stop line," approximately "one car length before the stop line," Love saw the stoplight was green and also saw C. Singleton's vehicle "start to move up" and realized C. Singleton was "going to continue moving." Love specifically recalled taking her "foot off the accelerator, check[ing] the light, [and] verif[ying] that it was green before [she] was going to proceed through the intersection." When she realized C. Singleton was not going to stop and as his vehicle was directly in front of her van, Love applied her brakes at the time she was near the stop line.

In his deposition, C. Singleton testified that on 7 January 1998, he was driving the vehicle of J. Singleton, his daughter. As C. Singleton proceeded into the intersection to make his left turn, the light in his direction of travel was yellow. Upon collision with Love's van, the vehicle C. Singleton was driving suffered damage to the passenger door and the front end of the vehicle.

Ervin Anderson, Jr. (Anderson), a passenger in C. Singleton's vehicle at the time of the accident, testified he "spotted" Love's van "[r]ight when [C. Singleton] made the turn into the intersection." At the time of the impact, Love's van was traveling "[a]bout 30, about 35, 40 [miles per hour]." Anderson could not say how long he saw the van before the impact because "when [he] saw the van[, he] started grabbing . . . onto the dashboard when [he] saw the impact coming." According to Anderson, C. Singleton's vehicle was traveling approximately five or eight miles an hour at the time of the impact, and he failed to notice any indication of Love's attempt to stop her van.

On 20 March 2000, the trial court determined "there [was] no genuine issue as to any material fact and that [Plaintiffs were] entitled to a partial judgment as a matter of law on the issue of liability." The trial court then granted Plaintiffs' motion for summary judgment on the issue of liability, and it dismissed Defendants' counterclaim. The trial court further ordered the issue of damages be tried by a jury. On 1 May 2000, Plaintiffs filed an objection to Defendants' proposed record on appeal. After a hearing on Plaintiffs' objection, the trial

court filed an order settling the record on appeal ordering that only a portion of Love's deposition be included in the record on appeal because, at the summary judgment hearing, it had only considered that portion offered by Plaintiffs.

The dispositive issue is whether the evidence in this case supports a judgment as a matter of law for Plaintiffs on C. Singleton's negligence and Love's contributory negligence.

We first note the trial court's order did not address the issue of damages and, specifically, it ordered that the issue of damages be tried by a jury. This appeal is, thus, interlocutory and subject to dismissal. *Coleman v. Interstate Casualty Ins. Co.*, 84 N.C. App. 268, 270, 352 S.E.2d 249, 251 (1987) ("[a] partial summary judgment on the issue of liability, reserving for trial the issue of damages, is not immediately appealable"). We, nevertheless, elect to treat the purported appeal as a petition for writ of certiorari and address the merits. *See id.* at 270, 352 S.E.2d at 251; *see also* N.C.R. App. P. 21(a).

Defendants argue the trial court erred in granting summary judgment for Plaintiffs because Plaintiffs were not entitled to judgment as a matter of law. We agree.

A motion for summary judgment is properly granted 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) (1999). In ruling on a motion for summary judgment, the trial court is required to view the evidence in the light most favorable to the non-moving party. *Wrenn v. Byrd*, 120 N.C. App. 761, 763, 464 S.E.2d 89, 90 (1995), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

In order to prevail on a claim of negligence, the plaintiff must establish the defendant owed her a duty of reasonable care, that the defendant breached this duty, and that such breach was the proximate cause of the plaintiff's injuries. *See Thompson v. Bradley*, ___ N.C. App. ___, ___, 544 S.E.2d 258, 261 (2001). Contributory negligence, however, will act as a complete bar to a plaintiff's recovery. *Id.* Contributory negligence occurs when a plaintiff fails "to exercise due care for his or her own safety, such that the plaintiff's failure to exercise due care is a proximate cause of his or her injury." *Id.* Summary judgment is rarely appropriate in cases of negligence or contributory

negligence, except in exceptional cases, because the reasonable care standard should be applied by a jury. *Id.*

C. Singleton's negligence

In this case, viewing the evidence in the light most favorable to Defendants, the non-moving party, the evidence does not support a conclusion that C. Singleton was negligent as a matter of law: The sun was in his eyes, the light was yellow, and Love's van was at least 20 feet away from the intersection. *See Robinson v. McMahan*, 11 N.C. App. 275, 280, 181 S.E.2d 147, 150 (in determining whether drivers exercised reasonable care, must consider circumstances surrounding them, including fog), *cert. denied*, 279 N.C. 395, 183 S.E.2d 243 (1971). Thus, a reasonable juror could conclude that C. Singleton proceeded with due care in making the turn onto Robinson Church Road.

Love's contributory negligence

Moreover, viewing the evidence in the light most favorable to Defendants, a reasonable juror could conclude that Love was contributorily negligent by proceeding into the intersection without keeping a proper lookout and, thus, she was not entitled to a judgment as a matter of law on this issue. Love did not notice C. Singleton's vehicle until she was about one car length away from the "stop line" despite the physical evidence raising an issue as to whether C. Singleton's vehicle was already beginning to make its turn and was in Love's lane of travel when she was 20 feet away from the intersection.[2] Even if Love had the benefit of a green light, which is in dispute, she nonetheless had the obligation to maintain a proper lookout and should not have relied blindly on the green light. *See Seaman v. McQueen*, 51 N.C. App. 500, 503-04, 277 S.E.2d 118, 120 (1981) (although a driver may proceed on a green light, she should not rely blindly on the green light, but should exercise due care as to others in the intersection and should keep a proper lookout). Accordingly, the trial court erred in granting Plaintiffs' motion for summary judgment.

Reversed and remanded.

Judges McGEE and CAMPBELL concur.

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2. The physical evidence shows that C. Singleton's vehicle was damaged on the front passenger side and front end of the vehicle.

LINDA CARPENTER, DAVID PAUL BROWN, AND MARCELLE H. BROWN, PLAINTIFFS
v. BREWER HENDLEY OIL COMPANY, DEFENDANT

No. COA00-765

(Filed 7 August 2001)

Declaratory Judgments— actual controversy—ownership of underground gas tanks

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's declaratory judgment action regarding whether defendant oil company is the owner of certain underground gas tanks located on plaintiffs' property in order to determine who has responsibility for the collection and removal of any discharge or release from the underground storage tanks, because: (1) the complaint does not set forth an actual controversy between plaintiffs and defendant when the North Carolina Environmental Management Commission (EMC) has brought forth an action against plaintiffs; and (2) the extent of the relationship between plaintiffs and defendant is that both could potentially be sued by EMC for damage caused by discharge from the gas tanks.

Judge TIMMONS-GOODSON concurring in the result.

Appeal by plaintiffs from order entered 15 March 2000 by Judge W. Erwin Spainhour in Anson County Superior Court. Heard in the Court of Appeals 25 April 2001.

Drake & Pleasant, by Robert S. Pleasant, for plaintiffs-appellants.

Griffin, Smith, Caldwell, Helder & Lee, P.A., by W. David Lee and Annika M. Goff, for defendant-appellee.

HUDSON, Judge.

Plaintiffs appeal from an order dismissing their declaratory judgment action. We affirm.

On 18 February 1999, plaintiffs filed a complaint seeking a declaratory judgment regarding the ownership of certain underground gas tanks (the gas tanks) located on certain property in Morven, North Carolina (the property) upon which is located a business commonly referred to as the "Morven Drive-In." The complaint

alleges that plaintiffs purchased the property from the Ratliffe Oil Company, Inc. (Ratliffe Oil) on 13 May 1977 by a deed registered in Anson County. The complaint alleges that the gas tanks on the property were excluded from this conveyance by the express terms of the deed, and that Ratliffe Oil thereby retained ownership of the gas tanks. The complaint further alleges that defendant acquired ownership of the gas tanks from Ratliffe Oil, and that defendant "has exercised dominion and control over" the gas tanks as a result of moving the gas tanks, attaching new pipes to the gas tanks, building "islands" connected to the gas tanks, rewiring the gas tanks, putting new pumps in the gas tanks, and owning all of the gasoline contained in the gas tanks. The complaint also alleges that "the Division of Environmental Management has proceeded against Linda Carpenter, concerning liability for [the gas tanks]."

Defendant filed an answer setting forth various defenses, including a request that the court dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to N.C.R. Civ. P. 12(b)(6). Following a hearing, the trial court entered an order granting defendant's motion to dismiss and stating that "the Complaint fails to state a claim upon which relief can be granted, [because] the matters and things set forth in the Complaint [do] not present a justiciable controversy." Plaintiffs appeal from this order.

In general, a Rule 12(b)(6) motion to dismiss "challenges whether a complaint states a legally sufficient cause of action." *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 146, 493 S.E.2d 814, 816 (1997). For a court to have jurisdiction under the Declaratory Judgment Act, N.C.G.S. §§ 1-253 to -267 (1999), the plaintiff must allege in his complaint that a real and justiciable controversy, arising out of opposing contentions as to respective legal rights and liabilities, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. *Town of Spencer v. Town of East Spencer*, 351 N.C. 124, 127, 522 S.E.2d 297, 300 (1999). A justiciable controversy exists when litigation to resolve the controversy between the parties appears to be unavoidable. *Id.*

In their brief, plaintiffs contend (1) that defendant acquired ownership of the gas tanks from Ratliffe Oil, and (2) that defendant is the "operator" of the gas tanks as a result of certain acts by defendant. Plaintiffs rely upon the "Oil Pollution and Hazardous Substances Control Act of 1978" (the Act), which is set forth in Article 21A of

Chapter 143 of our General Statutes.[1] Part 2A of the Act ("Leaking Petroleum Underground Storage Tank Cleanup") establishes certain rights and obligations for "owners" and "operators" of underground storage tanks when a "discharge or release of petroleum from an underground storage tank has occurred." N.C.G.S. § 143-215.94E (1999). Furthermore, N.C.G.S. § 143-215.94A(8) defines "Operator" as "any person in control of, or having responsibility for, the operation of an underground storage tank." Thus, plaintiffs apparently take the position that Part 2A of the Act is applicable, and that defendant, as the owner of the gas tanks, and as the "operator" of the gas tanks pursuant to G.S. § 143-215.94A(8), should be liable for damage caused by any petroleum leaking from the gas tanks.

Defendant, in its answer, denies that it is the owner of the gas tanks. Furthermore, defendant points to N.C.G.S. § 143-215.77(5) (1999), found in Part 1 of the Act ("General Provisions"), which provides in pertinent part:

> "Having control over oil or other hazardous substances" shall mean, but shall not be limited to, any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State, and specifically shall include carriers and bailees of such oil or other hazardous substances. *This definition shall not include any person supplying or delivering oil into a petroleum underground storage tank that is not owned or operated by the person, unless:*
>
> *a. The person knows or has reason to know that a discharge is occurring from the petroleum underground storage tank at the time of supply or delivery;* [or] . . .

G.S. § 143-215.77(5) (emphasis added). Thus, defendant apparently takes the position that it is not an "operator" of the gas tanks because an "operator" is defined by § 143-215.94A(8) as "any person in control of, or having responsibility for, the operation of an underground storage tank," and, pursuant to G.S. § 143-215.77(5), defendant did not have "control over" the contents of the gas tanks because it did not know, and did not have reason to know, that any discharge was occurring from the gas tanks at any time.

1. We note that although plaintiffs' brief explains that plaintiffs seek a declaratory judgment regarding the interpretation and application of the Act to the present facts, the complaint itself fails to make any reference to the Act.

Plaintiffs' complaint requests a declaration by the court as to whether defendant is an owner or operator of the gas tanks. Although it may be true, as plaintiffs contend in their brief, that such a declaration "is vital to the determination as to who has responsibility for the collection and removal of any discharge or release from the underground storage tanks" under the Act, we do not believe that the complaint sets forth an actual controversy between plaintiffs and defendant.

The agency charged with enforcing the Act is the North Carolina Environmental Management Commission (EMC). *See* N.C.G.S. §§ 143-215.77(2) and 143-215.79 (1999). Plaintiffs allege in their complaint that EMC has "proceeded against" plaintiffs. Even taking this allegation as true, the complaint does not allege that a justiciable controversy exists between plaintiffs and defendant. The extent of the relationship between plaintiffs and defendant is that both could potentially be sued by EMC for damage caused by discharge from the gas tanks. There is no allegation or showing of any legal controversy between plaintiffs and defendant that could result in litigation between these two parties, even if it is true that EMC has brought an action against plaintiffs.

In sum, we do not believe that the complaint states an actual legal controversy between plaintiffs and defendant. Thus, we affirm the trial court's dismissal of the action.

Affirmed.

Judge WYNN concurs.

Judge TIMMONS-GOODSON concurs in the result with a separate opinion.

TIMMONS-GOODSON, Judge, concurring in result.

I agree with the majority that the trial court's order dismissing plaintiff's complaint should be affirmed, but based upon different reasoning. It is my belief that the complaint is insufficient to state a claim for declaratory relief as to the ownership of the gas tanks. I, therefore, concur in the result only.

CITIZENS FOR RESPONSIBLE ROADWAYS, TOWN OF SUMMERFIELD, WILLIAM E. KNOX, AMY LIXIL-PURCELL, GAY E. CHENEY, AND THE NORTH CAROLINA ALLIANCE FOR TRANSPORTATION REFORM, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND DAVID MCCOY, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA00-812

(Filed 7 August 2001)

Administrative Law— agency decision—judicial review—connector roadway improvements

The trial court did not err by granting defendants' motion to dismiss plaintiffs' complaint seeking injunctive relief from defendant Department of Transportation's adoption of a transportation improvement program regarding connector roadway improvements and its approval of an environmental assessment, because: (1) plaintiffs' failure to comply with the judicial review provisions of N.C.G.S. § 113A-13 within thirty days of the agency decision waived their right to seek judicial review under N.C.G.S. § 150B-45; and (2) plaintiffs waited over four years after the finding of no significant impact was issued to file their petition with the Court of Appeals.

Plaintiffs appeal from order entered 11 April 2000 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 18 April 2001.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for plaintiffs-appellants Citizens for Responsible Roadways, William E. Knox, Amy Lixil-Purcell, Gay E. Cheney, and the North Carolina Alliance for Transportation Reform; William B. Trevorrow, for the plaintiff-appellant Town of Summerfield.

Attorney General Michael F. Easley, by Assistant Attorney General Fred Lamar, for defendants.

TYSON, Judge.

I. Facts

The North Carolina Department of Transportation ("NCDOT") determines future transportation needs and alternatives through adoption of a Transportation Improvement Program ("TIP"). N.C. Gen. Stat. § 143B-350 (1998). A TIP project, designated as R-2413

("Connector"), consisted of: (1) connector roadway improvements to US Highway 220 beginning in Rockingham County, just north of Guilford County, and (2) a portion of the new controlled access roadway between N.C. Highway 68 and US Highway 220 in Guilford County connecting to N.C. Highway 68 south. NCDOT prepared and approved an environmental assessment ("assessment") on 14 September 1993, as required by the North Carolina Environmental Policy Act ("NCEPA"), N.C. Gen. Stat. § 113A-4 (1992), and associated regulations. N.C. Admin. Code tit 1, r. 25.0401(a). The assessment consisted of environmental and area impacts for various proposed alternatives of R-2413.

After approval, NCDOT submitted the assessment to the State Clearinghouse. The Clearinghouse circulates assessment documents to state and local officials for comments and provides notice to the public of the availability of the assessment for review and comment. N.C. Admin. Code tit. 1, Chapter 25. Public notice requirements and opportunities for comments were provided in accordance with the statutes and the Administrative Code.

Comments from agencies and the public were received. After receipt of the comments, NCDOT issued a Finding of No Significant Impact ("FONSI"), on 31 March 1995. A FONSI is NCDOT's finding that a full Environmental Impact Statement ("EIS") is unnecessary. A design public hearing was scheduled and held for the interested public shortly after the issuance of FONSI. In November 1995, the United States Congress directed that the Connector road be part of the future I-73/I-74 north-south corridor.

Over four years after the FONSI was issued, plaintiffs filed a complaint on 24 May 1999 seeking injunctive relief, alleging that defendants failed to comply with NCEPA by: (1) failure to prepare a sufficient assessment, (2) failure to prepare an environmental impact statement, and (3) violation of certain statutory standards of NCEPA.

Defendants answered and filed a motion to dismiss on the grounds of Rule 12(b)(1) and/or 12(b)(2), lack of subject matter and/or personal jurisdiction, and Rule 12(b)(6) plaintiffs' failure to state a claim upon which relief can be granted. N.C. R. Civ. P. 12.

The trial court granted defendants' motion to dismiss on 11 April 2000 for (1) lack of subject matter and personal jurisdiction; (2) plaintiffs' failure to comply with the judicial review provisions of N.C. Gen. Stat. § 150B-43 *et seq.*; (3) plaintiffs' failure to comply with the

judicial review provisions of N.C. Gen. Stat. § 113A-13, waiving their right to seek review under N.C. Gen. Stat. § 150B-45; and (4) plaintiffs' failure to state a claim upon which relief may be granted. Plaintiffs appeal. We affirm the trial court's decision.

II. Issue

The issue is whether plaintiffs' complaint states a claim for relief, if plaintiffs did not timely exercise their right to judicial review under G.S. § 150(B)-43.

A. Timeliness

The North Carolina Administrative Procedure's Act ("NCAPA") states that:

> [i]t is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties or privileges . . . should be settled through informal procedures . . . [i]f the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a 'contested case.'

N.C. Gen. Stat. § 150B-22 (1998). Chapter 150B also "establishes a uniform system of administrative rule making and adjudicatory procedures for agencies" and "applies to every agency," unless an agency is expressly exempted. N.C. Gen. Stat. Sec. 150B-1 (1995). "The Department of Transportation, except as provided in G.S. 136-29 (construction contract claims)" is expressly exempt from the contested case provisions. N.C. Gen. Stat. Sec. 150B-1(e)(8) (1995). Plaintiffs cannot petition for a hearing before the Office of Administrative Hearings ("OAH") in this case.

This Court has held that judicial review of agency decisions in Superior Court, pursuant to 150B-43, was proper in cases where no prior proceeding was held before the OAH. *See, e.g., Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 112 N.C. App. 566, 572, 436 S.E.2d 594, 598 (1993) (citations omitted) ("although there was no hearing before an ALJ, there was an agency proceeding . . . determining the rights of a party"), *rev'd on other grounds*, 337 N.C. 569, 447 S.E.2d 768 (1994); *Charlotte Truck Driver Training School v. N.C. DMV*, 95 N.C. App. 209, 212, 381 S.E.2d 861, 862-63 (1989) (finding that interview and investigation by agency hearing officer is a contested case);

Hedgepeth v. North Carolina Div. of Servs. for the Blind, 142 N.C. App. 338, 345, 543 S.E.2d 169, 173-74 (2001) (proceeding before an agency hearing officer and review by director became the final agency decision to constitute a contested case for judicial review). Once a final decision is served, a party may petition for judicial review. N.C. Gen. Stat. § 150B-43 (1985). N.C. Gen. Stat. § 150B-45 (1987) states that:

> [t]o obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides. *The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision.* A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition. (emphasis supplied.)

"Administrative and judicial review of an environmental document is incidental to, and may only be undertaken in connection with, review of the agency action. No other review of an environmental document is allowed." N.C. Gen. Stat. § 113A-13 (1992).

Plaintiffs' failure to comply with the judicial review provisions of N.C. Gen. Stat. § 113A-13 within thirty days of the agency decision waived their right to seek judicial review under N.C. Gen. Stat. § 150B-45. This failure to comply with NCAPA's administrative review requirements is sufficient to affirm the trial court's decision.

B. Final Decision

Plaintiffs rely on *Orange County v. North Carolina Department of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890 (1980) in support of their position that their complaint was timely filed. That reliance is misplaced. *Orange* is inapposite to these facts.

The *Orange* court held that the proposed I-40 project was not administratively processed pursuant to an approved "action plan." The court could not determine at what stage in the action plan the Board's action was taken, which in turn prevented a determination of finality of the board's action. If no final decision was made, the statute of limitations never actually began to run.

In this case, NCDOT prepared and approved an assessment on 14 September 1993. After approval, NCDOT submitted the assess-

ment to the Clearinghouse for outside agency and public hearing review. NCDOT issued a FONSI on 31 March 1995. NCEPA provides that once a state agency issues a FONSI, the clearinghouse circulates these documents to state and local officials for comments and provides notice to the public of the availability of the environmental documents for comment and review. After the requisite review period, and based upon the comments received, the clearinghouse advises the project agency on the sufficiency of information provided in the FONSI and whether or not the documents can support the conclusions of the project agency. N.C. Admin. Code tit 1, r. 25.0506(c). Further environmental review is not required. N.C. Gen. Stat. § 113A-9.

Plaintiffs waited over four years, after the FONSI was issued on 31 March 1995, to file their petition with the court.

Affirmed.

Judges WALKER and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 AUGUST 2001

CARDEN v. LAMBERT No. 00-94	Orange (97CVS696)	Affirmed
EMBLER v. CITY OF LENOIR No. 99-1608	Caldwell (99CVS533)	Affirmed
EMBLER v. CITY OF LENOIR No. 00-811	Caldwell (99CVS721)	Remanded
GODWIN v. BARBOUR No. 00-792	Johnston (94CVD2195)	Affirmed
GUILFORD CTY. EX REL. WILLIAMS v. WILLIAMS No. 00-1161	Guilford (93CVD2033)	Vacated and remanded
HENDERSON v. TELECHECK RECOVERY SERVS., INC. No. 00-553	Mecklenburg (99CVD6332)	Affirmed
IN RE COOPER No. 00-1185	Yancey (99J56)	Affirmed
IN RE CRAIN No. 00-1124	Durham (99J27)	Affirmed
IN RE FOSTER No. 00-464	Durham (98J44-469(TPR)	Affirmed in part, vacated in part and remanded to the trial court
JONES v. FEDERAL EXPRESS CORP. No. 00-845	Guilford (00CVS158)	Appeal dismissed
KEMP v. KEMP No. 99-84-3	Guilford (94CVD6673)	Affirmed in part, remanded in part
LAMBERT v. CARDEN No. 00-537	Orange (99CVS1220)	Dismissed
LANDSBERGER v. LANDSBERGER No. 00-874	Guiford (98CVD8697)	Dismissed
MARCUM v. EDWARDS No. 00-158	Harnett (97CVS00083)	Reversed and remanded
MEEHAN v. CABLE No. 00-752	Macon (95CVS185)	Affirmed
NIMS v. N.C. FARM BUREAU MUT. INS. CO. No. 00-865	Watauga (99CVS261)	Affirmed

ROBINSON v. BYRD No. 00-643	Orange (99CVD1398)	Reverse and remanded
SIMMONS v. SIMMONS No. 00-628	Jones (90CVD57)	Affirmed in part, reversed in part
SMITH v. DAVE CARTER & ASSOCS. No. 00-802	Durham (99CVS3159)	Affirmed
STATE v. AGUILAR No. 00-160	Chatham (98CRS1182) (98CRS1310)	Affirmed
STATE v. ANDERSON No. 00-684	Union (99CRS1588) (99CRS3110)	No prejudicial error
STATE v. ARROYO No. 00-1205	Randolph (99CRS12847) (99CRS12848) (99CRS12849) (99CRS12850)	No error
STATE v. BACCHUS No. 00-890	Durham (99CRS16014) (99CRS5307) (99CRS5308)	No error
STATE v. CARTER No. 00-1196	Rockingham (99CRS008074)	No error
STATE v. CUBITT No. 00-1387	Craven (00CRS1812) (00CRS1813)	No error
STATE v. DAVIS No. 00-706	Sampson (98CRS12790) (98CRS12791)	No error
STATE v. FELTON No. 00-576	Perquimans (98CRS915) (98CRS925)	Reversed
STATE v. GIBSON No. 00-994	Guilford (97CRS14644)	No error
STATE v. GIVINS No. 00-1369	Gaston (97CRS4217) (97CRS11001) (97CRS11002)	No error
STATE v. HARRIS No. 00-1203	Harnett (99CRS8440)	No error

STATE v. HELMS No. 00-1164	Cabarrus (94CRS5951) (94CRS5952) (94CRS10086)	Dismissed
STATE v. HOOKER No. 00-650	Wake (99CRS24769)	No error
STATE v. JACKSON No. 00-542	Mecklenburg (98CRS37411) (98CRS37412)	No error
STATE v. KERNODLE No. 99-1385	Chatham (98CRS1642) (98RS797) (98CRS2145) (98CRS1960)	Affirmed
STATE v. KHAN No. 00-775	Granville (98CRS3313)	No error
STATE v. LOCKLEAR No. 00-825	Robeson (96CRS021840) (96CRS021843) (96CRS021844) (96CRS021845) (96CRS021847)	No error
STATE v. McRORIE No. 00-583	Mecklenburg (95CRS58064 (96CRS11211) (96CRS11212) (96CRS11213)	No prejudicial error
STATE v. MEADE No. 00-738	Pitt (97CRS11004)	No error
STATE v. MURIEL No. 00-636	Cumberland (97CRS000017)	No error
STATE v. PAIGE No. 00-763	Durham (98CRS36918) (98CRS51225)	No error at trial; remand for correction of the judgment
STATE v. RILEY No. 00-1150	Greene (99CRS2614)	No error
STATE v. ROBINSON No. 00-190	Orange (97CRS16127) (97CRS16129)	No error
STATE v. SELLERS No. 00-696	Catawba (99CRS16666) (99CRS16667)	No error

STATE v. SESSIONS No. 00-1455	Wake (98CRS74589) (98CRS74607) (98CRS74597)	No error
STATE v. WADE No. 00-1149	Greene (99CRS000495)	No error
STATE v. WALTERS No. 00-540	Burke (97CRS8054) (98CRS10166)	No error
STATE v. WASHINGTON No. 00-420	Rowan (98CRS16734) (98CRS16735) (98CRS14248)	No error
STATE v. WILLIAMS No. 00-1045	Wayne (99CRS04011)	No error
STATE v. WILSON No. 00-966	Alamance (99CRS5022)	No error
STEVENS v. MAGNUM TOWER SERV., INC. No. 00-478	Columbus (99CVS319)	Affirmed
TEAM SPOTTING SERV., INC. v. HATCHER No. 00-776	Guilford (97CVS9607)	Reversed and remanded
TURNER v. GUILFORD CTY. PUB. DEF. No. 00-529	Ind. Comm. (731727)	Affirmed
WILEY v. RAMTEX, INC. No. 00-924	Ind. Comm. (588987)	Affirmed

STATE OF NORTH CAROLINA v. MARION EDWARD PEARSON, JR.

No. COA00-647

(Filed 21 August 2001)

1. Evidence— nontestimonial identification order—hair and saliva samples—motion to suppress—statutory violations

The trial court did not err in a case where defendant pled guilty to two counts of second-degree rape by denying defendant's motion to suppress evidence of hair and saliva samples obtained from a nontestimonial identification order (NIO) even though defendant contends there were statutory violations after the NIO was obtained, because: (1) the State met the requirements of N.C.G.S. § 15A-271 establishing reasonable grounds to believe defendant committed the offenses before obtaining the NIO based on an officer's affidavit; (2) although defendant contends his right to counsel was violated, N.C.G.S. § 15A-279(d) protects subjects complying with an NIO from statements made during the procedure but does not render the results of the tests themselves inadmissible, and defendant is not seeking to suppress a statement made during the procedure; and (3) the failure to return an inventory from the NIO procedure to the judge within ninety days as required by N.C.G.S. § 15A-280 was not a substantial violation when defendant did not request an inventory or file a motion to have the products and reports of the NIO destroyed, and defendant was present during the procedure and saw what was taken from him.

2. Evidence— nontestimonial identification order—hair and saliva samples—motion to suppress—probable cause

The trial court did not err in a case where defendant pled guilty to two counts of second-degree rape by denying defendant's motion to suppress evidence of hair and saliva samples obtained from a nontestimonial identification order (NIO) even though defendant contends the NIO was allegedly not appropriately obtained and there was allegedly no probable cause, because: (1) although the State failed to comply with all of the safeguards provided under Article 14 of Chapter 15A of the North Carolina General Statutes, defendant still has not shown a substantial statutory violation rendering the NIO evidence inadmissible; and (2) the taking of hair and saliva samples without a showing of probable cause did not abridge either the North

Carolina or United States Constitutions when the samples are commonly seen and can be removed by the suspect rather than a technician, and the reasonableness safeguards of sample-taking were adhered to in this case.

3. Evidence— blood sample—DNA testing—motion to suppress—search warrant

The trial court did not err in a case where defendant pled guilty to two counts of second-degree rape by denying defendant's motion to suppress evidence of a blood sample and the DNA testing performed on the blood resulting from a 23 November 1998 search warrant, because: (1) the trial court relied on proper information to allow the search; (2) the evidence obtained from the nontestimonial identification order was not illegally obtained; and (3) there was no substantial violation of defendant's rights.

Judge BIGGS dissenting.

Appeal by defendant from judgment entered 11 January 2000 by Judge Richard D. Boner in Burke County Superior Court. Heard in the Court of Appeals 26 April 2001.

Michael F. Easley, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Robert C. Ervin for defendant-appellant.

Ann Groninger for American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

THOMAS, Judge.

Defendant, Marion Edward Pearson, appeals after pleading guilty as part of a plea agreement to two counts of second-degree rape. All of his assignments of error concern the trial court's denial of his pretrial motions to suppress evidence.

Defendant based those motions on three grounds. First, he argues evidence resulting from a non-testimonial identification order (NIO) more than twelve years prior to his arrest should have been suppressed by the trial court due to statutory violations after it was obtained. Second, defendant argues evidence from the NIO should have been suppressed because it was not appropriately obtained and because there was no probable cause. Third, defendant contends the

evidence resulting from a search warrant should have been suppressed because its taking was in violation of both the federal and state constitutions.

For the reasons discussed herein, we hold the trial court committed no error.

The facts are as follows: On 14 July 1985 at 1:15 a.m., Kathy Richards reported to Morganton Police that a man entered her apartment, held a knife to her throat and raped her. He then took thirty-eight dollars from her purse and left. Although she did not get a clear view of him in the dark, Richards said she thought he was a white male. She also noted he spoke with an accent and was over six feet tall. Police investigators found the screen to Richards's bathroom window had been removed. A Negroid hair unsuitable for scientific comparison was present, but there were no usable latent fingerprints. A sexual assault examination was completed at a local hospital, with evidence turned over to police investigators.

On 23 November 1985 at 1:10 a.m., Arlene K. Holden reported that a man with a dark complexion and an accent entered her apartment at the Village Creek Apartments, tied her with pantyhose, threatened her with pinking shears and then raped her. She also noted the assailant was approximately 5'8" tall and had a lean to medium build. A crime scene examination revealed a window screen had been removed from an unlocked bedroom window. Negroid body and pubic hairs were present but there were no usable latent fingerprints. Later, a sexual assault examination was completed at a local hospital, with evidence turned over to police investigators.

On 17 February 1986 at approximately 11:40 p.m., Ernestine Keyes reported that a black male with a fake Jamaican accent raped her at her Woodbridge Apartments home. The assailant also knew her children's names and where they went to school. She further noted he was from 5'8" to 5'11" tall and had an average build. He took forty dollars from her purse. A sexual assault examination was completed at a local hospital, with evidence turned over to police investigators.

After the second rape, in November 1985, police investigators began to develop defendant as a suspect in the crimes. Defendant was subsequently interviewed by investigators on 26 November 1985, 18 February 1986 and 26 March 1986. During this time period, Agent John H. Suttle (Suttle) of the North Carolina State Bureau of

Investigation learned defendant had been seen leaving the Village Creek Apartments on 7 March 1985 after police were called concerning a "peeping tom" offense. Lieutenant James Buchanan observed a black male with a light gray or blue windbreaker and blue jeans squatting beside an air conditioning unit behind an apartment building. When the suspect saw Buchanan, he ran, losing Buchanan in a foot chase. Buchanan notified other officers on the scene to stop two cars he heard leaving the complex. Defendant was operating one of them. Officer Robert Bauer stopped defendant, who was wearing a light blue windbreaker and blue jeans. Defendant was then taken to the police station for questioning. He was subsequently charged with driving while license revoked and released.

After the rape of Keyes in February 1986, Suttle drove straight to defendant's home, where he observed that defendant's car was warmer than other parked cars, as if it had been recently driven. Keyes had also reported that defendant's son was enrolled in the day-care facility where she was the director. She stated defendant would on occasion deliver and pick up his son.

On 28 March 1986, a judge signed an NIO and, after being served with it, defendant went to the Burke County Clerk of Superior Court's office and requested court-appointed counsel. He was told one could not be appointed at that time. Allegedly, defendant also requested counsel at the Morganton Police Department on 8 April 1986 when he gave the samples of blood, pubic hair and saliva, but none was provided. In an analysis of the samples, defendant was not ruled out as a suspect. The laboratory conclusions, however, were not definite.

On 15 May 1986, defendant was arrested after crawling into a women's restroom stall while it was occupied by a female. He subsequently was sentenced to two years in prison for the offense of secret peeping. Afterwards, defendant moved to Maryland, where he was arrested for secret peeping offenses.

In March, 1998, evidence from the rapes of Holden and Keyes was resubmitted to the SBI lab. The results showed defendant's DNA was present in both sexual assault kits containing vaginal swabs from the victims. In November 1998, working with Brenda Bissette (Bissette), an SBI agent assigned to the Molecular Genetics Division, Suttle presented the DNA findings plus other information to a judge and obtained a search warrant for a new sample of defendant's blood. With that test as well singling out defendant as the perpetrator, a war-

rant for defendant's arrest was issued. True bills of indictment were eventually obtained against defendant alleging five counts of first-degree rape, two counts of first-degree sexual offense, three counts of first-degree burglary and two counts of robbery with a dangerous weapon. Defendant subsequently made three motions to suppress the evidence obtained by the NIO and the search warrant.

The trial court, at hearings on 10 and 11 January 2000, allowed defendant's motion to suppress a blood sample obtained pursuant to the 1986 NIO. Motions to suppress the other samples taken in 1986, and the blood sample taken in 1998 pursuant to the search warrant, were denied. Defendant then tendered an *Alford* plea to two counts of second-degree rape on 11 January 2000 in Burke County Superior Court. All of the other charges were dismissed by the State as part of a plea agreement.

Additionally, in the plea agreement, defendant reserved his right to appeal the trial court's rulings on his motions to suppress while the State reserved its right to reinstate all of the charges it was dismissing if the appeal proved unsuccessful.

The trial court found defendant's prior record an aggravating factor but also found mitigating factors including that he was gainfully employed and had sought preventive treatment for a "recognized sexual addiction problem." Defendant received two consecutive twenty-five year active sentences. From the convictions and sentences, he appeals.

[1] By his first assignment of error, defendant argues the trial court erred by denying defendant's motion to suppress evidence obtained from an NIO based on statutory violations. We disagree.

Section 15A-271 provides

> A nontestimonial identification order . . . may be issued by any judge upon request of a prosecutor . . . . "[N]ontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a suspect.

N.C. Gen. Stat. § 15A-271 (1999). The order may only be issued based on an affidavit establishing

(1) That there is probable cause to believe that a felony offense, or a Class A1 or Class 1 misdemeanor offense has been committed;

(2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

N.C. Gen. Stat. § 15A-273 (1999). Defendant argues there were never reasonable grounds to believe he committed the offenses and that the State failed to meet the requirements of section 15A-273(2) before obtaining the NIO. The affidavit included information that defendant was a black male, approximately 5'8" tall and "was caught by Lt. James Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1985 around 9:00pm." Defendant claims he was never "caught" by anyone looking into apartments on that date and that Suttle, the affiant, did not have personal knowledge of the 7 March 1985 incident.

In an affidavit, "it is the long-standing rule of this Court that affidavits must be 'made on the affiant's personal knowledge.' " *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 630, 538 S.E.2d 601, 618 (2000), *rev. denied*, 353 N.C. 372, —— S.E.2d —— (2001) (quoting *Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972)). Further, if an affidavit contains statements not based on an affiant's personal knowledge, the court should not consider those portions. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998). In the instant case, Suttle submitted statements to the judge for purposes of obtaining the NIO. Under the section describing facts which establish reasonable grounds, the application for the NIO contained the following statement: "Marion Pearson is a black male, slender and muscular, approx. 5'8" tall. Pearson was caught by Lt. James Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1985 around 9:00pm." Both parties concede defendant was not "caught secretly peeping" into an apartment. Suttle, however, testified that he used the phrase because some police officers investigating the second rape "were familiar with that incident in March and they passed it on to us as investigators which is routine that when something major happens that anybody that thinks they might have something of benefit they come to you and tell

you." This Court has held that an officer making an affidavit for issuance of an arrest warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

An NIO, however, does not rise to the protective level of an arrest warrant. It has a lower standard than an arrest or search warrant because it has the limited purpose of being used only as an investigative tool to identify the perpetrator. *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000). Moreover, even if the affidavit did not have the words "secretly peeping," but rather described the "peeping" report combined with the other facts of the incident, we hold it would have still been sufficient to meet the reasonable grounds standard. The trial court found that the misrepresentation was not intentional and was reasonably drawn from the facts stated in Buchanan's report. The trial court concluded reasonable grounds existed. A trial court's conclusions of law will not be overturned if supported by competent evidence. *State v. Pugh*, 138 N.C. App. 60, 530 S.E.2d 328 (2000). We hold there is competent evidence to support this conclusion.

Defendant next argues the State substantially violated sections 15A-279(d), 15A-280 and 15A-282 of the N.C. General Statutes. We disagree.

Section 15A-279(d) entitles a subject of the NIO to have counsel present and if the person cannot afford an attorney, one will be provided. N.C. Gen. Stat. § 15A-279(d) (1999). Section 15A-280 provides that a return must be made to the judge who issued the NIO within ninety days of the procedure. N.C. Gen. Stat. § 15A-280 (1999). Section 15A-282 states that someone who has been the subject of an NIO must be provided with a copy of the results as soon as possible. N.C. Gen. Stat. § 15A-282 (1999). These statutes were in effect when the procedure took place and Suttle admitted he unknowingly violated them. However, evidence may be suppressed only if a statutory violation is substantial. N.C. Gen. Stat. § 15A-974(2) (1999). Factors utilized to examine this are a) the importance of the interest violated; b) the extent of the unlawful deviation; c) the extent to which the violation was willful; and d) the extent to which the exclusion of the evidence will deter future violations of Chapter 15A. *Id.*

First we address defendant's right to counsel. Section 15A-279(d) provides

> Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identifica-

> tion procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

N.C. Gen. Stat. § 15A-279(d). In *State v. Coplen*, the defendant sought to suppress the results of her gunshot residue test by arguing police violated her section 15A-279(d) right to counsel by administering the test without counsel present. *Coplen*, 138 N.C. App. 48, 530 S.E.2d 313, *cert. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000). The *Coplen* Court stated that

> according to the plain language of section 15A-279(d), the provision protects the defendant from having statements made during the nontestimonial identification procedure used against her at trial where counsel was not present during the procedure. . . . [T]he defendant did not seek to suppress statements made during the procedure but instead sought to suppress the results of the test. We conclude that section 15A-279(d) does not afford [the] defendant any relief on the counsel issue.

Id. at 57-58, 530 S.E.2d at 320. Thus, section 15A-279(d) protects subjects complying with an NIO from statements made during the procedure, but does not render the results of the tests themselves inadmissible. Likewise, in the instant case, defendant is not seeking to suppress a statement made during the procedure. He argues that the presence of counsel is important to protect against unreasonable or unnecessary force or unusually long detention. While we agree the presence of counsel may be preferable, there were no allegations of unreasonable force or delay. Consequently, section 15A-279(d) affords defendant no relief. We further note that any failure to remind defendant of his right to counsel does not amount to a substantial violation where the NIO specifically informed defendant of his right to counsel, as is the case here. *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980), *cert. denied*, 488 U.S. 957, 102 L. Ed. 2d 385 (1988).

Next, we address the ninety-day return to the court and notification of defendant. Section 15A-280 provides

> Within 90 days after the nontestimonial identification procedure, a return must be made to the judge who issued the order or to a

> judge designated in the order setting forth an inventory of the products of the nontestimonial identification procedures obtained from the person named in the affidavit. If, at the time of the return, probable cause does not exist to believe that the person has committed the offense named in the affidavit or any other offense, the person named in the affidavit is entitled to move that the authorized judge issue an order directing that the products and reports of the nontestimonial identification procedures, and all copies thereof, be destroyed. The motion must, except for good cause shown, be granted.

N.C. Gen. Stat. § 15A-280. The issue of whether the failure to return an inventory from an NIO procedure to the judge within ninety days is a substantial violation is properly before this Court for the first time. In looking at the factors determining a substantial violation, we find that the interest violated was minimal. We note defendant did not request an inventory or file a motion to have the products and reports of the NIO destroyed. The deviation was unlawful, but as Suttle testified, defendant was present during the procedure and saw what was taken from him. Indeed, Suttle testified defendant removed the hair and saliva himself. If the inventory return had been made, the listing would have eventually been filed simply awaiting any motion by defendant. Additionally, defendant in any event did not have a right to the destruction of the material. He could only motion for its destruction. The judge has clear authority to deny the request upon a finding of "good cause."

The trial court found Suttle's failure to observe the procedural rules was unintentional and concluded there was no substantial violation under section 15A-974(2). Again, a trial court's conclusions of law will not be overturned if supported by competent evidence. *State v. Pugh*, 138 N.C. App. 60, 530 S.E.2d 328 (2000). We therefore hold competent evidence existed to support the trial court's conclusions.

Section 15A-282 provides that "[a] person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available." N.C. Gen. Stat. § 15A-282. In *State v. Daniels*, this Court denied a motion to suppress NIO evidence and held there was no substantial violation where the prosecution took longer than ninety days to give the defendant a copy of the results. *Daniels*, 51 N.C. App. 294, 276 S.E.2d 738 (1981). The defendant was not able to

show he was prejudiced by the delay. In the instant case, we note by the end of that ninety-day period defendant had been arrested for going into an occupied stall in a women's restroom. That incident, the fact the scientific results had not excluded defendant, plus the other evidence collected would have given the judge an adequate basis upon which to find "good cause" to retain the products.

Moreover, in *State v. Dobbins*, 306 N.C. 342, 293 S.E.2d 162 (1982), our Supreme Court held that the return requirement of section 15A-257 "has little, if anything, to do with protecting persons from unreasonable searches and seizures since the search and seizure already will have taken place. *Dobbins*, 306 N.C. at 349, 293 S.E.2d at 166.

In the instant case, defendant was given a copy of the results over twelve years later. However, in order to suppress evidence under 15A-974(2), the evidence obtained must be the result of substantial violations of section 15A-282 and the other aforementioned statutes. N.C. Gen. Stat. § 15A-974(2) (1999). The term "result" indicates a causal relationship, such as a "cause in fact" or a "but-for" relationship between the violation and the acquisition of the evidence. *State v. Hunter*, 305 N.C. 106, 286 S.E.2d 535 (1982). Since we have already held the violations were not substantial, we believe the evidence was not obtained *as a result* of any substantial violation of Chapter 15A. *See State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978). Two of the violated statutes focus on post-procedure policies unrelated to *obtaining* the samples.

Further, the trial court did not err in denying defendant's motion to suppress the NIO evidence based on violations of the statute. We note section 15A-974(1) provides that evidence obtained as a result of a substantial constitutional violation be suppressed *only* if it is required to be suppressed by the constitution. N.C. Gen. Stat. § 15A-974(1) (1999).

Defendant strongly argues, from a public policy standpoint, that it is important for law enforcement to comply with the statute at issue. We agree. The logic in defendant's thesis is sound. The necessity of that compliance is inescapable.

Defendant further contends, however, the violations require suppression of the evidence in order to put law enforcement on notice that it, too, must follow the law as written. Anything less than exclusion, defendant argues, would make the statute meaningless.

We do not intend, in any way, to simply condone the statutory violations. Certainly, the processes set out should have been followed in every detail. At the same time, it is appropriate to not abdicate a close, textual reading of the statutes by divining a technical maze bound by unyielding exclusionary penalties. The combination of factors here results in our agreeing with the trial court that the violations were not substantial.

[2] By his second assignment of error, defendant argues the trial court erred in denying defendant's motion to suppress the NIO because the evidence was not obtained in conformity with the statutorily created, narrowly circumscribed procedures and because there was no probable cause. We disagree.

In *Davis v. Mississippi*, the U.S. Supreme Court observed that the Fourth Amendment would allow seizures for the purpose of obtaining fingerprints, with only reasonable suspicion, if the procedure would allow investigators to establish or negate a suspect's connection with the crime at hand. *Davis*, 394 U.S. 721, 22 L. Ed. 2d 676 (1969), *cert. denied*, 409 U.S. 855, 34 L. Ed. 2d 99 (1972). That case was the basis for the enactment of Article 14 of the N.C. General Statutes. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986). Hence, NIO procedures are authorized by Article 14 of Chapter 15A. The General Statutes, in the Official Commentary, state that

> The [Criminal Code] Commission inserted a number of significant safeguards to accompany this procedure, including the following:
>
> (1) The order must be served at least 72 hours in advance of the time designated for the procedures (unless the judge finds that the nature of the evidence makes it likely that the delay will adversely affect its probative value). § 15A-274.
>
> (2) The person named may seek modification of the time and place designated in the order. § 15A-275.
>
> (3) No one may be detained longer than is necessary to accomplish the procedures. § 15A-279(c).
>
> (4) Extraction of any bodily fluid must be conducted by a qualified member of the health professions; the judge may order medical supervision for any of the other procedures. § 15A-279(a).

(5) No unreasonable or unnecessary force may be used in conducting the procedures. § 15A-279(b).

(6) The person named has the right to have counsel present during any procedures conducted under this section and to have counsel appointed if he cannot afford to retain one. § 15A-279(d). The order must inform the named person of these rights. § 15A-278(5).

(7) No statement made by the named person while the procedures are being conducted may be used in evidence against him unless his attorney was actually present at the time the statement was made. § 15A-279(d).

(8) The subject of the procedures must be given a copy of the results as soon as they are available. § 15A-282.

N.C.G.S.A. Ch. 15A, Subch. II, Art. 14, Refs & Annos. (1999). With the exception of the eighth safeguard, all of these were observed. We have held defendant's not expeditiously receiving the test results did not prejudice him. Consistently, we hold now that although the State failed to comply with all of the safeguards, defendant still has not shown a substantial statutory violation rendering the NIO evidence inadmissible.

Defendant further argues that the taking of pubic hair and saliva samples was without probable cause and abridged the Fourth Amendment of the United States Constitution and Article I, section 20 of the North Carolina Constitution. We disagree.

The Fourth Amendment protects against unreasonable searches and seizures. Article I, section 20 of the North Carolina Constitution provides

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

N.C. Constitution. art. I, § 20. We note that although different language is used, there is no variance between our state search and seizure laws and federal requirements. *State v. Hendricks*, 43 N.C. App. 245, 258 S.E.2d 872 (1979), *cert. denied*, 299 N.C. 123, 262 S.E.2d 6 (1980). In *State v. Carter*, our Supreme Court held that where the police relied on an NIO to take a blood sample from a suspect in cus-

tody, there is no good faith exception to the exclusionary rule and the taking of a blood sample necessitates a search warrant. *Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

In the instant case, the trial court concluded it was error for police to have withdrawn a blood sample from defendant without a search warrant in 1986. Bissette, who performed the lab tests, testified that the 1986 blood sample was not used in determining defendant's guilt. Defendant, however, argues *Carter* should be extended to saliva and hair samples. As we stated earlier, *Davis v. Mississippi* led to the enactment of Article 14 of Chapter 15A. *Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986). In *Davis*, the U.S. Supreme Court allowed twenty-five people to be detained and fingerprinted based on evidence insufficient for an arrest. *Davis*, 394 U.S. 721, 22 L. Ed. 2d 676 (1969). The court in part based its decision on the less-intrusiveness of the search in comparison to a blood sample. *Id. Davis* notes that fingerprinting is a useful tool in determining the identity of the perpetrator and helpful because it is more reliable than eyewitness testimony or confessions. *Id.* at 727-8, 22 L. Ed. 2d at 681.

The taking of saliva and pubic hair is not as intrusive as a blood sample, which must be taken from below the body's surface. Saliva and hair are commonly seen and can be removed by the suspect rather than a technician. They can be quickly and easily removed without pain and, unlike blood removal, there is virtually no risk of medical complications. Moreover, hair and saliva are commonly deposited in public places, as hair sheds and saliva can be left while eating or when someone spits. Blood, on the other hand, is contained and is not commonly seen in public. *Davis* is limited to fingerprints but we note fingerprinting is more tedious than hair and saliva removal. Furthermore, the *Davis* safeguards as to the reasonableness of the sample-taking were adhered to here, including: 1) the evidence would aid in the criminal investigation of a crime already committed; 2) the standard used is less than probable cause; 3) the procedures would not be inconvenient or unexpected to the suspect; and 4) the procedures would be authorized in advance by a judicial official. *Id.*

Accordingly, we hold the taking of hair and saliva samples without a showing of probable cause did not abridge either the North Carolina or United States Constitutions. We further hold the trial court did not err in denying defendant's motion based on constitutional grounds to suppress the evidence resulting from hair and saliva samples.

We note the *amicus curiae* brief argues the DNA testing of defendant's hair and saliva constitutes a search separate from the initial seizure and requires a warrant based on probable cause. That question, however, is not properly before us.

[3] By defendant's third assignment of error, he argues the blood sample and the DNA testing performed on it which resulted from the 23 November 1998 search warrant should have been suppressed under the exclusionary rule. He contends the official's decision to seek the warrant and the judge's decision to issue it was prompted by illegally obtained evidence. We disagree.

As aforementioned, the Constitution of the United States prohibits unlawful searches. U.S. Const. amend. IV. It further prohibits the introduction of derivative evidence that is the product of an unlawful search under the exclusionary rule. *Murray v. United States*, 487 U.S. 533, 101 L. Ed. 2d 472 (1988). Likewise, the North Carolina Constitution forbids unlawful searches. N.C. Const. art. I, § 20.

Suttle applied for a search warrant after Bissette told him another sample could make their results more definitive. The affidavit supporting the search warrant included the following pertinent statements: 1) all of the raped women were white females who lived in apartments; 2) twice the suspect used a "fake" accent; 3) twice the suspect entered through a window; 4) the first victim described the rapist as twenty-five to thirty-five years old and over six feet tall who she believed was an educated white male; 5) second victim described the rapist as a dark-complected, lean male about 5'8"; 6) the rapist stole money from two of the victims; 7) someone called in a "peeping tom" report on 7 March 1985 at the Village Creek Apartments; 8) a black male in a grey or light blue windbreaker was observed squatting next to an air-conditioning unit by Lt. Buchanan; 9) when the male saw Buchanan, he ran away; 10) Buchanan gave chase, but lost the male and radioed for other units to intercept anyone leaving the complex; 11) defendant, wearing a light blue windbreaker, was stopped leaving the complex; 12) defendant denied being behind the apartments and said he had come there to visit a friend who was not home; 13) defendant was taken to the police station for questioning and later charged with driving while his license was revoked; 14) in questioning on 26 November 1985, defendant said he did not know the name of the person he was attempting to visit the night of March 7, just that he was a black male with a light-skinned wife; 15) after the

third rape, when defendant was a primary suspect, Suttle drove to defendant's home and noted that the hood of defendant's car was warmer than other cars in the vicinity; 16) on 18 February 1986, defendant was re-interviewed and after a great deal of debate agreed to provide the police with fingerprints; 17) defendant's son was in the third victim's daycare; 18) the perpetrator knew the third victim's children's names; 19) the samples were taken on 8 April 1986; 20) the second victim had a Negroid pubic hair found on her sweater which exhibited both similarities and dissimilarities when compared to the sample; 21) pubic hair found on the third victim were microscopically consistent with the sample; 22) defendant served two years for entering a women's restroom at Western Piedmont Community College and secret peeping at a woman occupying a stall there by crawling inside; 23) defendant moved to Maryland; 24) defendant was arrested for another peeping offense in Maryland on 28 June 1991; 25) since 1993, defendant has been arrested five times for "peeping tom" related offenses; 26) during the time between the sample-taking and 1998, Agent Suttle waited for technology to improve; 27) only one black person in 34 million would have the same DNA match found in the second victim's vaginal swabs; 28) there was a mix of defendant's and the third victim's blood in the vaginal swabs taken from the third victim; and 29) the blood sample is needed for more definite results.

The request for the search warrant was granted on 23 November 1998. Defendant contends the trial judge relied on improper information when he allowed the search. However, because we have held the evidence obtained from the NIO was not illegally obtained and there was no substantial violation of defendant's rights, we hold the trial judge relied on proper information in allowing the search and thus, there is no constitutional violation.

For the above reasons, we conclude the trial court did not err.

NO ERROR.

Judge MARTIN concurs.

Judge BIGGS dissents.

I respectfully dissent for several reasons.

First, the application for the nontestimonial identification order was facially inadequate, in that it did not establish reasonable grounds to suspect that this defendant had committed the subject

offenses. Special Agent Suttle with the SBI sought a nontestimonial identification order on 28 March 1986. The application presented information about two sexual assaults reported in November, 1985, and in February, 1986. The affidavit in support of the application set forth the following regarding reasonable grounds to suspect that the defendant committed the offenses: that he was "a black male, slender and muscular, approx. 5'8" tall," and that "Pearson was caught by Lt. James Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1895 around 9:00 P.M." However, the evidence in the Record tends to show the following: Three rapes occurred in Morganton between July, 1985 and February, 1986. Interviews with the victims failed to yield a consistent description of the perpetrator, who was variously described by the victims as a tall (over 6') white man, as a short (5'8") medium skinned man, and as a medium height (5'8"-5'10") black man. None of the victims suggested to law enforcement officers that the assailant was a personal acquaintance. The third victim indicated that the assailant knew the names of her children, while the others were total strangers. Thus, the affidavit supporting the application for the nontestimonial identification order relied on allegations that the defendant was the same race and general build as the assailant, and that he had been seen peeping into apartments where one of the assaults had occurred, approximately eight (8) months before the rapes discussed in the application. This information falls far short of providing reasonable grounds to suspect this defendant.

In addition, the affidavit relied on false and misleading information that was knowingly supplied by the State. The trial court found in its order that the statement that the defendant had been "caught secretly peeping" into the Village Creek apartments was "an opinion reasonably drawn" from the investigating officer's report. This finding is not supported by the testimony and evidence. During the suppression hearing, Agent Suttle testified that at the time that he applied for a nontestimonial identification order he knew that: (1) the defendant had not been observed looking into an apartment, much less "secretly peeping," but had been seen squatting near an air conditioning unit; (2) the defendant had provided an explanation for his presence at the apartments, which had been substantially verified; and (3) the incident at the apartments had occurred eight (8) months prior to either of the assaults. Suttle was also aware that a third victim had provided a different description of her assailant, much less like defendant than the two assaults that were discussed in the application. None of this information was included in the affidavit.

If an application for a nontestimonial identification order contains a false statement made intentionally or with reckless disregard for the truth, and without which there would not be reasonable grounds to suspect the defendant, then the nontestimonial identification order must be voided. *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667 (1978) (search warrant that does not establish probable cause absent false statement must be voided); *State v. Steen*, 352 N.C. 227, 536 S.E.2d 1 (2000) (challenge to false statements in search warrant affidavit requires evidence that affiant alleged false fact in bad faith). "A person may not knowingly make a false statement in good faith for the purposes of an affidavit in support of a search warrant." *State v. Severn*, 130 N.C. App. 319, 323, 502 S.E.2d 882, 885 (1998) (search warrant void where affiant stated that he had recovered controlled substances from inside defendant's house, when he actually had found them in trash outside the house). *Compare with State v. Vick*, 130 N.C. App. 207, 502 S.E.2d 871 (1998) (statement in application for search warrant held not intentionally false where officer's affidavit makes it clear that his conclusion was his opinion, inferred from observed facts). If the words "secretly peeping" were removed and the affidavit properly characterized the investigating officer's report, we would be left with this: the defendant was the same race and general size as the assailant described by two of the three victims, and had been seen after dark outside the apartment complex of one victim, some eight months prior to either of the subject offenses. Although the majority opinion sets out other facts that may have been within Agent Suttle's knowledge when he prepared the application for a nontestimonial identification order, they were not included in the affidavit or the application. A nontestimonial identification order may be issued only upon reasonable grounds to suspect the defendant of commission of the felonies under investigation. Our state Supreme Court has stated that "[t]he invasion of a person's body to seize blood, saliva, and hair samples is the most intrusive type of search[.]" *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000). Thus, while a nontestimonial identification order does not rise to the protection level of a search warrant, it must be based upon reasonable grounds. The application for the nontestimonial identification order in question did not provide the trial court with reasonable grounds to support the issuance of an order. Consequently, I believe that the trial judge erred in its denial of the defendant's motion to suppress the evidence obtained from the issuance of the 1986 nontestimonial identification order, which evidence impermissibly tainted the 1998 application for a search warrant.

Finally, the State committed numerous statutory violations, the cumulative effect of which was to deprive the defendant of a fair trial. These include: (1) the application for a nontestimonial identification order did not contain information sufficient to provide reasonable grounds to suspect the defendant, as required by N.C.G.S. § 15A-273(2); (2) the order issued by the court did not state the facts intended to establish reasonable grounds to suspect the defendant, required by N.C.G.S. § 15A-278(4); (3) the defendant was not provided with an attorney to which he had a statutory right under N.C.G.S. § 15A-279(d), *see State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713 (2000) (noting statutory right); (4) the order was not returned to the trial court within 90 days of its issuance, required by N.C.G.S. § 15A-280; (5) an inventory of nontestimonial identification procedures was not submitted to the trial court as required by N.C.G.S. § 15A-280; and (6) the defendant was not provided with a copy of the results of the nontestimonial identification procedures as soon as possible, as required by N.C.G.S. § 15A-282.

The most egregious of these statutory violations was the failure to afford the defendant an attorney during the identification procedures. This is not a case as suggested by the majority where the defendant was simply not *reminded* of his right to counsel. Rather, the defendant specifically asked on more than one occasion for counsel and was denied. The trial judge's findings of fact detailed the defendant's futile attempts to obtain counsel before the identification procedures were performed. The court concluded that the state had committed a substantial violation of statute in failing to provide defendant with counsel upon proper request. The right to counsel is so fundamental that the failure to provide counsel when required by law should be treated seriously.

If an attorney had been provided to defendant as authorized by statute, he or she would have been able to offer professional guidance regarding the defendant's legal rights. That being so, the advice of counsel would likely not be restricted to issues connected with custodial statements of an accused, but would reasonably encompass information on the legal implications of the identification procedures, the legal consequences of making a statement, the defendant's right to a copy of the results, and—most significantly—the defendant's right under N.C.G.S. § 15A-280 to seek the destruction of the products and reports of the nontestimonial procedures. The statute provides that:

> . . . If, at the time of the return [as required within 90 days of the nontestimonial identification procedure], probable cause does not exist to believe that the person has committed the offense named in the affidavit or any other offense, the person named in the affidavit is entitled to move that the authorized judge issue an order directing that the products and reports of the nontestimonial identification procedures, and all copies thereof, be destroyed. The motion must, except for good cause shown, be granted. (emphasis added)

The prejudice from the failure to avail himself of the right to seek destruction of the test results is manifest; *but for* the DNA testing of the samples over ten years after the original issuance of a nontestimonial identification order, there would have been no basis for a prosecution in this case. Although the evidence collected from the defendant pursuant to the nontestimonial identification order may not have been obtained as a result of the violation of the defendant's right to counsel, it is a reasonable conclusion that it likely was retained for over a decade as a result of that violation.

While the majority concluded that each of the violations was not substantial or prejudicial, errors that may not warrant a new trial when considered separately may deprive the defendant of a fair trial when evaluated cumulatively. In this regard, the North Carolina Supreme Court has held:

> Although neither of the trial court's errors, when considered in isolation, might have been sufficiently prejudicial to warrant a new trial, we are of the opinion that cumulatively they are sufficiently prejudicial that we are unable to say that defendant received a fair trial, and therefore a new trial is required.

State v. White, 331 N.C. 604, 610, 611, 419 S.E.2d 557, 561 (1992). *See also State v. Dilldine*, 22 N.C. App. 229, 206 S.E.2d 364 (1974) (cumulative effect of trial errors required new trial).

Even if no single statutory violation was substantial, their cumulative effect was that the defendant was subjected to the taking of hair and saliva samples without the required showing of reasonable grounds to suspect that he had committed the subject offenses; the defendant did not have an attorney present during the identification procedures; the defendant was not sufficiently informed of his rights in this situation, and; the defendant was not provided with the test results in a timely fashion, resulting in the test results and the defend-

ant's hair and saliva being preserved for over a decade, despite the absence of probable cause to charge the defendant with any offense in North Carolina during that time. The effect of the many statutory violations was to deprive the defendant of a fair trial. For these reasons, I believe the trial court erred in denying the defendant's motions to suppress the evidence obtained from the 1986 nontestimonial identification order and the 1998 search warrant. I would reverse and order a new trial.

LAKE MARY LIMITED PARTNERSHIP, PLAINTIFF v. HUGH W. JOHNSTON AND AUDREY S. JOHNSTON, DEFENDANTS

No. COA00-837

(Filed 21 August 2001)

1. Conversion— sale of shopping center—deposit of rental checks—unauthorized assumption of right of ownership

The trial court did not err by granting plaintiff's motion for a directed verdict on a conversion claim arising out of the sale of a shopping center when defendant husband intentionally deposited rental checks belonging to plaintiff after plaintiff purchased all of defendants' right, title, and interest in all leases on the pertinent property, because: (1) defendant's conduct shows an unauthorized assumption of the right of ownership over checks to which another was entitled; and (2) interest was appropriately awarded from the date each check was converted when the trial court directed verdicts in favor of plaintiff for breach of contract and conversion, N.C.G.S. § 24-5(a).

2. Unfair Trade Practices— sale of shopping center—taking of tenant rent checks—inequitable assertion of power and position

The trial court did not err by granting plaintiff's motion for a directed verdict on an unfair and deceptive practices claim under N.C.G.S. § 75-1.1 arising out of the sale of a shopping center when defendant husband intentionally deposited rental checks belonging to plaintiff after plaintiff purchased all of defendants' right, title, and interest in all leases on the pertinent property, because: (1) defendant engaged in deceptive activity when he breached the contract with plaintiff by retaining tenant rent checks intended

for plaintiff, knowing that plaintiff owed defendant nothing at the time, and defendant never notified the tenants to stop sending him the rent checks; (2) defendant continued to use the name and letterhead for the pertinent property after closing; and (3) defendant admittedly kept the checks to secure the performance of future contractual obligations by plaintiff, which amounted to an inequitable assertion of his power and position.

3. Vendor and Purchaser— sale of shopping center–tax reimbursements—method of calculation

The trial court did not err by ruling as a matter of law that plaintiff's calculation of tax reimbursements arising out of the sale of a shopping center was reasonable and plaintiff was not obligated to follow the method previously used by defendants, because the parties' contract was silent and imposed no obligation as to how tax reimbursements were to be calculated, nor did it state that plaintiff had to follow defendants' method of calculation.

4. Vendor and Purchaser— sale of shopping center—closing date—entitlement to rental payments

The trial court did not err by ruling as a matter of law that the closing of the sale of a shopping center took place on 31 October 1997 and defendants were not entitled to any rental payments after that date, because plaintiff moved that the pleadings be amended to conform to the evidence, the trial court allowed the claim, and defendants failed to show any abuse of discretion by the court.

5. Vendor and Purchaser— sale of real property–breach of contract—motion for directed verdict

The trial court did not err by denying plaintiff purchaser's motion for a directed verdict on defendant sellers' breach of contract claims arising out of the sale of a shopping center, because there was more than a scintilla of evidence supporting each element of the claim when: (1) plaintiff admits that after the closing, it did not attempt to collect charges relating to the period defendants owned the pertinent property as required by the contract; (2) plaintiff admits it was unable to meet the tax reimbursements schedule and did not bill the tenants in a timely manner; and (3) the issue of whether plaintiff's actions constituted a breach of the agreement and whether the alleged breach was material were issues of fact to be determined by the jury.

6. Husband and Wife— sale of shopping center–breach of contract—agency of husband for wife

The trial court erred by granting a directed verdict in favor of defendant wife as to plaintiff's breach of contract claim arising out of the sale of a shopping center, because defendant was receiving a benefit from the contract, and her husband was acting as her agent when he negotiated the contract.

7. Unfair Trade Practices— sale of shopping center—agency of husband for wife

The trial court erred by granting a directed verdict in favor of defendant wife as to plaintiff's unfair and deceptive practices claim arising out of the sale of a shopping center, because: (1) a wife who commits no acts of misrepresentation or fraud in a real estate transaction can be held liable on a plaintiff's claim for unfair and deceptive trade practices for acts of her husband determined to be her agent; and (2) there was sufficient evidence from which the jury could infer that defendant's husband acted as the agent of his wife.

8. Conversion— sale of shopping center—husband not agent for wife

The trial court did not err by granting a directed verdict in favor of defendant wife as to plaintiff's conversion claim arising out of the sale of real property, based on the fact that a husband is not the agent of his wife merely because of the marital relationship, and neither a husband or wife is ordinarily responsible for the torts of the other.

9. Setoff and Recoupment— sale of shopping center—counterclaims—single net judgment—abuse of discretion standard

The trial court did not err by failing to grant plaintiff's request to treat defendants' counterclaims arising out of the sale of a shopping center as setoffs to the claims of plaintiff and by not entering a single net judgment, because: (1) N.C.G.S. § 1A-1, Rule 13(c) provides that a counterclaim may or may not diminish or defeat the recovery sought by the opposing party; (2) the mere fact that mutual judgments exist generally does not entitle a party to have one set off against the other as a matter of right; and (3) plaintiff has failed to show any abuse of discretion by the trial court in not ordering a setoff.

10. Costs— attorney fees—contract for sale of shopping center

The trial court did not err by denying plaintiff's motion for attorney fees even though the parties provided in their purchase and sale agreement arising out of the sale of a shopping center that the party prevailing in a suit to enforce the agreement is entitled to recover reasonable attorney fees, because: (1) contractual provisions in North Carolina for attorney fees are invalid in the absence of statutory authority; (2) there is no basis in North Carolina law for the allowance of attorney fees in a dispute arising out of a contract for the sale of real property; and (3) plaintiff has failed to show an abuse of discretion by the trial court in failing to award attorney fees under N.C.G.S. § 75-16.1.

Appeal by plaintiff and defendants from judgment entered 17 November 1999 by Judge Raymond A. Warren in Gaston County Superior Court. Heard in the Court of Appeals 17 May 2001.

Tuggle Duggins & Meschan, P.A., by Kenneth J. Gumbiner, J. Reed Johnston, Jr. and Amanda L. Fields, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Parmele Calame and Cecil Harrison; James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr. and Fred B. Monroe, for defendant-appellants.

HUNTER, Judge.

Plaintiff Lake Mary Limited Partnership ("Lake Mary"), and defendants Hugh and Audrey Johnston (hereinafter, collectively "the Johnstons") appeal from the trial court's judgment on Lake Mary's breach of contract, conversion, and unfair and deceptive practices claims against the Johnstons, on the Johnstons' breach of contract counterclaim against Lake Mary, and denying both parties' motions for attorney fees. After a careful review of the record, briefs, and argument of counsel, we affirm the judgment in part; and we reverse and remand in part as to the directed verdict in Audrey Johnston's favor barring Lake Mary's claims of breach of contract and unfair and deceptive practices against her.

This matter arises out of Hugh and Audrey Johnstons' (husband and wife, respectively) sale of Dixie Village Shopping Center ("Dixie Village"), located in Gastonia, North Carolina, to Equity Investment Group, L.L.C. ("Equity"). On 12 August 1997, the parties entered into

a purchase and sale agreement, whereby the Johnstons agreed to sell Dixie Village for $6,250,000.00 (later reduced to $6,080,000.00) to Equity, which subsequently transferred its contractual rights to Lake Mary. Thereafter, on 31 October 1997, the closing on Dixie Village took place at the Johnstons' attorney's office. Pursuant to the purchase and sale agreement, the Johnstons had the obligation at closing to deliver to Lake Mary "[e]xecuted copies of a notice to tenants relating to the Assignment of Leases to [Lake Mary] and a general direction relating to the payment of rent . . . ." However, the Johnstons did not provide the tenant notice letter.

At approximately 3:00 p.m. on 31 October, the parties came to a final agreement, and Lake Mary notified Commonwealth Land Title Company of North Carolina—the company handling all the title work and document recording for Dixie Village—to disburse $1,250,000.00 to the Johnstons' attorney's trust account. Since the funds were not transferred before 2:00 p.m., the funds could not be credited to the Johnstons' attorney's trust account until the next business day, 3 November 1997. On 3 November, the Johnstons' attorney withdrew the $1,250,000.00 from his trust account and issued checks to the Johnstons for $450,000.00 and $800,000.00.

After the closing on the property, Hugh Johnston became concerned that Lake Mary would not fulfill its post-closing obligations. Thus, he kept November, December, and January rent checks that he received from the tenants of Dixie Village. In all, Hugh Johnston kept thirty-two tenant rent checks, totaling approximately $96,624.16, and he deposited these checks into an account that he previously used for Dixie Village business (Hugh Johnston transferred the funds to his attorney to hold in trust; however, his attorney later returned the funds back to him). As a result of Hugh Johnston's taking of the tenant rent checks, Lake Mary refused to fulfill some of its post-closing obligations under the purchase and sale agreement, including (1) reimbursing the Johnstons for overage rent (several Dixie Village tenants had leases which computed a portion of their rent obligation to a percentage of sales) for Dixie Village tenants Goodwill and Radio Shack, (2) billing and collecting tax reimbursements from Dixie Village tenants and reimbursing the Johnstons, and (3) billing and collecting common area maintenance (CAM) charges (a pro-rata share of the expenses incurred by the landlord in maintaining the shopping center) from Dixie Village tenants and forwarding them to the Johnstons.

On 4 March 1998, Lake Mary instituted this action against the Johnstons alleging conversion, breach of contract, and unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1 (1999), arising from the retention of the tenant rent checks, failure to provide the tenant notice letter, and use of the Dixie Village name and letterhead after closing. Subsequently, the Johnstons answered, and asserted a counterclaim for breach of contract, *inter alia*, against Lake Mary, arising from its failure to fulfill its post-closing obligations.

At the conclusion of all the evidence at trial, upon the motion of the parties, the trial court (1) granted a directed verdict in favor of Audrey Johnston and against Lake Mary as to its breach of contract, conversion, and unfair and deceptive practices claims arising from the retention of tenant rent checks, (2) granted a directed verdict in favor of Lake Mary and against Hugh Johnston for conversion, breach of contract, and unfair and deceptive practices arising from the retention of tenant rent checks, (3) awarded Lake Mary $96,624.16 in compensatory damages from Hugh Johnston, with interest to run from the date the checks were deposited or converted, for his conversion and breach of contract, and (4) granted a directed verdict in favor of Lake Mary and against Hugh Johnston for breach of contract arising from his use of the Dixie Village name and letterhead after closing. Additionally, the trial court ruled as a matter of law that (1) the method used by Lake Mary to calculate the pro-rata share of taxes due from each tenant was acceptable under the contract, (2) the closing of the sale of Dixie Village took place on 31 October 1997, and the Johnstons were not entitled to any rental payments after that date, (3) the Johnstons were entitled to judgment in the amount of $1,086.00 plus interest for overage rent collected from Dixie Village tenant Radio Shack, and (4) the Johnstons were due a tax refund for overpayment of property taxes from Lake Mary in the amount of $3,855.46 plus interest.

After issuing its directed verdicts and various rulings, the trial court submitted nine issues to the jury. Then, after the jury returned with its verdict, the trial court, based on its directed verdict rulings, rulings as a matter of law, and the jury's verdict, entered judgment (1) in favor of Lake Mary and against the Johnstons, jointly and severally, in the amount of $5,100.00 plus interest for breach of contract arising from their failure to provide a tenant notice letter to Lake Mary at closing, (2) in favor of Lake Mary and against Hugh Johnston in the amount of $289,875.48 ($96,625.16 trebled as per N.C. Gen. Stat. § 75-16 (1999)) plus interest for his unfair and deceptive practices, (3)

in favor of the Johnstons and against Lake Mary in the amount of $68,224.70 ($52,123.94 for failure to bill and collect tax reimbursements; $6,144.64 for failure to bill, collect, and forward CAM charges; $5,014.10 for overage rent for Goodwill; $3,855.46 tax refund for overpayment of property taxes; $1,086.00 for overage rent for Radio Shack; and $1.00 for Hugh Johnston's use of the Dixie Village name) plus interest for Lake Mary's breach of contract, and (4) denying both parties' motions for attorney fees. All of the parties subsequently moved for a judgment notwithstanding the verdict (JNOV), which motions were denied by the trial court. Both Lake Mary and the Johnstons now appeal.

In the Johnstons' first and second assignments of error, Hugh Johnston contends that the trial court committed reversible error by granting Lake Mary's motion for a directed verdict for conversion and unfair and deceptive practices against him. We disagree.

It is well-settled that:

> A motion for directed verdict tests the sufficiency of the evidence to take the case to the jury. In making its determination of whether to grant the motion, the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. . . .

Abels v. Renfro Corp., 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993) (citations omitted). "A directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish." *Beam v. Kerlee*, 120 N.C. App. 203, 210, 461 S.E.2d 911, 917 (1995). Likewise, "[a] JNOV motion constitutes renewal of an earlier motion for directed verdict, and similarly tests the legal sufficiency of the evidence to take the case to the jury." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). "[T]he test for determining sufficiency of the evidence is the same under both motions." *Id.*

[1] First, Hugh Johnston challenges the trial court's grant of a directed verdict against him for conversion. "The tort of conversion is well defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d

351, 353 (1956) (quoting 89 C.J.S., Trover & Conversion, sec. 1). Moreover:

> "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act." 89 C.J.S. Trover and Conversion § 3, pp. 533-34. "[T]he general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property." 18 Am. Jur. 2d, Conversion, § 1, p. 158. It is clear then that two essential elements are necessary in a complaint for conversion—there must be ownership in the plaintiff and a wrongful conversion by defendant. *Wall v. Colvard, Inc.*, [268 N.C. 43, 149 S.E.2d 559 (1966)]; *Vinson v. Knight*, 137 N.C. 408, 49 S.E. 891 (1905).

Gallimore v. Sink, 27 N.C. App. 65, 67, 218 S.E.2d 181, 183 (1975).

In the present case, according to the purchase and sale agreement, Lake Mary purchased all of the Johnstons' "right, title and interest in and to all leases . . . affecting the Property," which would necessarily include the right to all tenant rent checks received after the closing date. Thereafter, Hugh Johnston intentionally deposited checks received from Dixie Village tenants, for their November, December, and January rents, into an account that he previously used for Dixie Village business. Hugh Johnston admitted that these rent checks belonged to Lake Mary, thus, he had no ownership interest in them. The evidence further shows that Hugh Johnston had an obligation to forward these checks to Lake Mary. Consequently, we conclude that Hugh Johnston's conduct shows an unauthorized assumption of the right of ownership over checks to which another was entitled sufficient to support the trial court's directed verdict against him for conversion.

Incidentally, Hugh Johnston, relying on N.C. Gen. Stat. § 24-5(b) (1999), argues that the trial court erred in awarding interest from the date each check was "converted," as opposed to the date the complaint was filed. However, the trial court directed verdicts against Hugh Johnston for *breach of contract* and conversion arising from his retention of the rent checks. Pursuant to N.C. Gen. Stat. § 24-5(a), "[i]n an action for breach of contract . . . the amount awarded on the contract bears interest from the date of breach." Here, the breach occurred on the dates that Hugh Johnston deposited or

converted each check. Therefore, Hugh Johnston's argument is without merit.

[2] Secondly, Hugh Johnston contends the trial court erred in granting a directed verdict against him for unfair and deceptive practices, in violation of N.C. Gen. Stat. § 75-1.1. "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000).

"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Furthermore, "[a] practice is deceptive if it 'possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception.' " *Poor v. Hill*, 138 N.C. App. 19, 28-29, 530 S.E.2d 838, 845 (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). "A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Johnson v. Insurance Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Generally, "whether a practice is unfair or deceptive is . . . dependent upon the facts of each case." *Moretz v. Miller*, 126 N.C. App. 514, 518, 486 S.E.2d 85, 88 (1997). Ultimately, "[t]he determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court." *Gray*, 352 N.C. 61, 68, 529 S.E.2d 676, 681.

"[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." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992). Moreover, actions for unfair or deceptive practices are ordinarily distinct from actions for breach of contract. *See Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998), *affirmed*, 350 N.C. 90, 511 S.E.2d 304 (1999). However, aggravating circumstances can elevate a breach of contract into an unfair and deceptive practice if the conduct of the breaching party is deceptive. *See Poor*, 138 N.C. App. 19, 28, 530 S.E.2d 838, 844-45.

Viewing the evidence in the light most favorable to Hugh Johnston, the evidence in this case is sufficient to support an unfair

and deceptive practices claim. First and foremost, Hugh Johnston engaged in deceptive activity. He breached the contract with Lake Mary by retaining tenant rent checks intended for Lake Mary, knowing that Lake Mary owed him nothing at the time; he never notified the Dixie Village tenants to stop sending him the rent checks; and he continued to use the Dixie Village name and letterhead after closing. Second, Hugh Johnston admittedly kept the checks to secure the performance of future contractual obligations by Lake Mary, which amounted to an inequitable assertion of his power and position. We note that Hugh Johnston contends that he retained the checks in good faith; however, "[g]ood faith is not a defense to an alleged violation of N.C.G.S. § 75-1.1." *Gray*, 352 N.C. 61, 68, 529 S.E.2d 676, 681. Thus, the trial court did not err in granting a directed verdict against Hugh Johnston for his unfair and deceptive practices. Accordingly, we find no error in the trial court's directed verdicts against Hugh Johnston arising from his taking of the tenant rent checks.

Next, the Johnstons assign error to two of the trial court's rulings associated with its granting of the directed verdicts. Specifically, the Johnstons contend that the trial court erred in ruling as a matter of law that (1) Lake Mary's calculation of tax reimbursements was reasonable and Lake Mary was not obligated to follow the method previously used by the Johnstons, and (2) the closing of the sale of Dixie Village took place on 31 October 1997, and the Johnstons were not entitled to any rental payments after that date. Again, we disagree with the Johnstons' argument.

[3] First, the Johnstons argue that under the contract Lake Mary was obligated to follow the Johnstons' previous method of billing tenants for tax reimbursements. "The court is to interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law." *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209, *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). After a careful review of the purchase and sale agreement, we find that the contract was silent and imposed no obligation as to how tax reimbursements were to be calculated, or that Lake Mary had to follow the Johnstons' method of calculation. Viewing the evidence in the light most favorable to the Johnstons, competent evidence of record supports the trial court's ruling "as a matter of law that the method

used by [Lake Mary] to calculate the prorata share of taxes due from each tenant was acceptable under the contract between the parties and the prevailing law."

[4] Second, the Johnstons argue that the trial court erred in determining that they were not entitled to an additional one-day rent proration for 31 October 1997. At closing, rent was prorated with Lake Mary receiving credit for one-day's rent, 31 October. Thereafter, in its complaint, Lake Mary alleged that the Johnstons were entitled to rent for the entire month of October. Then, at the conclusion of all of the evidence in the trial, the Johnstons argued that they were entitled to the rent for 31 October, claiming judicial admission by Lake Mary. As a result, Lake Mary moved that the pleadings be amended to conform to the evidence, and the trial court allowed the claim and denied the Johnstons' request.

"Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the trial court and is accorded great deference." *North River Ins. Co. v. Young*, 117 N.C. App. 663, 670, 453 S.E.2d 205, 210 (1995). "While such amendment of pleadings may be made, even late in the trial or after judgment, in order to conform the pleadings to the evidence . . . the trial court's ruling upon such a motion is not reviewable absent an abuse of discretion." *Mosley & Mosley Builders v. Landin, Ltd.*, 87 N.C. App. 438, 447, 361 S.E.2d 608, 614 (1987). Evidence of record supports the trial court's ruling, and the Johnstons have failed to show any abuse of discretion by the court. Thus, we find no error in the trial court's ruling "as a matter of law that the closing of the sale of the Dixie Village Shopping Center took place on October 31, 1997 and that the [Johnstons] were not entitled to any rental payments after that date." In sum, after viewing all of the evidence in the light most favorable to the Johnstons, we hold that competent evidence of record supports each of the trial court's rulings associated with its grants of directed verdicts. Hence, this assignment is overruled.

Finally, as to the Johnstons' fourth, fifth, seventh, eighth, and ninth assignments of error in their brief, they have failed to cite any legal authority for their arguments. Where a party fails to cite any authority in his brief in support of his argument, the assignment of error upon which that argument is based will be deemed abandoned. N.C.R. App. P. 28(b)(5); *see also State v. Thompson*, 110 N.C. App. 217, 429 S.E.2d 590 (1993). Nevertheless, having reviewed these arguments, we find no merit in the Johnstons' assignments.

[5] Now, we turn to Lake Mary's cross-appeal. Under its first assignment of error, Lake Mary contends that the trial court committed reversible error by denying its motion for a directed verdict as to the Johnstons' breach of contract claims against it. We disagree.

We note that, "[i]f there is more than a scintilla of evidence supporting each element of the non-movant's claim, the motion [for a directed verdict or JNOV] should be denied." *Poor*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843; *see also Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825. "Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998). "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843.

In this case, the purchase and sale agreement provided that:

> All *rents*, income, utilities and *all other operating expenses* with respect to the Property . . . and real estate and personal property taxes and other assessments with respect to the Property . . . shall be prorated as of the date of Closing. . . . Subsequent to the Closing, if any *rents* for the month of closing, or for prior rental periods, are actually received by [Lake Mary], immediately upon its receipt of such rents, [Lake Mary] shall pay to the [Johnstons] its proportionate share thereof for such month. [Lake Mary] shall make a good faith effort and attempt to collect any such rents not apportioned at the Closing, for the benefit of [the Johnstons] but [Lake Mary] shall not be required to bring suit, default a tenant or incur expenses in connection therewith. Tax reimbursement amounts and other reimbursables, *common area maintenance charges* and percentage rents shall be prorated as of the closing date for the applicable periods and adjusted between the parties when received.

(Emphasis added.) Additionally, Dixie Village tenant leases specifically categorized CAM charges as rents. It is undisputed that Lake Mary failed to meet these obligations. In fact, as to the CAM charges, Lake Mary admits in its brief that "[a]fter the closing, [it] did not attempt to collect, and did not collect, CAM charges relating to the period the Johnstons owned Dixie Village." Then as to the tax reimbursements, Lake Mary admits it "was unable to meet this schedule

and did not bill the tenants until early January and did not collect most of the reimbursements until February." Thus, there was more than a scintilla of evidence supporting each element of the Johnstons' breach of contract claim, and the motion for a directed verdict and JNOV were properly denied.

However, Lake Mary argues that since the Johnstons materially breached the contract, it was legally excused from performing any subsequent duties under the contract.

> The general rule governing bilateral contracts requires that if either party to the contract commits a material breach of the contract, the other party should be excused from the obligation to perform further. . . .
>
> Failure to perform an independent promise does not excuse nonperformance on the part of the other party. . . .

Coleman v. Shirlen, 53 N.C. App. 573, 577-78, 281 S.E.2d 431, 434 (1981). Whether Lake Mary's actions in the present case constituted a breach of the agreement, and whether the alleged breach was material, was an issue of fact that should have been determined by the jury. *See id.* Hence, the trial court did not err in denying Lake Mary's motion for a directed verdict on the Johnstons' breach of contract claim, and properly submitted the issue to the jury for determination.

In its next assignment of error, Lake Mary contends that the trial court committed reversible error by granting a directed verdict in Audrey Johnston's favor as to Lake Mary's breach of contract, conversion, and unfair and deceptive practices claims arising from the retention of tenant rent checks. After a careful review, we find no error in the trial court's directed verdict as to conversion; however, we reverse as to breach of contract and unfair and deceptive practices.

Again, "[a] directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish." *Beam v. Kerlee*, 120 N.C. App. 203, 210, 461 S.E.2d 911, 917. Here, Dixie Village was owned by Hugh and Audrey Johnston, husband and wife, as tenants in the entireties. The evidence further showed that Audrey Johnston attended the closing for Dixie Village; she was a party to the contract, evidenced by her signing the purchase and sale agreement; she received benefits under the contract (the purchase

price was used to discharge the debts of both her and her husband on jointly held property); she sued Lake Mary for breach of contract; she recovered for breach of contract pursuant to the trial court's judgment; and Hugh Johnston retained the tenant rent checks, in violation of the purchase and sale agreement, and placed them in a checking account previously used for Dixie Village business.

"No presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife. There must be proof of the agency." *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 173, 84 S.E.2d 828, 831 (1954). Nevertheless, "agency of the husband for his wife may be 'shown by evidence of facts and circumstances which authorize a reasonable inference that he was authorized to act for her.' " *Douglas v. Doub*, 95 N.C. App. 505, 513, 383 S.E.2d 423, 427 (1989) (quoting *Passmore v. Woodard*, 37 N.C. App. 535, 540, 246 S.E.2d 795, 800 (1978)).

[6] Regarding Lake Mary's breach of contract claim against Audrey Johnston, "[a] wife's retention of benefits from a contract negotiated by the husband is a factual circumstance giving rise to an inference that the husband was authorized to act for her under the contract." *Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999). "Only ' "slight evidence of the agency of the husband for the wife is sufficient to charge her where she receives, retains, and enjoys the benefit of the contract[]" ' negotiated by her husband." *Boyd v. Drum*, 129 N.C. App. 586, 591, 501 S.E.2d 91, 96 (quoting *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284 (1964)). If a wife "was a party to the contract, . . . she is liable for damages caused by the breach of that contract." *Coley v. Eudy*, 51 N.C. App. 310, 315, 276 S.E.2d 462, 466 (1981). Thus, as the evidence tended to show that Audrey Johnston, wife, was receiving a benefit from the contract and Hugh Johnston, husband, was acting as her agent, the trial court's directed verdict in favor of Audrey Johnston as to breach of contract was improper.

[7] Likewise, as to Lake Mary's unfair and deceptive practices claim against Audrey Johnston, a wife who commits no acts of misrepresentation or fraud in a real estate transaction can be held liable on a plaintiff's claims for unfair and deceptive practices for acts of her husband determined to be her agent. *See Lee v. Keck*, 68 N.C. App. 320, 324-25, 315 S.E.2d 323, 327 (1984); *see also Poor v. Hill*, *supra*. Moreover, in an unfair and deceptive practices action,

> [w]here evidence of an agency relationship has been presented, agency becomes a fact to be proved and a question for the jury . . . and a directed verdict would be proper only if "there [wa]s no evidence presented tending to establish an agency relationship," *Smith v. VonCannon*, 17 N.C. App. 438, 439, 194 S.E.2d 362, 363, *aff'd*, 283 N.C. 656, 197 S.E.2d 524 (1973).

Poor, 138 N.C. App. at 31-32, 530 S.E.2d at 846.

Since there was sufficient evidence from which the jury could infer that Hugh Johnston, husband, acted as the agent of Audrey Johnston, wife, the trial court should not have granted a directed verdict on the unfair and deceptive practices claim. While Audrey Johnston claims that she had no knowledge of her husband's actions regarding the tenant rent checks, "[t]he fact that the 'principal did not know or authorize the commission of the fraudulent acts' is immaterial." *Douglas v. Doub*, 95 N.C. App. 505, 513, 383 S.E.2d 423, 427 (quoting *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284). Accordingly, we reverse the trial court's entry of directed verdicts in favor of Audrey Johnston on Lake Mary's breach of contract and unfair and deceptive practices claims.

[8] Conversely, we note that conversion is a tort. "A husband is not the agent of his wife merely because of the marital relationship and neither a husband or wife is ordinarily responsible for the torts of the other." *Shoe v. Hood*, 251 N.C. 719, 724, 112 S.E.2d 543, 548 (1960); see also N.C. Gen. Stat. § 52-12 (1999) ("[n]o married person shall be liable for damages accruing from any tort committed by his or her spouse"). In light of *Shoe* and § 52-12, the trial court's directed verdict in Audrey Johnston's favor as to conversion was properly granted.

[9] Next, Lake Mary assigns error to the trial court's failure to enter a set off or net judgment. Particularly, Lake Mary argues that the trial court erred in not granting its request to treat the claims of the Johnstons as set offs to the claims of Lake Mary, and by not entering a single net judgment. However, we find no error.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 13(c) (1999), "[a] counterclaim may or *may not* diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." (Emphasis added.) "[T]he rule permits a court to set off judgments by way of claim and counterclaim against each other so that only a net recovery accrues to the prevailing party." 1 G. Gray Wilson, *North*

Carolina Civil Procedure § 13-7, at 266 (2d ed. 1995). However, "[t]he mere fact that mutual judgments exist generally does not entitle a party to have one set off against the other as a matter of right." 47 Am. Jur. 2d *Judgments* § 1031 (1995). In fact:

> The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. A set-off is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court. Therefore, such motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised.

Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425-26 (2000) (citations omitted). Lake Mary has failed to show any abuse of discretion by the trial court in not ordering a set off, therefore, we find no error in the trial court's judgment.

[10] Finally, Lake Mary assigns error to the trial court's denial of its motion for attorney fees. Nonetheless, we affirm the trial court's ruling.

In the present action, the parties provided in the purchase and sale agreement that "[i]n the event it becomes necessary for either party . . . to file suit to enforce [the] Agreement or any provision contained [t]herein, the party prevailing in such suit shall be entitled to recover . . . reasonable attorneys' fees . . . ." Then, at the conclusion of the trial, Lake Mary made a motion for attorney fees pursuant to the contract and N.C. Gen. Stat. § 75-16.1 (1999). Ultimately, the trial court denied the motion.

In North Carolina, " '[a]s a general rule[,] contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court . . . .' " *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 167, 510 S.E.2d 690, 695, *disc. review denied and dismissed*, 350 N.C. 379, 536 S.E.2d 70 (1999) (quoting *Forsyth Municipal ABC Board v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502 (1994)); *see also Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 143 N.C. App. 1, 11-12, 545 S.E.2d 745, 752 (2001).

Therefore, based on the law of this state, the contractual provision alone is insufficient to allow the awarding of attorney fees. In

fact, "we know of no basis in North Carolina law for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property, as is involved in this case." *Forsyth Municipal ABC Board v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502. Nevertheless, § 75-16.1 provides statutory authority for attorney fees under an unfair and deceptive practices claim. However, "[a]ward or denial of attorney fees under [§] 75-16.1 is a matter within the sole discretion of the trial judge." *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987). Again, Lake Mary has failed to show any abuse of discretion by the trial court, thus we conclude the trial court denied the motion for attorney fees within its discretion. Hence, this assignment is rejected.

In the record, the Johnstons and Lake Mary preserve additional assignments of error. However, as they fail to argue them in their briefs, we deem those not argued abandoned. N.C.R. App. P. 28(b)(5).

In sum, we affirm the trial court's rulings as against Hugh Johnston and Lake Mary; however, we reverse the trial court's directed verdicts in favor of Audrey Johnston for breach of contract and unfair and deceptive practices arising from the retention of the tenant rent checks and remand for a new trial on those claims.

Affirmed in part; reversed and remanded in part.

Judges MARTIN and JOHN concur.

STATE OF NORTH CAROLINA v. HOWARD EUGENE SAFRIT

No. COA00-375

(Filed 21 August 2001)

1. Evidence— excited utterance—25 minutes after assault—clear motive for fabrication

The trial court did not err in an assault prosecution in which defendant argued self-defense by excluding statements defendant made to his sister 25 minutes after the altercation where defendant contended that the statements fell within the excited

utterance exception to the hearsay rule, but the circumstances, coupled with defendant's clear motive for fabrication, indicate a lapse of time sufficient to allow manufacture of a statement and show that defendant's statements to his sister lacked sufficient spontaneity.

2. Evidence— recorded exculpatory statement–testimony about subsequent statement–door not opened

The State did not "open the door" to the admission of defendant's recorded exculpatory statement to a deputy in a prosecution for felonious assault and armed robbery when it elicited testimony from the deputy that he and defendant had a conversation at the conclusion of defendant's recorded interview during which defendant mentioned having a head injury and asked the deputy to look at it because defendant's remarks to the deputy about his head injury constituted a separate verbal transaction from defendant's prior recorded statement, and the State did not attempt to offer into evidence any portion of defendant's recorded statement or any testimony concerning its contents.

3. Sentencing–violent habitual felon— prior violent habitual felon prosecution—same felonies—collateral estoppel

The trial court erred by denying defendant's motion to dismiss a violent habitual felon indictment where another jury in a previous prosecution had found defendant not guilty of being a violent habitual felon based on the same two alleged prior violent felony convictions. The issue to be determined in this case was raised and litigated in the prior action, it was material and relevant to the disposition of the prior action, it was necessary and essential to the jury's not guilty verdict in that action, and the State was collaterally estopped.

Appeal by defendant from judgment and commitment entered 7 October 1999 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 27 March 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth J. Weese, for the State.

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

CAMPBELL, Judge.

On 12 January 1998, Howard Eugene Safrit ("defendant") was indicted on one count of assault with a deadly weapon with intent to kill inflicting serious injury ("97 CRS 15635"), and one count of robbery with a dangerous weapon ("97 CRS 15636"), arising from an altercation with Tyrone Miller that occurred in the early morning hours of 15 November 1997. On 18 May 1998, defendant was charged in a separate indictment ("98 CRS 6730") with being a violent habitual felon, based on alleged prior convictions of armed robbery in 1973, and assault with a deadly weapon inflicting serious injury in 1977. On 7 October 1999, defendant was found guilty of assault with a deadly weapon inflicting serious injury, a lesser included offense of the principal charge in 97 CRS 15635. Defendant was found not guilty of robbery with a dangerous weapon. After the jury's verdict in 97 CRS 15635 was returned, argument was heard on defendant's motion to dismiss the violent habitual felon indictment in 98 CRS 6730 on the grounds that the State was precluded from relitigating the allegations contained in the indictment because defendant had earlier been found not guilty of being a violent habitual felon based on the same two alleged prior violent felony convictions. This motion was denied by the trial court, and defendant was subsequently convicted of being a violent habitual felon. Pursuant to N.C. Gen. Stat. § 14-7.12, defendant was sentenced to life imprisonment without parole. Defendant appeals both the underlying felony assault conviction in 97 CRS 15635, and his conviction of being a violent habitual felon. We find no error in defendant's conviction in 97 CRS 15635. However, we do find that the trial court erred in denying defendant's motion to dismiss the violent habitual felon indictment in 98 CRS 6730, and, therefore, we reverse defendant's conviction of violent habitual felon status and remand for a new sentencing hearing in 97 CRS 15635.

The State's evidence at trial tended to show that on the evening of 14 November 1997, defendant and his wife, Lisa Safrit ("Lisa"), visited the home of Tyrone and Susan Miller ("Susan") and asked Tyrone Miller ("Miller") if he would purchase some cocaine for them. During the previous month, Miller had purchased cocaine for defendant on three or four separate occasions. Miller agreed to buy defendant some cocaine, and when Miller returned with the cocaine, defendant and Lisa took it and left the Miller house. An hour or two later, defendant and Lisa returned to the Miller residence seeking more cocaine. Miller invited the couple in and again went to purchase

cocaine for them. After Miller returned this second time, he and defendant began smoking cocaine and playing cards. Later in the evening, defendant and Lisa again went home to get more money. Defendant later returned to the Miller residence with Rick, one of defendant's friends. Defendant and Miller resumed playing cards and continued playing into the early morning hours of 15 November 1997.

At some point in the evening, the two men began playing cards for money and cocaine. Miller eventually won all of defendant's money, as well as all of his cocaine. When Miller decided he was ready for bed, defendant and Rick got up to leave. Rick started out the door, followed by defendant and Miller. Miller's wife, Susan, was standing near the door. As defendant was walking out the door, Miller turned to see if his money was still on the table, at which time Miller felt a stab in the lower right back. Miller turned back around, saw a knife in defendant's right hand, and began fighting with defendant. Defendant attempted to stab Susan, causing Susan to run into the back room. She was pursued by Rick. Miller heard Susan scream from the back room, got up to assist her, and then was stabbed in the lower left back by defendant. Miller then ran to the back room towards Rick, allowing Susan to break a window and escape from the house.

Miller returned to the front room where he found defendant holding a knife to the throat of Mike, one of Miller's friends, who had apparently passed out in a chair. Miller snatched Mike out of the way and was stabbed in the right shoulder. As the altercation with defendant continued, Miller was again stabbed in the lower right back. Mike left the house to retrieve his shotgun, but by the time he returned, defendant and Rick were driving away in a van.

On cross examination, Miller testified that approximately three weeks prior to this altercation, defendant's wife had given Miller's wife, Susan, rings to be pawned in order to acquire money for cocaine. About a week before the altercation, defendant came to Miller's house demanding the money and the rings.

Susan Miller testified that as defendant was leaving the Miller residence on 15 November 1997 he demanded his money and his wife Lisa's rings, and as Miller turned to see if the money was still on the table, defendant pulled a knife from his coat pocket and stabbed Miller. Defendant then attempted to stab Susan, and the altercation intensified. After having escaped from the house, Susan returned,

picked up a kerosene heater, and threw it at defendant, causing the carpet to catch fire. Susan then picked up the heater, threw it out the door, and ran next door for help.

On cross examination, Susan admitted that she did not actually see Miller get stabbed the first time, but she did see Miller get stabbed in the arm while attempting to protect Mike and in the lower back when Miller and defendant were fighting in the kitchen. Susan also testified that she had taken Lisa Safrit to see C.J. McClure ("McClure"), to whom Lisa pawned rings and earrings in exchange for cash. About two weeks prior to the altercation, Susan accompanied defendant, Lisa and defendant's sister, to McClure's house in an attempt to reclaim Lisa's jewelry. McClure refused to return the jewelry, saying he needed more money. Susan testified that to her knowledge defendant and Lisa had not come up with enough money to get the jewelry back.

Defendant presented evidence that tended to show that in the early morning hours of 15 November 1997, his sister, Debbie Brooks ("Debbie"), was waiting with Lisa for defendant to return home from the Miller residence. Debbie testified that she was worried because defendant had gone to the Miller residence to get back the rings that Lisa had pawned, or money, and he should have been home sooner. According to Debbie's testimony, defendant arrived home shortly after 4:10 a.m., extremely upset and in a state of panic. Defendant had two cuts on his side, and was bleeding from the back of his head.

Nancy Arne also testified that she saw defendant in the early morning hours of 15 November 1997, and he had a big red place on the back of his neck, and a "pretty good size place" on his side that had been bleeding.

After defendant was found guilty of assault with a deadly weapon inflicting serious injury, the State presented evidence on the violent habitual felon charge. This evidence included certified copies of judgments in two prior cases, one from Rowan County and one from Caswell County. The State also introduced into evidence SBI fingerprint cards showing defendant's name and other information. After considering this evidence, the jury returned a verdict of guilty of being a violent habitual felon.

Defendant brings forward in his brief the following four assignments of error: (I) the trial court erred in excluding evidence of defendant's statements to his sister following the altercation, because

the statements were relevant and fall within the excited utterance exception to the hearsay rule; (II) the trial court erred in excluding evidence of defendant's exculpatory statement to Deputy Rollins because the State opened the door to its admission by asking Deputy Rollins about a conversation he had with defendant; (III) the trial court erred in denying defendant's motion to dismiss the violent habitual felon indictment; and (IV) the trial court erred in admitting into evidence fingerprint cards offered to prove defendant's identity as the perpetrator of prior violent felonies for purposes of proving the violent habitual felon charge. Defendant's remaining assignments of error are not set out nor argued in appellant's brief and are, thus, deemed abandoned. *See* N.C. R. App. P. 28(b)(5) (2000).

I.

[1] Defendant argues that the trial court erred in excluding evidence of statements he made to his sister, Debbie Brooks, shortly after the altercation between him and Miller.

At trial, defendant attempted to argue self-defense as a defense to the felonious assault charge. As part of this defense, defendant sought to introduce statements he made to his sister on the morning of 15 November 1997, approximately twenty-five minutes after the altercation. On direct examination, Debbie Brooks testified that defendant returned home from the Miller residence a few minutes after 4:10 a.m. According to Brooks, defendant was in a "state of panic," "very upset emotionally," and "just like hysterical." Defendant was bleeding from the back of his head and had two cuts on his side. When Brooks was asked what defendant said upon his return home and whether defendant told her what had happened at the Miller residence, the State made objections which were sustained by the trial court. At the close of all the evidence, defendant made an offer of proof for the record that indicated Brooks would have testified that, upon his arrival in an emotionally upset condition, defendant told her that he had been in a fight with Tyrone Miller which started when defendant was hit on the back of the head. Defendant told Brooks that as he was hit on the head he heard a door slam, Tyrone Miller jumped on him, and the two men began fighting. Defendant told Brooks that he was injured and that he believed Miller was also injured. Defendant argues that his statements to his sister fall within the excited utterance exception to the hearsay rule, as they were a spontaneous reaction to a sufficiently startling event. We disagree.

North Carolina Rule of Evidence 803(2) provides that statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not excluded by the hearsay rule, "even though the declarant is available as a witness." N. C. Gen. Stat. § 8C-1, Rule 803(2) (2000). "It is well established that in order for an assertion to come within the parameters of this particular exception, 'there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.' " *State v. Thomas*, 119 N.C. App. 708, 712, 460 S.E.2d 349, 352, *disc. review denied*, 342 N.C. 196, 463 S.E.2d 248 (1995) (quoting *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). "While the period of time between the event and the statement is without a doubt a relevant factor, the element of time is not always material." *Id.* " '[T]he modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.' " *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (citation omitted).

In the instant case, Brooks testified that defendant told her he had been involved in a fight during which he was hit on the back of the head, and that both he and the other combatant, Miller, had been injured. When defendant made this statement, his head was bleeding and he had two cuts on his side. These facts clearly indicate that defendant's statements were related to a sufficiently startling event or condition. However, we feel that defendant's statements lacked the spontaneity necessary to show that they were made free from reflection or fabrication.

Although Debbie Brooks testified that defendant was in a state of panic, was very emotionally upset, and was acting hysterical when he talked to her, Brooks also testified that defendant "knew exactly what he was saying." Further, the evidence shows that defendant's statements were made when he arrived home a few minutes after 4:10 a.m. The emergency telephone call reporting the altercation and Tyrone Miller's injuries was made at 3:47 a.m., as defendant was leaving the Miller residence. Therefore, defendant's statements to Debbie Brooks were made approximately twenty-five minutes after the altercation with Miller. During this lapse of time, defendant apparently fled from the Miller house in a van driven by Rick, who had also been involved in the altercation, and eventually returned to his home. The evidence does not disclose what else defendant and Rick did during this time period, where else the two men drove, whether they dis-

cussed the altercation during this time, or defendant's conduct or state of mind prior to returning home. We believe that these circumstances, coupled with defendant's clear motive for fabrication, *see State v. Deck*, 285 N.C. 209, 214, 203 S.E.2d 830, 834 (1974) (where the Supreme Court relied on the hearsay declarant's lack of a motive for fabrication in support of its determination that declarant's statements were properly admitted as spontaneous utterances), indicate a lapse of time sufficient to allow manufacture of a statement and show that defendant's statements to his sister lacked sufficient spontaneity. *See State v. Sidberry*, 337 N.C. 779, 448 S.E.2d 798 (1994) (within an hour of victim's death, sixteen-year-old defendant, distraught and on the verge of tears, told his aunt about the shooting; statement not admitted because defendant had time to manufacture statement and it was not made spontaneously). Therefore, we find that the trial court properly excluded Debbie Brooks' testimony on the grounds that it was inadmissible hearsay.

II.

[2] Defendant next argues that the trial court erred in not admitting into evidence the exculpatory statement made by defendant to Deputy Robert Rollins on 17 November 1997. Defendant contends the State opened the door to admission of this statement when it elicited testimony from Deputy Rollins about a later conversation he had with defendant, wherein defendant mentioned having a head injury and asked Deputy Rollins to take a look at it.

On direct examination, Deputy Rollins testified that he saw defendant within a couple of days of the stabbing of Tyrone Miller and that he did not notice any injuries to defendant at that time. On cross examination, Deputy Rollins testified that he interviewed defendant on 17 November 1997, and defendant signed a waiver of rights form and gave Deputy Rollins a recorded statement. When asked whether he recalled defendant mentioning a knot on the back of his head that he wanted Deputy Rollins to photograph, Deputy Rollins stated that he did not remember any mention of injuries. The following morning, on redirect examination, the State offered Deputy Rollins an opportunity to clarify his prior testimony, whereupon Rollins testified as follows:

> A. Yes. There was an issue raised about whether I recalled any conversation between myself and Mr. Safrit during the interview when he raised an issue of having an injury. And when I testified

> yesterday, I said I couldn't recall. And I didn't have any notes to that effect. And I do recall that there was conversation between me and Mr. Safrit at the close of the interview when I interviewed him.
>
> And I do recall him making mention of having some type injury. And if I'm not mistaken, he was saying something about possibly having a head injury, and wanted me to look at it. And I did look at it, but I didn't note anything that I thought was significant or would be significant or would be sufficient injury in this case, or any noticeable injury. But I do recall having a conversation with Mr. Safrit about that.

Thereafter, on re-cross, defense counsel asked, "Officer Rollins, during that conversation when Gene Safrit was telling you about the head injury, did he tell you how he got that injury?" When the State's objection to this question was sustained, defendant contended that the State had opened the door to this inquiry. As part of his offer of proof at the close of all the evidence, defendant offered his entire recorded statement to Deputy Rollins. In that statement, defendant told Deputy Rollins that the fight between him and Miller started when someone hit defendant over the head with a hard object, and that he stabbed Miller in the heat of battle because he was scared. Defendant argues that by eliciting testimony that Deputy Rollins had a conversation with defendant about a head injury, the State opened the door for defendant to introduce his entire statement about what happened on 15 November 1997. We disagree.

It is well-settled law in North Carolina that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). Under this doctrine, commonly referred to as "opening the door," the courts of this State have consistently held that if the State introduces into evidence part of a statement made by a defendant, the defendant is entitled to have the rest of the statement introduced, even if self-serving, so long as the statements are part of the same verbal transaction. *State v. Vick*, 341 N.C. 569, 578-79, 461 S.E.2d 655, 660 (1995); *State v. Weeks*, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988). Thus, by simply introducing into evidence a statement made by a defendant, the State does not open the door for the introduction of another statement made by the defend-

ant at some other time during that day. *State v. Lovin*, 339 N.C. 695, 709, 454 S.E.2d 229, 237 (1995).

In the instant case, we do not believe the State "opened the door" to the introduction of defendant's entire recorded statement to Deputy Rollins. The testimony elicited by the State from Deputy Rollins was that he and defendant had a conversation at the conclusion of defendant's recorded interview, during which defendant mentioned having a head injury and asked Rollins to take a look at it. Defendant's statement about his head injury did not provide any additional details into what happened on the morning of 15 November 1997, and it was not recorded as part of defendant's earlier interview with Deputy Rollins. Therefore, we hold that defendant's remarks to Deputy Rollins concerning his head injury constituted a separate verbal transaction from defendant's prior recorded statement. Further, the record shows that the State made no attempt to offer into evidence any portion of defendant's recorded statement, or any testimony concerning its contents. Consequently, the State did not open the door to the admission of defendant's recorded statement.

Defendant, relying on *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 653, 656 (1981), and other cases, contends that the State, by eliciting testimony from Deputy Rollins as to a conversation with defendant concerning a possible head injury, offered "evidence as to a particular fact or transaction" which opened the door to cross examination by defendant in regard to the earlier statement given to Deputy Rollins. The "particular . . . transaction" to which the State opened the door was the conversation between defendant and Deputy Rollins that occurred after defendant's recorded interview had ended. It did not include defendant's entire recorded statement. *Compare Lovin*, 339 N.C. 695, 710, 454 S.E.2d 229, 237-38.

For the foregoing reasons, defendant's second assignment of error is overruled.

III.

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the violent habitual felon indictment in 98 CRS 6730 on the grounds that the State was precluded from relitigating the allegations contained in the indictment because defendant had previously been found not guilty of being a violent habitual felon pursuant to an indictment alleging the same two prior violent felony convictions.

Subsequent to being indicted in the case *sub judice*, defendant was indicted on 13 July 1998 on a separate set of charges related to events that occurred on 24 May 1998. These separate charges against defendant also included an ancillary indictment charging defendant with violent habitual felon status ("98 CRS 10003"). The allegations in the indictment in 98 CRS 10003 are identical to the allegations in the violent habitual felon indictment in 98 CRS 6730. Defendant was tried on this subsequent set of charges prior to being tried on the charges in the instant case. Having been found guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, felony larceny, and felony possession of stolen goods, defendant was tried for being a violent habitual felon in 98 CRS 10003. The jury returned a verdict of not guilty. Defendant argues that since he has previously been found not guilty of violent habitual felon status as charged in an indictment alleging he committed the same two prior violent felonies upon which the State charged him as a violent habitual felon in the instant case, the State is precluded from trying defendant as a violent habitual felon on the indictment in 98 CRS 6730. Defendant does not contend that he may never again be charged as a violent habitual felon, but merely that he cannot be charged and convicted of being a violent habitual felon based on the same combination of alleged prior violent felony convictions upon which a jury has previously found him not guilty of violent habitual felon status.

In support of his argument, defendant relies on the common law principles of res judicata and collateral estoppel, the North Carolina General Statutes, and the protections against double jeopardy contained in Article I, Sec. 19 of the North Carolina Constitution and the Fifth Amendment to the Federal Constitution. Concluding that this case is resolved by a straightforward application of the doctrine of collateral estoppel as it is applied to criminal cases pursuant to N.C. Gen. Stat. § 15A-954(7), we do not address defendant's constitutional arguments. However, we do begin with a brief discussion of the doctrine of res judicata, and its relevance to the case *sub judice*.

Under the doctrine of res judicata, also referred to as claim preclusion, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Here, defendant does not argue that the State may never again charge

defendant as a violent habitual felon (i.e., bring a second suit on the same cause of action), but simply that the State cannot do so based on the same alleged prior violent felonies on which a jury has previously found defendant not guilty of violent habitual felon status. Therefore, the doctrine of res judicata does not bar the State in the instant case. However, we believe the companion doctrine of collateral estoppel does prevent the State from relitigating whether defendant is a violent habitual felon based on the same combination of prior violent felonies alleged in 98 CRS 10003.

The doctrine of collateral estoppel, also referred to as issue preclusion or estoppel by judgment, precludes relitigation of a fact, question, or right in issue

> when there has been a final judgment or decree, necessarily determining [the] fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.

Masters v. Dunstan, 256 N.C. 520, 524, 124 S.E.2d 574, 576 (1962). " ' . . . (W)hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' " *Id.* at 523-24, 124 S.E.2d at 576 (citing *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957) (citations omitted)). Simply put, "the doctrine of collateral estoppel operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action." E.H. Schopler, Annotation, *Modern Status of Doctrine of Res Judicata in Criminal Cases*, 9 A.L.R.3d 203, 214 (1966).

The application of the common law doctrine of collateral estoppel to criminal cases has been codified by N.C. Gen. Stat. § 15A-954(a)(7), which requires dismissal of the charges stated in a criminal pleading if it is determined that "[a]n issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of defendant in a prior action between the parties." N.C. Gen. Stat. § 15A-954(a)(7) (2000); *State v. Parsons*, 92 N.C. App. 175, 177, 374 S.E.2d 123, 124 (1988), *disc. review denied*, 324 N.C. 340, 378 S.E.2d 805 (1989).

The requirements for the identity of issues to which collateral estoppel may be applied have been established by the North Carolina Supreme Court as follows:

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

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)). Therefore, we must examine what issues were involved in the two respective actions. Specifically, we must determine what issues were fully litigated and finally decided by the jury's verdict of not guilty in 98 CRS 10003, and whether those issues were implicated in 98 CRS 6730.

Under N.C. Gen. Stat. § 14-7.7, "[a]ny person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon." N.C. Gen. Stat. § 14-7.7 (2000). For purposes of N.C.G.S. § 14-7.7, "convicted" means that the person has been found guilty or has entered a plea of guilty or no contest to the violent felony charge, and judgment has been entered on said charge on or after 6 July 1967. *Id.* Therefore, in order to find a defendant guilty of being a violent habitual felon, the State must prove beyond a reasonable doubt that the defendant has been convicted of two prior violent felonies, with both convictions occurring on or after 6 July 1967. Consequently, the only issue for the jury to determine in a violent habitual felon proceeding is whether the defendant who has just been convicted of the underlying substantive felony is the same person as the individual the State alleges has two prior violent felony convictions since 6 July 1967.

In the prior action (98 CRS 10003), the jury was instructed that in order to find defendant guilty of being a violent habitual felon, the State had to prove two things beyond a reasonable doubt. First, that on 1 May 1973, in the Superior Court of Rowan County, North Carolina, defendant was convicted of the violent felony of armed robbery that was committed on 11 March 1973, in violation of the laws of

the State of North Carolina. Second, that on 8 December 1977, in the Superior Court of Caswell County, North Carolina, defendant was convicted of the violent felony of assault with a deadly weapon inflicting serious injury that was committed on 5 May 1977, in violation of the laws of the State of North Carolina. Having been so instructed, the jury returned a verdict of not guilty. In the instant case (98 CRS 6730), the jury received the exact same instructions and returned a guilty verdict.

The issue to be determined in the violent habitual felon proceeding in the instant case, whether defendant was convicted of armed robbery on 1 May 1973 in Rowan County Superior Court and convicted of assault with a deadly weapon inflicting serious injury on 8 December 1977 in Caswell County Superior Court, was raised and litigated in the prior action, was material and relevant to the disposition of the prior action, and was necessary and essential to the jury's not guilty verdict in the prior action. Therefore, we hold that the State was collaterally estopped from attempting to convict defendant of being a violent habitual felon based on the same two alleged prior violent felony convictions upon which a jury has already found defendant not guilty of violent habitual felon status. Consequently, the trial court erred in denying defendant's motion to dismiss the violent habitual felon indictment in 98 CRS 6730, and we remand for a new sentencing hearing for defendant.

IV.

Having found that the trial court erred in denying defendant's motion to dismiss the violent habitual felon indictment in the instant case, we need not address defendant's final assignment of error that the trial court erred in admitting into evidence the SBI fingerprint cards during the violent habitual felon proceeding.

In conclusion, we find no error in defendant's conviction of assault with a deadly weapon inflicting serious injury. However, we hold that the trial court erred in denying defendant's motion to dismiss the violent habitual felon indictment in 98 CRS 6730. Therefore, we reverse defendant's conviction of being a violent habitual felon and remand for a new sentencing hearing, at which defendant is to be sentenced for his conviction of assault with a deadly weapon inflicting serious injury, a Class E felony.

No error in 97 CRS 15635.

Reversed in 98 CRS 6730, and remanded for resentencing.

Judges GREENE and McGEE concur.

STATE OF NORTH CAROLINA v. TERRENCE EUGENE GALLOWAY AND EDWARD ANTOINE RHEDDICK

No. COA00-807

(Filed 21 August 2001)

1. Criminal Law— motion for a mistrial—inconsistent testimony—not the knowing use of perjury

The trial court did not abuse its discretion in a prosecution for kidnapping, rape, and other offenses by denying defendants' motion for a mistrial based upon the State's alleged use of perjured testimony where there were inconsistencies between the testimony of the victim and the testimony of an accomplice who was allowed to plead to reduced charges in exchange for testifying for the State. The State offered both witnesses and left the inconsistencies to be resolved by the jury; the defendants did not show that the State knew that either the victim's or the accomplice's testimony was false.

2. Criminal Law— prosecutor's argument—redacted statements

The trial court did not abuse its discretion by denying defendants' motion for a mistrial in a prosecution for kidnapping, rape, and other offenses where defendants contended that the State in its closing argument improperly referred to portions of defendants' statements concerning prostitution that had been redacted to comply with *Bruton v. United States*, 391 U.S. 123. The State did not expressly mention any statement redacted by the parties and not all of the statements about prostitution were redacted. Furthermore, the victim's alleged consent and willful prostitution could be inferred from an accomplice's testimony.

3. Criminal Law— prosecutor's argument—inferences

The trial court did not abuse its discretion in a prosecution for kidnapping, rape, and other offenses by denying defendants' motion for a mistrial based upon the State's closing argument

where defendants pointed to inaccurate inferences that a defense theory was fabricated for trial and that defendants failed to present evidence that they were not present or did not assist in the commission of the crimes. Two defense attorneys had the opportunity to refute the State's inferences, the defendants' locations and actions could be inferred from the evidence and, while the State may have misled the jury as to when the defense theory of voluntary prostitution was devised, the victim's past conviction for prostitution, defendants' defense of alleged consent, and the defendants' locations and actions during the commission of the crimes were not excluded. The State's alleged inferences were harmless.

4. Witnesses— credibility—cross-examination

The trial court did not err in a prosecution for kidnapping, rape, and other offenses by not allowing defendants to fully attack the credibility of the victim. During cross-examination, the victim admitted that she was addicted to crack cocaine and had smoked crack on the day of these crimes; she denied an alleged suicide attempt; she admitted visiting psychiatrists, being involuntarily admitted to a "detox" center and leaving it against medical recommendation; evidence was admitted that she used several aliases and had been convicted of writing bad checks, driving with a revoked license, and prostitution; and she admitted that this was a difficult time in her life, with financial problems, depression, and her husband's recent imprisonment.

5. Evidence— medical records—discharge notation—psychiatric history—not admissible

The trial court did not err in a prosecution for kidnapping, rape, and other offenses by excluding the victim's medical discharge summary and other medical records. The notation of psychiatric history on the discharge summary was not admissible under N.C.G.S. § 8C-1, Rule 703 as the basis for an expert opinion because the doctor making the notation was an expert in surgery rather than psychiatry and admitted during voir dire that he had no personal knowledge or expertise on the challenged matters. The discharge summary statements were not admissible as business records under N.C.G.S. § 8C-1, Rule 803(6) because the court found the source of the doctor's statements to be unreliable. Moreover, any error that might have resulted from the omission of these statements was cured by the testimony of another emergency room doctor, who clearly identified the source of her

information. Other medical records were properly excluded because they contained inconsistencies and the doctor was not present to clarify them, or were in fact used by defendant.

6. Rape— first-degree—instructions—disjunctive

The trial court did not err by instructing the jury that one of the elements of first-degree rape was that the defendant employed or displayed a dangerous or deadly weapon or that defendant inflicted serious injury or that defendant aided and abetted one or more persons. Although defendant argued that it was impossible to determine whether the jury was unanimous, these acts establish an element of the offense and do not constitute a separate offense. Under *State v. Hartness*, 326 N.C. 561, the requirement of unanimity is satisfied.

7. Criminal Law— motion to sever—redacted statements from codefendants

The trial court did not err in denying a motion to sever in a prosecution for kidnapping, rape, and other offenses because of the admission of redacted statements of both defendants where the court sanitized the statements with assistance from the State and attorneys for both defendants and the deletions did not materially change the nature of either statement. N.C.G.S. § 15A-927(c)(2)b.

8. Homicide— attempted second-degree murder—conviction set aside

A conviction for attempted second-degree murder was set aside pursuant to *State v. Coble*, 351 N.C. 448, which held that no such crime exists in North Carolina.

Appeal by defendants from judgments entered 17 December 1999 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 17 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien and Joan M. Cunningham, for the State.

Lisa Miles for defendant-appellant Galloway.

Thomas S. Hicks, PLLC, by Thomas S. Hicks, for defendant-appellant Rheddick.

HUNTER, Judge.

Terrence Galloway ("defendant Galloway") and Edward Antoine Rheddick ("defendant Rheddick") appeal from judgments on jury verdicts finding them guilty of the rape, sexual offense, attempted murder, and kidnapping of Ronda Seaton ("the victim"). On appeal, defendants assign error to the trial court's: (1) denial of their motions for mistrial based on the State's alleged use of perjured testimony and the State's closing argument, (2) limitation of the cross-examination of the victim, (3) jury instructions on first-degree rape, and (4) denial of defendant Rheddick's motion to sever. After a careful review of the record and briefs, we find no error as to the trial court's rulings; however, as to defendant Rheddick, we vacate his conviction for attempted second-degree murder in light of our Supreme Court's decision in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000).

The State's evidence tended to show that on 10 February 1998, defendant Galloway, defendant Rheddick, and Maurice Brown ("Brown") were riding around in a white Honda automobile with tinted windows, and the men had two guns in the automobile. At approximately 11:00 p.m., the three men saw the victim, and they stopped to pick her up. According to the victim's testimony, the men forced her into the car at gun point and abducted her against her will. However, Brown contradicted the victim's account, testifying instead that the victim voluntarily entered the car and agreed to exchange sex for money.

After searching for a location to stop, defendant Galloway drove the car onto a side road. When the car was parked, the victim testified that defendant Rheddick, holding a gun, ordered her out of the car and told her to undress. The victim began to comply, but before she could finish undressing, defendant Rheddick ripped off her shirt. Defendant Rheddick then pushed the victim into the car, forced her to perform oral sex on him, and thereafter engaged in vaginal intercourse. When defendant Rheddick was finished, the victim ran off into the woods. However, after some coaxing by the three men, she came back. Thereafter, defendant Rheddick threw the victim onto the hood of the car and placed a gun inside her vagina. Next, defendant Galloway ordered the victim to get inside the car. When the two were in the car, defendant Galloway forced the victim to perform oral sex on him, and thereafter engaged in vaginal intercourse.

Brown's testimony of defendants' actions when they arrived at the side road is fairly consistent with the victim's, however, Brown

testified that first defendant Galloway, and then defendant Rheddick, had sex with the victim. After both defendants were finished, Brown got into the car with the victim. The victim was forced to perform oral sex and engage in vaginal intercourse with Brown, also. At this juncture, the victim got out of the car and again attempted to flee. However, the victim's attempt was thwarted as Brown pushed her down, defendant Galloway beat her with a two-by-two board with a bolt in it, and defendant Rheddick kicked her. After this attack, the victim lost consciousness; and the three men left the scene.

Defendant Galloway and defendant Rheddick were tried together in a joint trial during the 6 December 1999 Criminal Session of New Hanover County Superior Court, the Honorable W. Allen Cobb, Jr. presiding. At the conclusion of the trial, the jury found (1) defendant Galloway guilty of first-degree rape, first-degree sexual offense, attempted first-degree murder, and first-degree kidnapping, and (2) defendant Rheddick guilty of second-degree rape, second-degree sexual offense, attempted second-degree murder, and first-degree kidnapping. Judge Cobb entered judgments and sentenced both men to imprisonment. Defendants now appeal.

In their first assignment of error, defendants contend that the trial court erred when it denied their motions for mistrial. Specifically, defendants argue that the trial court abused its discretion in denying their motions for mistrial based on the State's (1) alleged use of perjured testimony, and (2) closing argument. However, we find no error.

We recognize that a trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (1999). Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge. *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). The decision to grant or deny such a motion will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *State v. McGuire*, 297 N.C. 69, 75, 254 S.E.2d 165, 169-70 (1979).

[1] First, defendants argue that the trial court erred in denying their motion for a mistrial based upon the State's alleged use of perjured testimony. At trial, two versions of the victim's abduction were presented—the victim's and Brown's. As one of the versions was

obviously false, defendants assert that the State knowingly used perjured testimony.

Ordinarily:

> A prosecutor's presentation of known false evidence, allowed to go uncorrected, is a violation of a defendant's right to due process. The State has a duty to correct any false evidence which in any reasonable likelihood could affect the jury's decision. However, if the evidence is 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) (citations omitted); *see also State v. Edwards*, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988).

Initially, the victim testified that she was abducted at gun point. Additionally, the victim admitted, on cross-examination, that she had a 1997 conviction for prostitution—on that occasion, she approached a car, in the same neighborhood where defendants picked her up, and offered an undercover police officer sex in exchange for cash and a ride. Contrarily, Brown—who was allowed to plead to reduced charges of second-degree rape, second-degree sexual offense, and second-degree kidnapping in exchange for testifying for the State—testified that defendant Galloway said, "[l]et's get a prostitute"; the victim came to the passenger side of the car and discussed prostitution with defendant Galloway; the victim was not forced to get into the car; while performing oral sex on defendant Galloway, the victim asked about money; and defendant Galloway then put a gun to the victim's head. Otherwise, the victim's and Brown's accounts of the events are fairly consistent.

At bar, we find that defendants have failed to show that the State *knew* that either the victim's or Brown's testimony was false. Instead, the State offered both witnesses's testimony, and it was then for the jury to consider and resolve the inconsistencies. *See State v. Clark*, 138 N.C. App. 392, 397, 531 S.E.2d 482, 486. Accordingly, we hold that the trial court did not abuse its discretion in denying defendants' motion for a mistrial based on the State's use of the victim's and Brown's testimony.

[2] Secondly, defendants argue that the trial court erred in denying their motion for a mistrial based on the State's closing argument. Particularly, defendants make two separate contentions. First,

defendants allege that the State improperly referred to portions of defendants' statements that were redacted—the references to prostitution. Second, defendants allege that the State made improper inferences based upon those redacted statements—specifically, (1) defendants' defense that the victim consented and willingly prostituted herself was fabricated for trial, and (2) defendants failed to present evidence that they were not present or did not assist in the commission of these crimes.

It is well-settled that "[t]rial counsel are allowed wide latitude in jury arguments." *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 39-40 (1994). However, trial counsel may not make arguments "calculated to mislead or prejudice the jury." *State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984). "[A]n attorney may not make arguments based on matters outside the record but may, based on 'his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.' " *State v. Wilson*, 335 N.C. 220, 224, 436 S.E.2d 831, 834 (1993) (quoting N.C. Gen. Stat. § 15A-1230 (1988)). "Ordinarily, the control of jury arguments is left to the sound discretion of the trial court and the trial court's rulings thereon will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Jones*, 339 N.C. 114, 158-59, 451 S.E.2d 826, 850 (1994).

After being arrested, defendants both made statements to the police; each defendant's statement implicated the other defendant and minimized their own involvement. At trial, a hearing was held and portions of defendants' statements were redacted in an effort to comply with *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968) (holding that the admission of a codefendant's statements against interest that also incriminated the defendant violated the defendant's Confrontation Clause rights where the declarant was unavailable for cross-examination). Then, during the closing argument, the State argued:

> Curious thing about this whole prostitution thing is, we've got our initial statements and nobody said, I'm the one that hired the prostitute. Right. If she was there hooking, who did she hook for? He denied it. He denied it. Maurice Brown denied it.
>
> There is another thing you need to understand. This first statement they made was before they had lawyers, too . . . . [T]hey've got lawyers who say no, no, no, denying everything is not going to do you any good. We've got DNA evidence. You can't deny everything, so we've got to come up with a new lie and the

> new lie was she wanted to do it. She wanted to get in the car. She wanted you to go out in the woods with her. She wanted you to bust her up side the head with that club. That's the new lie.
>
> . . .
>
> If one of them did it and they are all acting in concert or they are all aiding and abetting, then they're all guilty, *and there's nobody that said they weren't all acting together. Nobody has said one of them went over here, so and so went over here.* Maurice Brown didn't say it, Galloway didn't say it, Rheddick doesn't say it. *Nobody says, I went over here and they did their thing. I went there. I wasn't a part of what nobody said.*

In denying defendants' motion for a mistrial based on the State's closing argument, the court made the following findings of fact:

> [T]hat any misstatement that the prosecutor made in his final argument to the jury could be addressed by at least two defense lawyers.
>
> [E]ach defense lawyer did, in fact, address the issue of consent and whether or not she had prior convictions for prostitution.

Based on these findings, the trial court concluded "that nothing in the prosecutor's final argument resulted in substantial and irreparable prejudice to either defendants."

Here, it is clear that the State did not expressly make mention of any statement redacted by the parties. As to defendants' allegation that the State's references to prostitution were improper, not all statements regarding prostitution were in fact redacted. For instance, the following was left in defendant Galloway's statement: "[the victim stated] [y]'all going to pay me right?" "So, as she unzipped my pants she was like well y'all are still going to pay me? I want about thirty-thirty five dollars." Furthermore, the victim's alleged consent and willful prostitution could be reasonably inferred from Brown's testimony. Therefore, the trial court did not abuse its discretion in denying defendants' motion for a mistrial based on the State's references to prostitution in the closing argument.

[3] As to the State's alleged improper inferences—(1) defendants' story that the victim willingly prostituted herself was a new defense fabricated for trial, and (2) defendants failed to present evidence that they were not present or did not assist in the commission of these crimes, the inferences, although inaccurate, were nevertheless harm-

less and did not likely affect the jury's decision. Two defense attorneys had the opportunity to refute the State's alleged inferences, and both defense attorneys argued that the victim was a prostitute and consented to the sexual activity. Additionally, defendants' locations and actions during the commission of these crimes, again, can be reasonably inferred from Brown's testimony, as well as other evidence of record. Therefore, the State's closing argument was not so grossly improper as to require a new trial, in light of the convincing evidence indicating defendants' guilt.

Moreover, defendants' reliance on *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996) is misguided. In *Bass*, an indecent liberties and first-degree sexual offense case, this Court found that where evidence that the victim had been previously abused by the defendant was excluded, it was prejudicial error and misleading for the prosecutor to argue during closing arguments that there was an absence of evidence of the victim's prior sexual abuse. *Id.* Here, the State may have misled the jury as to when defendants' defense was devised, but unlike *Bass*, evidence of the victim's past conviction for prostitution, defendants' actual defense of the victim's alleged consent and voluntary prostitution, and defendants' locations and actions during the commission of the crimes were not excluded. Therefore, the State's alleged inferences *sub judice* were harmless, and *Bass* is distinguished. Accordingly, we hold that the trial court did not abuse its discretion in denying defendants' motion for a mistrial based on the State's closing argument.

[4] Next, defendants assign error to the trial court's limitation of the cross-examination of the victim. Particularly, defendants argue that the trial court committed prejudicial error in failing to allow them to fully attack the credibility of the victim during their cross-examination. We disagree.

"It is a well-established principle that an accused is assured the right to cross-examine adverse witnesses." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). "Generally, the scope of permissible cross-examination is limited only by the discretion of the trial court and the requirement of good faith." *State v. Locklear*, 349 N.C. 118, 156, 505 S.E.2d 277, 299 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). In other words, "[t]he scope of cross-examination . . . is within the sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion." *Herring*, 322 N.C. at 743, 370 S.E.2d at 370. Furthermore:

> While specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to "cast doubt upon the capacity of a witness to observe, recollect, and recount, and if so they are properly the subject not only of cross-examination but of extrinsic evidence . . . ."

State v. Williams, 330 N.C. 711, 719, 412 S.E.2d 359, 364 (1992) (quoting 3 *Federal Evidence* § 305, at 236).

At bar, defendants argue that the trial court prevented them from offering evidence that would cast doubt on the victim's credibility, such as her history of drug addiction, an alleged suicide attempt, and her psychiatric history. However, during cross-examination, the victim admitted that she was addicted to crack cocaine, and she had smoked crack the very day of these crimes. Additionally, the victim was asked about an alleged suicide attempt, when she allegedly attempted to cut her wrists, and she denied it. Moreover, as to the victim's psychiatric history, the victim admitted to visiting psychiatrists. She further admitted that she was involuntarily committed into a "detox" center, which she left against medical recommendation.

Also, evidence was presented that the victim, who used several aliases, had been convicted of writing bad checks, driving while her license was revoked, and prostitution. Moreover, during this point in her life, the victim admitted that she was going through a difficult time—financial problems, depression, and her husband's recent imprisonment. Therefore, we find that defendants were afforded an adequate opportunity to attack the victim's credibility.

[5] Nevertheless, defendants argue that they should have been allowed to more fully probe the victim's psychiatric history and alleged suicide attempt. Particularly, defendants contend that they should have been given the opportunity to present medical evidence of the victim's history, i.e., the medical opinions and records prepared by Dr. Thomas Clancy, Dr. Kevin Reece, and Dr. Thomas Mathews.

First, defendants argue that certain portions of the victim's discharge summary prepared by Dr. Clancy should not have been excluded. In preparing the discharge summary, Dr. Clancy, who examined the victim the morning after her attack, noted that the victim had a "[p]sychiatric history including anti-social behavior, substance abuse, substance addiction, [and] uncooperativeness"

and was "[w]ell-known to The Oaks [a psychiatric facility] for previous psychiatric history." At trial, the court excluded these two statements, but allowed Dr. Clancy to testify as to the victim's "uncooperativeness."

Defendants first attempt to admit the statements as Dr. Clancy's medical opinion under N.C. Gen. Stat. § 8C-1, Rule 703 (1999). Under Rule 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon by experts in the particular field* in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

"A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence." *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979). While this rule gives a party the right to vigorously cross-examine an expert regarding the underlying facts upon which he bases his opinion, it is the duty of the trial judge to exercise sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy, and materiality. *See McClain v. Otis Elevator Co.*, 106 N.C. App. 45, 415 S.E.2d 78 (1992).

At bar, Dr. Clancy was qualified as an expert in surgery, with a special association in emergency care and critical care—not psychiatry. During *voir dire*, Dr. Clancy admitted that he was not a behaviorist and he had no personal knowledge or expertise on the challenged matters in the victim's discharge summary. Therefore, we hold that the statements were not inherently reliable or the type reasonably relied upon by experts in Dr. Clancy's particular field—surgery. Hence, the trial court properly excluded these statements under Rule 703.

Defendants next attempt to admit Dr. Clancy's discharge summary statements as a business record under N.C. Gen. Stat. § 8C-1, Rule 803(6) (1999). Under Rule 803(6), business records, including medical records, are admissible, "unless the source of information or

the method or circumstances of preparation indicate lack of trustworthiness." Moreover, "[t]he simple fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial." *Donavant v. Hudspeth*, 318 N.C. 1, 7, 347 S.E.2d 797, 801 (1986). "Trustworthiness is the foundation of the business records exception." *State v. Miller*, 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (1986).

During *voir dire*, Dr. Clancy was questioned regarding the source of the two statements, and he replied:

> I don't recall, now. Her mother indicated that she had had some problems in the past, and we had a record indicating that she had been in The Oaks prior to this admission, and that information was probably . . . was probably culled from those records and that previous admission from her mother.

Subsequently, the trial court found that the source of Dr. Clancy's statements was unreliable. Therefore, when, as here,

> the trial judge determines on *voir dire* that the source of the physician's statement is in fact unreliable, he may exclude the statement as evidence for any purpose. If the opinion of the physician testifying as an expert is based solely on the unreliable statement, the physician should not be allowed to state the opinion. . . .

Donavant, 318 N.C. 1, 26, 347 S.E.2d 797, 812. Based on the unreliability and the lack of trustworthiness of the source of Dr. Clancy's statements, the trial court did not abuse its discretion in denying their admission.

Furthermore, any error that might have resulted from the omission of Dr. Clancy's statements was cured by the testimony of Dr. Monique Minor, the victim's emergency room physician on the night of her attack. During cross-examination, Dr. Minor was questioned regarding a discharge summary she assisted in preparing. Unlike Dr. Clancy, Dr. Minor clearly identified the source of her information as the victim's mother. Then, in her testimony, Dr. Minor confirmed that the victim was suicidal about three weeks prior to the attack, and the victim had been admitted to "The Oaks."

Next, defendants argue that the trial court improperly excluded medical records prepared by Dr. Kevin Reece. However, upon an

examination of the records, several inconsistencies, such as names, dates of birth, medical record numbers, and symptoms, were found. As a result, the trial court ruled that the records were inadmissible based on the inconsistencies and the fact that Dr. Reece was not present to clarify them. We note that defendants subpoenaed Dr. Reece, but he was never called to testify. Therefore, the source, method, and circumstances of preparation surrounding the information in Dr. Reece's documents indicated a lack of trustworthiness. Thus, the trial court again did not abuse its discretion in excluding these records under Rule 803.

Finally, defendants' challenge as to the medical records prepared by Dr. Thomas Mathews is meritless. Upon a review of the record, we find that the trial court allowed the defense to use the record prepared by Dr. Mathews to cross-examine the victim, and the defense did in fact make use of Dr. Mathews' record. Accordingly, we hold that defendants were afforded an adequate opportunity to cross-examine and attack the credibility of the victim. Thus, defendants' assignment of error is overruled.

[6] In their third assignment of error, defendants challenge the trial court's instructions on first-degree rape. Specifically, defendants argue that the first-degree rape jury instruction that the trial court used improperly permitted defendants' convictions by less than a unanimous verdict. However, we disagree.

During the charge to the jury, the trial court used the North Carolina Pattern Jury Instruction for first-degree rape (207.10). The elements of first-degree rape specified in the pattern jury instructions are identical to those elements set out in the statute. *See* N.C. Gen. Stat. § 14-27.2 (1999). At trial, the court charged,

> for you to find each of the defendants guilty of first degree rape, the State must prove four things beyond a reasonable doubt. First, that the defendant engaged in vaginal intercourse with the victim. . . .
>
> Second, that the defendant used or threatened to use force sufficient to overcome any resistance the victim might make. . . .
>
> Third, that the victim did not consent and it was against her will. . . . *And fourth, that the defendant employed or displayed a dangerous or deadly weapon, or that the defendant inflicted*

> *serious personal injury upon the victim or that the defendant was aided and abetted by one or more persons. . . .*

(Emphasis added.)

Defendants argue that the trial court's disjunctive phrasing as to the fourth element constituting first-degree rape rendered the verdict potentially nonunanimous. As a result, defendants assert that the jury could have split in its decision regarding which act constituted the offense, thus making it impossible to determine whether the jury was unanimous in its verdict.

In North Carolina, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. In our state, two lines of cases have developed regarding jury unanimity and disjunctive instructions: (1) *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), and (2) *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). The *Diaz* line,

> establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis in original). Contrarily, the *Hartness* line, "establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *Id.* at 303, 412 S.E.2d at 312 (emphasis in original).

Here, as to the fourth element of first-degree rape, the instructions were in the disjunctive—namely, defendants could be found guilty of first-degree rape if they "employed or displayed a dangerous or deadly weapon, *or* . . . [they] inflicted serious personal injury upon the victim *or* . . . [they were] aided and abetted by one or more persons." These acts establish an element of the offense, and do not, by themselves, constitute a separate offense. Furthermore, our Supreme Court has found that a trial court's instruction that defendants could be found guilty of rape and sexual offense if they employed a deadly weapon *or* were aided and abetted was proper. *See State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986), *overruled on other grounds by*

State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997). Thus, we hold that the case *sub judice* is controlled by *Hartness*.

In the present case, defendants' reliance on *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985 (1999), is not well founded. First, *Richardson* deals expressly with crimes under a federal statute, 21 U.S.C.S. § 848. Second, while *Richardson* holds that a jury must unanimously find that the government proved each *element of a federal crime* to convict, the United States Supreme Court, in arriving at its decision, focused primarily on § 848 and how (1) a jury must unanimously agree not only that a defendant committed some "continuing series of violation," but also about which specific violations make up that "continuing series," and (2) "violations" in a continuing criminal enterprise refer to elements rather than means. *See id.* Here, the jury instructions clearly did not deprive defendants of their right to be convicted by a unanimous jury. Therefore, we reject this assignment of error.

[7] In the next assignment of error, defendant Rheddick assigns as error the trial court's denial of his motion to sever based on the admission of the redacted statements. Again, we find no error.

Under N.C. Gen. Stat. § 15A-927(c)(2)b (1999), the trial court must grant a severance upon a defendant's motion if "it is found necessary to achieve a fair determination of the guilt or innocence of that defendant." "Whether defendants should be tried jointly or separately . . . is a matter addressed to the sound discretion of the trial judge." *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987). "Absent a showing that defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed on appeal." *Id.* At bar, defendants did not initially object to their trials being joined. Then, at the close of the State's evidence, well into the trial, defendants made their motion to sever based on the introduction of their redacted statements. Subsequently, the trial court denied the motion.

In the past, this Court has found that where deletions from a defendant's statement of references to a co-defendant do not materially change the nature of a defendant's statement, a defendant is not prejudiced by admission of the sanitized statement. *See State v. Giles*, 83 N.C. App. 487, 350 S.E.2d 868 (1986). Here, the trial court with the assistance of the State and both defendants' attorneys complied with *Bruton* and sanitized the statements. Further, the deletions do not materially change the nature of either defendant's statement—

both statements acknowledge that the victim was in the car, a sexual assault took place, and the victim was beaten. Thus, defendants were not prejudiced by the admission of the redacted statements. As such, we hold that the trial court did not abuse its discretion in denying defendant Rheddick's motion to sever.

[8] Finally, we examine defendant Rheddick's conviction and sentence for attempted second-degree murder. In light of our Supreme Court's recent holding in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000), "a crime denominated as 'attempted second-degree murder' does not exist under North Carolina law." *Id.* at 453, 527 S.E.2d at 49. Accordingly, we vacate defendant Rheddick's conviction for attempted second-degree murder.

In the record, defendants preserved approximately one hundred additional assignments of error. As defendants fail to argue them in their briefs, we deem those not argued abandoned. N.C.R. App. P. 28(b)(5).

In light of all the foregoing, we hold that defendants received a fair trial, free from prejudicial error. However, as to defendant Rheddick, we vacate his conviction for attempted second-degree murder.

No error as to defendant Galloway.

No error in part, vacated in part as to defendant Rheddick.

Judges MARTIN and HUDSON concur.

STATE OF NORTH CAROLINA v. DARIAN JAQUAN HARRIS

No. COA00-796

(Filed 21 August 2001)

1. Criminal Law— juror's notes made during recess—mistrial denied

The trial court did not abuse its discretion in a cocaine prosecution by not granting defendant's motions for a mistrial or to conduct an inquiry into juror misconduct where the court

recessed on a Wednesday; there was no court on Thursday; a juror returned on Friday with a two-page typewritten document listing circumstantial factors pointing towards guilt; the juror asked the bailiff to make copies to distribute to the other jurors; the bailiff turned the document over to the court; and the court returned the document to the juror. Jurors may make notes and take them into the jury room except where the judge directs otherwise. N.C.G.S. § 15A-1228.

2. Drugs— conspiracy to sell—sufficiency of evidence

The trial court did not err by refusing to dismiss charges of conspiracy to sell and deliver cocaine where both defendant and an accomplice exercised some control over the hotel room where defendant was arrested, defendant had negotiated a drug deal with a detective two days earlier, there was heavy foot traffic to the room, plastic bags and a razor blade found in the room tested positive for cocaine, and the accomplice opened the door to detectives, then ran to the bathroom and flushed the toilet. There was at least a jury question as to the existence of a conspiracy.

3. Search and Seizure— items seized during arrest in hotel room—ruse to open door—search of pager memory

The trial court did not err in a cocaine prosecution by denying defendant's motion to suppress evidence seized during his arrest where officers called defendant's hotel room and told him that maintenance would be coming to fix a smoke detector, then knocked on the door and answered "maintenance" when asked who was there. Officers may have used a ruse to get the room door open, but the identity of the officers was immediately obvious and they did not step into the room until additional exigent circumstances arose. Defendant's pager, the numbers therein, and currency were found on defendant's person after he was arrested; the detective was entitled to search the pager's memory without a warrant because he had probable cause to believe that the pager contained information that would assist in the investigation of the crime.

Appeal by defendant from judgments entered 16 November 1999 by Judge Jerry Cash Martin in Guilford County Superior Court. Heard in the Court of Appeals 7 June 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Marvin R. Waters, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Jarvis John Edgerton, IV, for defendant-appellant.

HUNTER, Judge.

Darian Jaquan Harris ("defendant") appeals from the judgment entered on jury verdicts finding him guilty of possession with intent to sell and deliver cocaine and conspiracy to possess with intent to sell and deliver cocaine. On appeal, defendant assigns error to the trial court's denial of his: (1) motions for a mistrial based on alleged juror misconduct, motion to conduct an inquiry into possible jury misconduct, and objection to the return of a document to a juror, (2) motions to dismiss based on insufficient evidence of conspiracy, and (3) motion to suppress evidence. After a careful review of the record and briefs, we find no error.

At trial, the State's evidence tended to show that on 16 February 1999, Detective Kyle Shearer ("Detective Shearer"), of the Greensboro Police Department, was investigating a narcotics complaint at the residence of Joyce McSwain ("McSwain") in Greensboro, North Carolina. During the consent search of McSwain's home, Detective Shearer found a piece of paper with a phone number and the name "Heavy"—who was later identified as defendant—written on it. Upon being questioned, McSwain told Detective Shearer that "Heavy" was her source of cocaine, and that "Heavy" was a fat black male, approximately 6'3" to 6'4" tall. Detective Shearer called the phone number on the slip of paper and left a numeric page with McSwain's phone number. Shortly thereafter, McSwain's phone rang, and Detective Shearer answered the phone and spoke with defendant, who represented himself as "Heavy." Detective Shearer and defendant then negotiated a drug deal to take place at McSwain's residence.

While awaiting defendant's arrival for the drug deal, McSwain received several phone calls. After approximately thirty minutes, defendant did not arrive. Detective Shearer then called defendant's pager number again, left a numeric page with his cellular phone number, received a call, recognized the voice as defendant's, and inquired as to what happened with the drug deal. During this call, defendant

stated that he was not involved in the drug business, and he told Detective Shearer not to page him again.

Then two days later, on 18 February 1999, Detective Shearer dialed defendant's pager number again. This time he entered the phone numbers of two phones at the Greensboro Police Department. Within a few minutes, the two phones rang, and Detective Shearer determined from the caller ID on the phones that the calls were originating from the Extended Stay America Hotel in Greensboro, North Carolina.

Thereafter, Detective Shearer and three other detectives went to the Extended Stay America Hotel, and upon arrival, the detectives spoke with hotel personnel. Specifically, Detective Shearer indicated that some guests at the hotel might be engaged in the sale of narcotics, and he gave McSwain's description of "Heavy." The hotel employees informed the detectives that room 308 was receiving a large amount of foot traffic, and the guests were constantly using the phone. Based on this information, the detectives observed room 308 for approximately forty-five minutes. However, the detectives did not witness any suspicious activity afoot.

Consequently, Detective Shearer once again dialed defendant's pager number, left his pager number, and did not receive a response. After this failed attempt to contact defendant, Detective Shearer called the telephone in room 308, an individual answered the phone, and Detective Shearer recognized the voice as defendant's. Detective Shearer indicated that he was with the hotel's maintenance staff; there were problems with the smoke detector in the room; and a maintenance worker would be coming by room 308 shortly to repair the problem. During the call, defendant inquired as to whether there were any washing machines in the hotel.

After this conversation, the detectives went to room 308, and Detective Shearer knocked on the door. A voice from inside the room inquired as to who was there, and Detective Shearer responded, "maintenance." Brandon Martin ("Martin"), one of the occupants of the room, opened the door. When the door opened, Detective Shearer, holding his credentials in his hand, identified himself as a police officer. Upon seeing Detective Shearer, Martin reached into his pocket and started to back away. As he did so, a "baggie corner" fell out of his pocket. Detective Shearer saw the "baggie corner," as well as one other on the floor, and recognized them as a type of storage bag used for packaging narcotics. At this point, Martin ran into the

room's bathroom, and Detective Shearer entered the room to chase him. Before Detective Shearer could reach Martin, Martin was able to slam the bathroom's door shut and flush the toilet. Thereafter, Detective Shearer secured Martin in the bathroom.

While Detective Shearer was pursuing Martin, the other detectives entered room 308 and noticed two other individuals in the room. One of the individuals, defendant—"a large heavyset black male"—was standing next to a bed with his hands in his pockets. When the detectives ordered defendant to remove his hands from his pockets, defendant opened his mouth, moved his left hand to his mouth, and lunged towards the bed. Ultimately, two detectives physically subdued defendant on top of the bed, while the other detective secured another individual, Terrence Jackson, who was sitting on a second bed in the room.

Defendant, who used the false name of his brother, and Martin were arrested. Upon a subsequent search of the room, the detectives discovered large size clothes (the clothes seemed to be defendant's size, and would not fit the other two individuals in the room), three "baggie corners" with white residue, three razor blades with white residue, a box of sandwich bags, electronic scales, a pager, and a handgun under the mattress of the bed, where defendant lunged. SBI testing showed that the white residue on the "baggie corners" and razor blades tested positive for cocaine. A search of defendant's person revealed a second pager and $770.00 in United States currency. When Detective Shearer searched the memory of defendant's pager, he found his cellular phone number and the numbers of the two phones with caller ID that he used at the police station.

On 8 November 1999, defendant's case was heard during the Criminal Session of Guilford County Superior Court, the Honorable Jerry Cash Martin presiding. At the conclusion of the trial, a jury found defendant guilty of possession with intent to sell and deliver cocaine and conspiracy to possess with intent to sell and deliver cocaine. Thereafter, Judge Martin entered judgment and sentenced defendant to imprisonment. Defendant now appeals.

[1] In his first assignment of error, defendant contends that the trial court erred when it denied his motions for a mistrial based on a juror's alleged misconduct, motion to conduct an inquiry into possible jury misconduct, and objection to the return of a document to a juror. However, we find no error.

Michael Boulton ("juror Boulton") was chosen as a juror for defendant's trial. At the close of all the evidence, the case was turned over to the jury, and the jury began its deliberations on Wednesday, 10 November 1999. Prior to recessing for the night, the trial court announced that there would be no court the next day (Thursday) due to a holiday, therefore court would not reconvene until Friday, 12 November 1999. Additionally, the court ordered the jurors to cease with deliberations, and "[m]ake no inquiry or investigation of your own about this matter."

Thereafter, on 12 November 1999, court reconvened and the jury returned. However, juror Boulton returned with a two-page typewritten document ("document") that he created. The document was titled "Circumstantial Evidence," and it listed fourteen circumstantial factors based on trial evidence pointing towards defendant's guilt. Juror Boulton gave the document to the court bailiff, and asked if the bailiff could make copies to distribute to the other eleven jurors. Upon receipt of the document, the bailiff turned it over to the trial judge, who then showed the document to counsel for both parties.

Subsequently, defense counsel, alleging juror misconduct, made a motion for a mistrial, a motion to conduct an inquiry into possible jury misconduct, and an objection to the return of the document to juror Boulton; however, the trial court denied the motions and objection, and returned the document to juror Boulton (without copies) for use during deliberations. Specifically, the trial court ruled:

> It's a two-page document containing in the Court's view a collection of the juror's thoughts and his recollection of the evidence presented in the case. The Court does not find or infer from the contents of this document, nor from the request that was made by him that he has violated any order of the Court. There is no implication that he has continued with other jurors in deliberation, no implication by this that he has made any inquiry or investigation of his own about this. It does appear to show a juror who is very serious minded, attentive to his duty, and has continued to give thought to what is before him, and that is an important decision about whether the person is guilty or not guilty of criminal offenses.
>
> The Court in reviewing the matter, based on defendant's objection and motion for mistrial . . . reviews it pursuant to [N.C.

> Gen. Stat. §§] 15A-1061 and 15A-1063. The Court does not find that there has occurred during the trial of this matter any error or legal defect in the proceedings or conduct inside or outside of the courtroom that would result in any substantial and irreparable prejudice to the defendant's case. . . .

After the jury returned with its verdicts, defense counsel renewed the motion for a mistrial, and the trial court denied the motion.

A trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (1999). Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge. *See State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). The decision to grant or deny such a motion will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *See State v. McGuire*, 297 N.C. 69, 75, 254 S.E.2d 165, 169-70 (1979).

Generally, "[o]nce a jury has been impaneled, any further challenge to a juror is a matter within the trial court's sound discretion." *State v. Conaway*, 339 N.C. 487, 518, 453 S.E.2d 824, 844 (1995). Moreover:

> It is well-settled law in this State that the determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion occurred. The reason for the rule of discretion is apparent. Misconduct is determined by the facts and circumstances in each case. The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings.

State v. Drake, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976) (citations omitted). In other words, "[t]he determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991).

"Where juror misconduct is alleged . . . the trial court must investigate the matter and make appropriate inquiry." *State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993) (emphasis omitted). However, there is no absolute rule that a court must hold a hear-

ing to investigate juror misconduct upon an allegation. *See State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240-41 (1993).

> [T]he trial court has the responsibility to conduct investigations [into apparent juror misconduct], including examination of jurors *when warranted*, to determine whether any misconduct has occurred and has prejudiced the defendant. An inquiry into possible misconduct is *generally required only where there are reports indicating that some prejudicial conduct has taken place.*

State v. Barnes, 345 N.C. 184, 226, 481 S.E.2d 44, 67 (1997) (emphasis added).

"An examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous . . . ." *State v. Aldridge*, 139 N.C. App. 706, 713, 534 S.E.2d 629, 635, *disc. review denied*, 353 N.C. 382, 546 S.E.2d 114 (2000). " 'The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.' " *State v. Johnson*, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978) (quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)). Only "[w]hen there is *substantial reason to fear* that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (emphasis added).

"The presiding judge is vested with broad discretion in matters relating to the conduct of the trial. This broad discretion includes rulings with respect to making inquiry of jurors to determine whether they may have been influenced or prejudiced by any matters outside the evidence." *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 90, *disc. review and cert. denied*, 343 N.C. 754, 473 S.E.2d 620 (1996) (citation omitted). Allegations of juror misconduct are determined by the facts present in each case; the trial judge is in a better position to investigate such allegations and make appropriate findings. Therefore, it is well settled that the trial court's determination on the question of juror misconduct will not be reversed on appeal unless it is clearly an abuse of discretion. *Aldridge*, 139 N.C. App. 706, 713, 534 S.E.2d 629, 634; *State v. Drake*, 311 N.C. App. 187, 229 S.E.2d 51 (1976).

Accordingly, we conclude that it was in the trial court's discretion whether to conduct a hearing and inquiry of juror Boulton. While we concede that a better course of action might have been for the trial court to have conducted a *voir dire* of juror Boulton here, the trial court was by no means required to do so, and we hold that no abuse of discretion occurred, because we discern no substantial or irreparable harm to defendant's case resulting from the juror's notes. *See* N.C. Gen. Stat. § 15A-1061. Not every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial. As stated above, the notes were likely "a collection of the juror's thoughts and his recollection[s]," or in other words, his typed notes.

For similar reasons, the trial court did not err in permitting the juror to take the notes into the jury room. Pursuant to N.C. Gen. Stat. § 15A-1228 (1999), "[e]xcept where the judge, on the judge's own motion or the motion of any party, directs otherwise, jurors may make notes and take them into the jury room during their deliberations." Therefore, the trial court did not abuse its discretion in returning the document (notes) to juror Boulton for use during deliberations.

[2] Next, defendant assigns error to the denial of his motions to dismiss the charge of conspiracy to possess with intent to sell and deliver cocaine. Specifically, defendant argues that there was insufficient evidence to sustain his conviction for conspiracy. We disagree.

At the close of the State's evidence, and again at the close of all the evidence, defendant made motions to dismiss the conspiracy charge on the grounds of insufficient evidence, and the trial court denied these motions. The standard for ruling on a motion to dismiss "is whether 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. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In determining the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). "The conspiracy is the crime and not its execution. Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975) (citation omitted). Furthermore, "[a] conspiracy may be shown by circumstantial evidence, or by a defendant's behavior." *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000), *disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001) (citation omitted). In fact, proof of a conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). "Ordinarily the existence of a conspiracy is a jury question." *State v. Gary*, 78 N.C. App. 29, 35, 337 S.E.2d 70, 74 (1985), *disc. review denied*, 316 N.C. 197, 341 S.E.2d 586 (1986).

At trial, the State proved the crime of conspiracy based solely on circumstantial evidence. In particular, there was evidence that defendant exercised some control over the hotel room in which he was arrested. For instance, defendant answered the phone when Detective Shearer called the room; large size clothes, that seemed to fit defendant, were found in the room; and he inquired as to whether the hotel had washing machines. Also, defendant negotiated a drug deal with Detective Shearer two days before his arrest; hotel personnel informed the detectives that hotel room 308 was receiving heavy foot traffic; when defendant first saw the detectives, he moved his hand from his pocket to his mouth; and he was arrested with a pager and $770.00 in United States currency on his person.

Additionally, Martin exerted some control over the room—i.e., he opened the door to the hotel room after Detective Shearer knocked. Moreover, upon seeing the detectives, Martin ran to the room's bathroom, slammed the door, and flushed the toilet. Also, a "baggie corner" fell out of Martin's pocket; a second "baggie corner" was found on the floor; and a third "baggie corner" was found in Martin's toboggan, which was also in the room. The detectives also found three razor blades, a box of plastic bags, and electronic scales in the room;

white residue was found on the "baggie corners" and razor blades; and the white residue tested positive for cocaine. Taken in the light most favorable to the State, the evidence seems to show that there was an agreement between defendant and Martin to possess with intent to sell and deliver cocaine. Therefore, we conclude that there was at least a jury question here as to the existence of a conspiracy. Thus, the trial court did not err in submitting the charge of conspiracy to the jury.

[3] Finally, defendant assigns error to the trial court's denial of his motion to suppress evidence seized during his arrest. Particularly, defendant argues that the police officer's use of a ruse or trickery—calling and telling defendant that maintenance would come to the room to fix a smoke detector, and then, knocking on the door and answering "maintenance" when asked who was there—to get the hotel room door open was an unreasonable search and seizure in violation of his Fourth Amendment rights. Again, we find no error.

At bar, defendant, alleging federal constitutional violations, made a motion to suppress the evidence of and about his pager, the phone numbers therein, and the currency that were found on his person when arrested. Subsequently, the trial court held a suppression hearing; and at the end of the hearing, the trial court issued an order, with detailed findings of fact and conclusions of law, denying defendant's motion. Upon a review of a trial court's denial of a motion to suppress, this Court

> 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. 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. . . .

State v. Milien, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001) (citation omitted).

We recognize that 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. Generally, warrantless searches are not allowed; however, "[a] warrantless search may be conducted if 'probable cause exists to search and the exigencies of the situation make search without a warrant necessary.' "

State v. Frazier, 142 N.C. App. 361, 368, 542 S.E.2d 682, 688 (2001) (quoting *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991)). "The reasonableness of a search, and the existence of exigent circumstances are factual determinations that must be made on a case by case basis." *State v. Johnson*, 64 N.C. App. 256, 262, 307 S.E.2d 188, 191 (1983), *remanded on other grounds*, 310 N.C. 581, 313 S.E.2d 580 (1984).

In the present case, Detective Shearer found a piece of paper with defendant's pager number at McSwain's residence; McSwain admitted that defendant was her source of cocaine and provided a description of defendant; Detective Shearer and defendant made a drug deal over the phone two days before his arrest; Detective Shearer paged defendant from two phones with caller ID, and both phones were called from the Extended Stay America Hotel; upon talking with hotel personnel, the detectives were informed that room 308 was receiving heavy foot traffic and the guests were frequently using the phone; and when Detective Shearer called room 308, defendant answered the phone. Based on the evidence, the detectives had probable cause to believe defendant was selling illegal drugs and that he was staying in room 308 of the Extended Stay America Hotel.

Moreover, we find that exigent circumstances existed here. Exigent circumstances may include such instances as where the detectives have reason to believe defendant was in the room, a delay may have led to the destruction of the controlled substances, and there was the possibility of risk to other guests in the hotel should defendant attempt to escape. *See State v. Mills*, 104 N.C. App. 724, 411 S.E.2d 193 (1991); *see also State v. Smith*, 96 N.C. App. 235, 238, 385 S.E.2d 349, 350 (1989); *State v. Prevette*, 43 N.C. App. 450, 457, 259 S.E.2d 595, 601 (1979), *appeal dismissed and review denied*, 299 N.C. 124, 261 S.E.2d 925 (1980).

"When executing a warrant, law enforcement officials are required to 'knock and announce' their presence before entering the premises unless exigent circumstances exist to justify entry without first knocking." *State v. Johnson*, 143 N.C. 307, 314, 547 S.E.2d 445, 450 (2001) (citing *Wilson v. Arkansas*, 514 U.S. 927, 131 L. Ed. 2d 976 (1995)); *see also* N.C. Gen. Stat. § 15A-249 (1999). Likewise, in a warrantless search made under exigent circumstances, the exigent circumstances may also justify the failure to "knock and announce" before entry. *See Prevette*, 43 N.C. App. 450, 455-56, 259 S.E.2d 595, 599-600.

"The knock and announce rule has three purposes: (1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent the unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (1998). "Th[at] is not to say . . . that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Wilson v. Arkansas*, 514 U.S. at 934, 131 L. Ed. 2d at 982. As a result, the trial courts are left to "determin[e] the circumstances under which an unannounced entry is reasonable." *Id.* at 936, 131 L. Ed. 2d at 984.

In the past, this Court found no violation of the announcement requirement of the "knock and announce" rule when the defendant came to the door and police officers asked her if she knew who owned a car parked outside, and then, the officers informed the defendant that they were police officers and had a search warrant. *See State v. Tate and State v. Tate*, 58 N.C. App. 494, 500, 294 S.E.2d 16, 20 (1982). However, for guidance, we look to the case law of other jurisdictions that have more thoroughly dealt with this issue of police ruse and trickery.

In both Kentucky and Wisconsin, the courts found that the police officers' ruse of calling out "pizza" and "pizza delivery," after the officers knocked on the door, did not violate the announcement requirement of the "knock and announce" rule, as the ruse successfully enticed the defendant to voluntarily open the door, the officers then announced themselves as police officers, and they gained peaceful entry. *See Adcock v. Commonwealth*, 967 S.W.2d 6; *see also State v. Moss*, 166 Wis.2d 733, 480 N.W.2d 526 (1992). Additionally, in Hawaii, the state Supreme Court held that the use of a police ruse violated neither state nor federal constitutional law, because the purposes of the "knock and announce" rule were not frustrated. *See State v. Dixon*, 83 Hawaii 13, 924 P.2d 181 (1996) (police officers sent a hotel security guard to defendant's hotel room, while they waited outside the door; the security guard knocked on the door and informed the occupants that he was there to check the air-conditioning; when the door opened, the officers announced themselves and entered the room).

We note that the use of deception (ruses, trickery, etc.) by law enforcement officials, in other contexts, is sometimes necessary and

is not always unconstitutional, i.e., undercover officers and informants. *See Maryland v. Macon*, 472 U.S. 463, 470, 86 L. Ed. 2d 370, 377 (1985) ("[t]he use of undercover officers is essential to the enforcement of vice laws"); *see also Arizona v. Fulminante*, 499 U.S. 279, 306, 113 L. Ed. 2d 302, 329 (1991) ("the use of informants in the discovery of evidence of a crime [i]s a legitimate investigatory procedure consistent with the Constitution"). Therefore, if we were to find the use of ruses and trickery illegal here, then there could be no use of undercover officers or informants by law enforcement officials in any context.

In the case *sub judice*, we further note that the police officers did knock and use a ruse to get the hotel room door open, however, the officers did not enter the room based on the ruse. In fact, once the door was voluntarily opened, the ruse was no longer necessary, and Detective Shearer, holding his credentials, identified himself as a police officer. Then, before the officers could take any further action, Martin started backing away from the door; Detective Shearer observed two "baggie corners" in plain view, one falling from Martin's pocket; it was apparent to Detective Shearer that the items were evidence of a crime or contraband; and Martin hurried to the room's bathroom. This series of events gave rise to additional exigent circumstances warranting the detectives' entry into the room—to avoid the destruction of evidence and Martin's possible obtaining of a weapon in the bathroom.

Thus, probable cause and exigent circumstances existed sufficient to conduct a warrantless search of the hotel room. Once the door was open, the identity of the detectives was immediately obvious from Detective Shearer's credentials and announcement, and the detectives did not step into the hotel room until additional exigent circumstances arose. Therefore, we hold that the detectives' use of a ruse to get the hotel room door voluntarily opened did not frustrate the purposes of the "knock and announce" rule, and was not an unreasonable search under the Fourth Amendment.

As to defendant's pager, the numbers therein, and currency, those items were found on defendant's person after he was arrested and handcuffed. " ' "In the course of [a] search [incident to arrest], the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof." ' " *State v. Goode*, 350 N.C. 247, 255-56, 512 S.E.2d 414, 419 (1999) (quoting *State v. Harris*, 279 N.C. 307, 310, 182 S.E.2d 364, 366-67 (1971))

(quoting *State v. Roberts*, 276 N.C. 98, 102, 171 S.E.2d 440, 443 (1970)). Furthermore, as to the numbers in the pager's memory, Detective Shearer had probable cause to believe that the pager contained information that would assist in the investigation of the crime; hence, he was entitled to search the numbers in the pager's memory without a warrant. *See State v. Wise*, 117 N.C. App. 105, 107, 449 S.E.2d 774, 775-76 (1994). Accordingly, we find that the trial court's ultimate conclusion was supported by its findings of fact; thus, we hold that the trial court properly denied defendant's motion to suppress.

In light of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN and HUDSON concur.

NORWOOD FENNELL AND ANNIE FENNELL, ADMINISTRATORS OF THE ESTATE OF KENNETH B. FENNELL, DECEASED, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, DEFENDANT

No. COA00-824

(Filed 21 August 2001)

1. Tort Claims Act— reversal of deputy commissioner by Commission—credibility of witness

The Industrial Commission did not err by reversing a deputy commissioner's decision in a Tort Claims action arising from the shooting of a motorist by a Highway Patrol Trooper where a deputy commissioner had found that the Trooper's testimony was not credible and that his use of deadly force was negligent, and the Commission found that the Trooper's testimony was credible, that the Trooper had believed that he was in danger of being shot, and that his use of deadly force was deliberate and not negligent. The Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner. Language in *Brewington v. N.C. Dept. of Correction*, 111 N.C. App. 833, that the responsibil-

ity for weighing credibility lies solely with the hearing commissioner is distinguished as dicta.

2. Tort Claims Act— shooting by Highway Patrol Trooper— intentional rather than negligent

The Industrial Commission did not err in a Tort Claims action by reversing a deputy commissioner's finding of negligence arising from a shooting by a Highway Patrol Trooper where competent evidence supports the Commission's findings that the Trooper believed that he was in danger of being shot and that he intended deadly force. The Tort Claims Act does not permit recovery for intentional injuries.

Judge HUDSON concurring in the result.

Appeal by plaintiffs from a decision and order entered 3 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2001.

McSurely & Osment, by Alan McSurely, for plantiff-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General William H. Borden, for defendant-appellee.

HUNTER, Judge.

Norwood and Annie Fennell (collectively, "plaintiffs") appeal from a decision and order of the North Carolina Industrial Commission ("Commission"). In its decision, the Commission reversed the decision and order of the deputy commissioner and dismissed plaintiffs' Tort Claims Act, N.C. Gen. Stat. § 143-291 *et. seq.* (1999), claim against the State Highway Patrol ("Highway Patrol"). On appeal, plaintiffs assign error to the Commission's reversal of the deputy commissioner's decision. After a careful review of the record and briefs, the decision and order of the Commission is affirmed.

The record discloses evidence which tended to show on 30 August 1993, Trooper Richard L. Stephenson ("Trooper Stephenson"), of the Highway Patrol, was on duty in his patrol car conducting radar surveillance of the speed of traffic on Interstate 85 in Randolph County, North Carolina. At approximately 7:00 p.m., Trooper Stephenson clocked a northbound blue Pontiac Grand Am automobile traveling at a speed of seventy miles an hour in a zone with a posted speed limit of sixty-five. Trooper Stephenson pursued the

vehicle, activated his blue lights, and pulled the vehicle over to the shoulder.

The driver of the vehicle was Kenneth Fennell ("Fennell"), plaintiffs' son. Before Trooper Stephenson had the opportunity to fully position his patrol car, Fennell exited his vehicle and began walking towards Trooper Stephenson's. Immediately, Trooper Stephenson exited his patrol car and met Fennell between the two cars. Fennell inquired as to why he had been stopped, and Trooper Stephenson indicated that he had been stopped for speeding. Trooper Stephenson then asked Fennell to sit in the right front passenger seat of his patrol car, and Fennell complied.

Next, Trooper Stephenson asked Fennell for his operator's license, and Fennell produced a student ID. When Trooper Stephenson again asked for an operator's license, Fennell produced a New York license. Thereafter, Trooper Stephenson contacted dispatch to determine if Fennell had a valid North Carolina or New York license. Dispatch advised Trooper Stephenson that Fennell did not have a valid North Carolina license, and the information was inconclusive as to Fennell's New York license. After obtaining this information, Trooper Stephenson issued Fennell a citation for not having a valid North Carolina operator's license.

After determining that Fennell's car was a rental and sensing Fennell's nervousness, Trooper Stephenson asked Fennell whether he had any illegal drugs, contraband, or weapons in his vehicle, to which Fennell responded that he did not. Trooper Stephenson then asked Fennell if he could search the vehicle, and Fennell verbally consented. Notably, Trooper Stephenson had written consent forms in his patrol car that he normally asked motorists to sign, but he failed to secure a written consent on this occasion. Trooper Stephenson began by searching the passenger side of the vehicle. Upon placing his left hand under the front passenger seat, Trooper Stephenson discovered a black bag, removed it, and unzipped it.

When he had the bag approximately half open, Trooper Stephenson recognized the barrel of a gun. Trooper Stephenson asked Fennell about the gun, and Fennell immediately struck Trooper Stephenson with his fists twice between the eyes. Upon being hit, Trooper Stephenson dropped the black bag, and the two men began to struggle. During the struggle, Trooper Stephenson attempted to

use his night stick and mace, but both were either dropped or knocked out of his hand. Trooper Stephenson then threw Fennell to the ground and attempted to gain control of him. At this point during the struggle, Fennell attempted to grab Trooper Stephenson's service revolver. When Trooper Stephenson realized he was not going to be able to subdue Fennell, he released him and stood upright.

After the two separated, Fennell grabbed the black bag and unzipped it. At this juncture, Trooper Stephenson removed his service revolver and warned Fennell that if he continued to reach for the gun, he would shoot. Despite the warning, Fennell continued to reach in the bag and began to remove the gun. When Trooper Stephenson saw the butt of the gun, he fired his first shot. Nevertheless, Fennell continued to remove the gun from the bag, thus Trooper Stephenson fired a second shot. Still, Fennell continued to clear the gun from the bag, and Trooper Stephenson then fired a third and fourth shot in rapid succession. These shots caused Fennell to spin to his right, where he fell with his face to the ground. As Fennell fell to the ground, his gun flew out of his hand and landed approximately twelve feet from his body. Fennell died at the scene.

Upon taking an inventory of the area, police officers, who had arrived at the scene, found a black bag, a night stick, nail clippers, an AA battery, pepper mace, a set of scales, a plastic bag with crack cocaine, two prophylactics, a nylon bag with a mirror and a calculator inside, a plastic bag containing $1,200.00 in cash, shell casings, a set of keys, assorted coins, and a gun. Subsequent testing of the scales and gun established no usable finger prints.

On 26 May 1995, plaintiffs, on behalf of their son, filed this Tort Claims Act, N.C. Gen. Stat. § 143-291 *et. seq.*, claim with the Commission alleging negligence on the part of the Highway Patrol, *inter alia*, for the actions of Trooper Stephenson. Initially, plaintiffs' case was heard by Deputy Commissioner George T. Glenn II. During the proceedings before the deputy commissioner, certain inconsistencies developed as to Trooper Stephenson's account of the events—for instance, during a video deposition, Trooper Stephenson testified that he was twenty to twenty-five feet away from Fennell when he fired his first shot, however, during the hearing before the deputy commissioner, Trooper Stephenson testified that he was five to six feet away when he fired his first shot. Due to inconsistencies in Trooper Stephenson's testimony and the physical evidence, Deputy Commissioner Glenn questioned Trooper Stephenson's credibility. At

the conclusion of plaintiffs' evidence, Deputy Commissioner Glenn dismissed plaintiffs' claims against all defendants, except the Highway Patrol.

Then, on 30 June 1998, Deputy Commissioner Glenn filed his decision and order in this matter. In his decision, Deputy Commissioner Glenn found that Fennell did not have a gun and did not attempt to enter a gun into the situation; Trooper Stephenson's testimony was not credible; Trooper Stephenson did not intend to use the amount of force he did in fact use; Trooper Stephenson's use of deadly force was unjustified, excessive, and negligent; and the gun found at the scene was placed there by someone other than Fennell. Based on these findings, the deputy commissioner concluded that Trooper Stephenson's use of deadly force was negligent, and his negligence was the proximate cause of Fennell's death. Therefore, Deputy Commissioner Glenn ordered the Highway Patrol to pay plaintiffs $100,000.00 for Trooper Stephenson's negligence.

The Highway Patrol appealed to the Full Commission. On 5 August 1998, the Highway Patrol filed a motion for dismissal, or in the alternative summary judgment, based on collateral estoppel. The Full Commission reviewed this matter and filed its decision and order, with detailed findings and conclusions, on 3 March 2000. In its decision and order, the Full Commission reversed the decision and order of Deputy Commissioner Glenn and denied the Highway Patrol's motion for dismissal, or summary judgment. Significantly, in its decision and order, the Full Commission found:

> 25. Although inconsistencies exist between Trooper Stephenson's testimony at the hearing before the Deputy Commissioner and the statements Trooper Stephenson gave following the incident, Trooper Stephenson's testimony regarding his actions as they relate to the shooting of [] Fennell is uncontradicted and is accepted as credible.
>
> 26. When Trooper Stephenson shot [] Fennell, he acted intentionally. Trooper Stephenson believed that [] Fennell had a gun and that he was in danger of being shot by [] Fennell. Trooper Stephenson not only intended to shoot, but intended to inflict deadly force, and did so in fact by causing the death of [] Fennell. Therefore, [] Fennell's death was the result of an intentional act and cannot be found to have been the result of negligent conduct.

> Plaintiffs failed to meet their burden of proving Trooper Stephenson was negligent.

Therefore, the Full Commission concluded:

> 3. When Trooper Stephenson shot [] Fennell, he not only intended to shoot, but intended to inflict deadly force. . . .
>
> 4. . . . The death of [] Fennell was the result of Trooper Stephenson's intentional actions and cannot be found to be the result of negligent conduct. Therefore, plaintiffs' claim must be denied. . . .
>
> 5. The Industrial Commission does not have jurisdiction over claims arising from intentional acts. . . .

Based on its findings of fact and conclusions of law, the Full Commission reversed Deputy Commissioner Glenn's decision and order and denied plaintiffs' claim. Plaintiffs now appeal to this Court.

[1] Plaintiffs assign error to the Commission's reversal of the deputy commissioner's decision. Specifically, plaintiffs challenge the Commission's findings that: (1) Trooper Stephenson was credible, and (2) Trooper Stephenson acted intentionally, not negligently. After a careful review of the record, we find that competent evidence supports the Commission's findings, and the Commission's findings support its conclusions and decision. Therefore, we reject plaintiffs' assignment of error.

Under the Tort Claims Act, "when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). In a proceeding under the Tort Claims Act, "[f]indings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding." *McGee v. N.C. Dep't of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999); *see also Bailey v. Dept. of Mental Health*, 272 N.C. 680, 683-84, 159 S.E.2d 28, 30-31 (1968). "On appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The Court's duty goes no further than to determine whether the record contains any evidence tending to support

the finding.' " *McGee*, 135 N.C. App. at 324, 520 S.E.2d at 87 (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

First, plaintiffs contend that the responsibility of weighing a witness' credibility lies solely with the deputy commissioner; hence, the Commission erred in reversing Deputy Commissioner Glenn's credibility determination regarding Trooper Stephenson, and making findings contrary to those made by the deputy commissioner. We are unpersuaded by plaintiffs' argument.

"[T]he Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner." *McGee*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87. In fact, under the Tort Claims Act, the Commission has statutory authority on appeal to "amend, set aside, or strike out the decision of the hearing commissioner and may issue its own findings of fact and conclusions of law." N.C. Gen. Stat. § 143-292 (1999). Furthermore:

> In reviewing the findings made by a deputy commissioner . . ., the Commission may modify, adopt, or reject the findings of fact found by the hearing commissioner. *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976). It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998)[, *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999)]. This State's Supreme Court in *Adams*, overruling *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), stated:
>
> "Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders* states, 'that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.' "
>
> *Adams*, 349 N.C. at 681, [509] S.E.2d at 413. Thus, the Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner.

McGee, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87.

At bar, Trooper Stephenson was the only witness to the events from start to finish. Three drivers did witness the events to an extent as they transpired, but none of the witnesses saw the events in their entirety. Moreover, the drivers saw Fennell strike Trooper Stephenson and the resulting struggle; yet, none of the witnesses noticed a gun in Fennell's hands. However, a gun was found approximately twelve feet from Fennell's body, which supported Trooper Stephenson's account of the events. Additionally, the police officers' inventory of the scene after the shooting supported Trooper Stephenson's and the drivers' accounts of a struggle between the two men.

While there may be some contrary evidence to the Commission's finding, primarily in the form of inconsistencies in Trooper Stephenson's accounts of the events and the physical evidence, the Commission, in an acceptable exercise of its discretion, gave more weight and credibility to the testimony of Trooper Stephenson than did Deputy Commissioner Glenn. Furthermore, although contrary evidence exists, some competent evidence of record supports the Commission's finding as to Trooper Stephenson's credibility, and therefore, the finding is conclusive on appeal.

In furtherance of their contention, plaintiffs rely on this Court's opinion in *Brewington v. N.C. Dept. of Correction*, 111 N.C. App. 833, 433 S.E.2d 798 (1993), for the proposition that, "the responsibility of weighing the credibility of the witnesses lies solely with the hearing commissioner." *Id.* at 839, 433 S.E.2d at 801. However, plaintiffs' reliance is misguided, as the above quote is merely dicta in our previous opinion.

In *Brewington*, a Tort Claims Act action, this Court affirmed a decision of the Commission, which affirmed and adopted a decision and order of a deputy commissioner, without the Commission making its own findings of fact and conclusions of law. *Id.* In doing so, we held that the Commission, when hearing appeals of claims from a hearing commissioner under the Tort Claims Act, may make its own findings of fact and conclusions of law, but that it is not required to do so. *Id.* We based our determination in part on the express language of N.C. Gen. Stat. § 143-292, which states, in pertinent part, the Commission "may issue its own findings of fact and conclusions of law." Significantly, a credibility determination by a deputy commissioner was not at issue in *Brewington*.

In the case *sub judice*, a deputy commissioner's credibility determination is at issue. We reiterate that under the Tort Claims Act, the Commission has the authority on appeal to "amend, set aside, or strike out the decision of the hearing commissioner . . . ." N.C. Gen. Stat. § 143-292. Certainly, the language of § 143-292—"amend, set aside, or strike out"—includes the authority for the Commission to reverse a deputy commissioner's credibility determination. Therefore, *Brewington* is distinguished.

[2] Next, plaintiffs contend that the Commission erred in reversing Deputy Commissioner Glenn's finding of negligence, and making findings contrary to those made by the deputy commissioner—particularly, the Commission's finding that Trooper Stephenson acted intentionally. Again, plaintiffs' argument lacks merit.

As stated in *McGee*, the Commission is the ultimate fact-finder on appeal in a Tort Claims Act action. *See McGee*, 135 N.C. App. at 324, 520 S.E.2d at 87. Based on our review of the record, competent evidence supports the Commission's findings that Trooper Stephenson acted intentionally when he shot Fennell; Trooper Stephenson believed Fennell had a gun and that he was in danger of being shot; and Trooper Stephenson intended to inflict deadly force. Consequently, the Commission's findings are conclusive on appeal.

It is well-settled that the Tort Claims Act does not permit recovery for intentional injuries. *See Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 577 (1956); N.C. Gen. Stat. § 143-291 *et. seq.* Only claims for negligence are covered. *Id.* Therefore, the Commission does not have jurisdiction over claims arising from intentional acts, such as the ones at issue here. Accordingly, we hold that competent evidence supports the Commission's findings of facts, and thus, those findings are conclusive on appeal. Thus, we affirm the Commission's findings of fact, and decision and order.

Finally, in light of our affirming the Commission's decision and order, the Highway Patrol's cross-assignment of error as to collateral estoppel based on a federal court decision in this same case is deemed moot.

Thus, the Commission's decision and order is

Affirmed.

Judge MARTIN concurs.

Judge HUDSON concurs in the result in a separate opinion.

Judge HUDSON concurring in the result.

I agree that the decision of the Industrial Commission must be affirmed, but for different reasons than those above.

Unlike the majority, I believe this Court was correct when it stated in *Brewington v. N.C. Dept. of Correction*, 111 N.C. App. 833, 839, 433 S.E.2d 798, 801, *disc. review denied*, 335 N.C. 552, 438 S.E.2d 142 (1993), that, in cases under the Tort Claims Act, "the responsibility of weighing the credibility of the witnesses lies solely with the hearing commissioner." In cases under the Workers' Compensation Act, on the other hand, the Full Commission is required to make its own credibility determinations, and is not bound by the deputy commissioners who initially hear the cases. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). There are differences in the language of the Tort Claims Act and the Workers' Compensation Act that lead me to believe the legislature intended for the Full Commission to have an enhanced role on review in workers' compensation claims that it did not intend or provide in the Tort Claims Act.

Under the Tort Claims Act, the Industrial Commission is specifically "constituted a court for the purpose of hearing and passing upon tort claims against the State [departments and agencies]." N.C. Gen. Stat. § 143-291 (1999). Although the Commission may promulgate rules for the processing of these claims, the Rules of Civil Procedure and the Rules of Evidence specifically apply to tort claims. *See* N.C. Gen. Stat. § 143-300 (1999). The claims are initially heard by a deputy commissioner sitting as trial judge. The first appeal of a decision is to the Full Commission, and "shall be heard . . . on the basis of the record in the matter and upon oral argument of the parties." N.C. Gen. Stat. § 143-292 (1999). The Full Commission may not take new evidence in deciding the case. *See id.*

By contrast, under the Workers' Compensation Act, the Industrial Commission was created by the General Assembly as "a commission." *See* N.C. Gen. Stat. § 97-77(a) (1999). The Commission is "primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workers' Compensation Act." *Hanks v. Utilities Co.*, 210 N.C. 312, 319, 186 S.E. 252, 257 (1936) (*citing In re Hayes*, 200 N.C. 133, 139, 156 S.E. 791, 793 (1931)); *see also Letterlough v. Atkins*, 258 N.C. 166, 168, 128

S.E.2d 215, 217 (1962). The Commission is explicitly *not* a court of general jurisdiction, but is a quasi-judicial board with jurisdiction limited to that conferred upon it by the Legislature. *See Letterlough*, 258 N.C. at 168, 128 S.E.2d at 217; *Bryant v. Doughtery*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966). In workers' compensation cases, the Rules of Civil Procedure and the Rules of Evidence do not apply, and the Commission is empowered to make its own rules; in fact, the statute requires that "[p]rocesses, procedures and discovery under this Article shall be as summary and simple as reasonably may be." N.C. Gen. Stat. § 97-80(a) (1999). The Workers' Compensation Act provides for disputes to be heard by a deputy, and for review of the award of the deputy by the Full Commission. *See* N.C. Gen. Stat. §§ 97-84, 97-85 (1999).

In conducting such review, the Full Commission "shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, [and] rehear the parties or their representatives." N.C.G.S. § 97-85. In *Adams*, the Supreme Court explicitly relied on this section in holding that "the ultimate fact-finding function [lies] with the [Full] Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Adams*, 349 N.C. at 681, 509 S.E.2d at 413. In a tort claims case, the Full Commission may not hear additional evidence and need not make its own findings of fact and conclusions of law. However, in a workers' compensation case, the commission can and must make its own findings of fact and conclusions. *See Brewington*, 111 N.C. App. at 838-39, 433 S.E.2d at 801. The courts have made it very clear that the Full Commission in a workers' compensation case may not simply affirm and adopt the findings of a deputy commissioner, but is required to conduct its own review of the evidence, including credibility rulings. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552-53 (2000) *(citing Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413-14); *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992). I believe that the General Assembly has created a uniquely expansive role for the Full Commission in workers' compensation cases and has not done so in tort claims. While the statute and the courts have clearly described the nature of this role in workers' compensation cases, the Tort Claims Act does not have the same provisions and does not provide a basis for us to treat Full Commission review in tort claims any different from the way we typically treat credibility rulings by a judge, on appeal from a non-jury trial.

In a non-jury trial, the trial judge acts as both judge and jury, and resolves credibility issues as the trier of fact. *See In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) *(citing Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)). This court has summarized the usual standard of review of such findings as follows:

> The findings of fact by a trial court in a non-jury trial have the force and effect of a verdict by a jury and are conclusive on appeal if supported by competent evidence. . . . *Henderson County v. Osteen*, 38 N.C. App. 199, 247 S.E.2d 636 (1978), [*judgment affirmed*, 297 N.C. 113, 254 S.E.2d 160 (1979)]. [T]he trial court, having had the fullest opportunity to hear the testimony and observe the demeanor of the parties, to weigh any competent evidence either party cared to place before the court and arrive at appropriate conclusions [regarding the issues], . . . should be accorded deference unless his findings and conclusions are manifestly unsupported by the record.

McAulliffe v. Wilson, 41 N.C. App. 117, 120-21, 254 S.E.2d 547, 550 (1979). Given the different language in the Tort Claims Act and the Workers' Compensation Act regarding review by the Full Commission, I do not find a reason to conclude that the Legislature intended to empower the Full Commission to overrule credibility determinations of the hearing officers in tort claims, as it clearly intended in workers' compensation cases. I therefore conclude that review by the Full Commission of findings of the deputy commissioner in a tort claim is governed by this usual standard.

Here, the Full Commission completely disregarded the Deputy Commissioner's determination that Trooper Stephenson's testimony was not credible, which I do not believe it was empowered to do. Furthermore, in this determination it made a finding, challenged by plaintiff, that in my opinion is not supported by competent evidence in the record. In this finding (number 25), the Commission wrote that "Trooper Stephenson's testimony regarding his actions as they relate to the shooting of Mr. Fennell is uncontradicted and is accepted as credible." To the contrary, Trooper Stephenson's testimony, particularly regarding the distance between himself and Fennell during the shooting, was plainly contradicted by his own prior statements and by the forensic evidence.

However, because plaintiffs did not assign error to several other significant findings of the Full Commission, I concur in

the result reached by the majority. Among these findings are the following:

> 15. After the two men separated, Mr. Fennell ran to and picked up the black bag and began to unzip it. Trooper Stephenson removed his service revolver when Mr. Fennell picked up the bag and told Mr. Fennell that if Mr. Fennell continued to attempt to get the gun, Trooper Stephenson would shoot him. Despite this warning, Mr. Fennell continued to attempt to remove the gun from the bag.
>
> 16. When Trooper Stephenson saw the butt of the gun coming out of the bag in Mr. Fennell's hand, he fired once at Mr. Fennell. Trooper Stephenson did not know at that time whether he had hit Fennell with his first shot. After the first shot, Trooper Stephenson waited to determine what Mr. Fennell was doing. When Trooper Stephenson discovered that Mr. Fennell was still attempting to gain control of the gun, he again told Mr. Fennell not to remove the gun. After determining that Mr. Fennell was continuing to remove the gun from the bag, Trooper Stephenson fired a second shot at Mr. Fennell. After the second shot, Mr. Fennell continued removing the gun with his right hand. When Mr. Fennell cleared the gun from the bag and positioned it in Trooper Stephenson's direction, Trooper Stephenson fired the third and fourth shots in rapid succession. These shots caused Mr. Fennell to spin to his right, where he fell with his face to the ground. Additionally, after these final two shots, Mr. Fennell's gun flew from his hand. A gun was found later approximately twelve feet from the location of Mr. Fennell's body.

As plaintiffs did not assign error to the above findings of fact, they are binding on appeal. *See Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 84, 361 S.E.2d 575, 577 (1987); N.C.R. App. P. 10(a). These findings do support the Commission's conclusion that Trooper Stephenson believed he was in danger of being shot by Fennell and that he intended to inflict deadly force when he shot Fennell. Since the Tort Claims Act does not cover intentional acts which are reasonable, plaintiffs cannot recover. *See Frazier v. Murray*, 135 N.C. App. 43, 48, 519 S.E.2d 525, 528 (1999), *appeal dismissed*, 351 N.C. 354, 542 S.E.2d 209 (2000).

MORRIS COMMUNICATIONS CORPORATION, D/B/A FAIRWAY OUTDOOR ADVERTISING; OUTDOOR COMMUNICATIONS, INC.; AND MAPLE COVE, INC., PLAINTIFFS V. THE CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA00-219

(Filed 21 August 2001)

1. Zoning— ordinance—outdoor advertising billboards—protest petition provisions—text amendments

The trial court did not err by concluding that the passage of zoning ordinance number 2427 concerning outdoor advertising billboards was subject to the protest petition provisions of N.C.G.S. §§ 160A-385 and 160A-386 even though defendant contends the protest petition procedure applies to only zoning map amendments and not to amendments to the text of a zoning ordinance, because: (1) the legislature intended for the protest procedure in N.C.G.S. § 160A-385 to apply to both zoning map amendments and amendments to the text of zoning ordinances since the statute speaks of zoning regulations, restrictions, and zone boundaries; (2) N.C.G.S. § 160A-386 expressly refers to changes in or amendments to zoning ordinances or zoning maps; and (3) a text amendment which adversely affects the rights of property owners should be treated no differently than a map amendment which has such adverse effect.

2. Zoning— ordinance—outdoor advertising billboards—class of lots affected

The trial court erred by concluding that the class of lots affected by zoning ordinance number 2427 concerning outdoor advertising billboards are those lots upon which off-premises signs affected by the seven-year amortization provisions of the ordinance were located at the time of its passage, because the ordinance included a larger area than just those lots on which non-conforming signs subject to amortization were located at the time of its passage.

3. Zoning— ordinance—outdoor advertising billboards—city's duties under protest petition statute

The trial court did not err by failing to conclude as a mater of law that defendant city failed to carry out its duties under the protest petition statute of N.C.G.S. § 160A-386 used by plaintiffs and others to protest proposed zoning ordinances concerning outdoor advertising billboards, because: (1) defendant city had a

prescribed form for protest petitions under N.C.G.S. § 160A-386 which was used by plaintiffs and others in submitting their protests to the proposed ordinances, and the city attorney reviewed the protest petitions and the proposed ordinances and came to the legal conclusion that the protest petition procedure did not apply to text amendments; (2) the city performed calculations to determine whether the twenty percent threshold under N.C.G.S. § 160A-385 had been met; and (3) the city took substantial action to determine whether a three-fourths vote of the city council was required.

Appeal by defendant and cross appeal by plaintiffs from order entered 27 September 1999 by Judge Loto Greenlee Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 12 January 2001.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., and Craig D. Justus, for plaintiff-appellee/cross-appellant Morris Communications, Inc.

Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., and Philip S. Anderson, for plaintiffs-appellees/cross-appellants Outdoor Communications, Inc., and Maple Cove, Inc.

Roberts & Stevens, P.A., by Sarah Patterson Brison Meldrum; Kilpatrick Stockton, LLP, by Robert C. Stephens; and Robert W. Oast, Jr., City Attorney, for defendant-appellant/cross-appellee.

CAMPBELL, Judge.

Defendant appeals and plaintiffs cross appeal from an order of the trial court granting partial summary judgment to plaintiffs and denying defendant's motion for partial summary judgment. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs, Morris Communications Corp., d/b/a Fairway Outdoor Advertising, Inc. (Fairway), Outdoor Communications, Inc. (OCI), and Maple Cove, Inc. (Maple), own and/or lease various properties within the zoning jurisdiction of defendant City of Asheville (the City). Fairway and OCI own and maintain advertising billboards on the properties they own and/or lease. Maple owns property which it rents to others and upon which advertising billboards are located.

The following overview of the history of the City's regulation of advertising billboards is relevant to the instant case: In 1977, the

Asheville City Council (City Council) adopted zoning regulations (1977 Sign Regulations) regarding "off-premises signs" (signs used for the purpose of displaying, advertising, identifying or directing attention to a business, products, operations or services sold or offered at a site other than the site where such sign is displayed) located within the City's zoning jurisdiction. The 1977 Sign Regulations permitted "off-premises signs," including billboards and directional signs, in all commercial and industrial zoning districts, subject to area and height limitations. The 1977 Sign Regulations also provided that any existing "off-premises sign" which exceeded the area and height limitations by ten percent (10%) or less would be considered a "conforming" sign under the regulations, and all other existing "off-premises signs" which exceeded the area and height limitations would be considered "non-conforming." These "non-conforming" signs were "grand-fathered" by the regulations, allowing them to remain in perpetuity, so long as they were not altered in any significant way.

In August 1990, the City Council amended the 1977 Sign Regulations related to "off-premises signs," reducing the area and height limitations, mandating certain spacing requirements, and requiring that all "non-conforming" signs under the 1977 Sign Regulations be brought into conformity with the 1990 Regulations or be removed (amortized) within five years without monetary compensation to the owner. Those "off-premises signs" that were "conforming" under the 1977 Sign Regulations but were "non-conforming" under the 1990 Regulations were required to be brought into conformity or amortized within seven years.

In February 1995, the City Council amended the 1990 Regulations to allow "off-premises signs" that conformed with the 1977 Regulations to avoid amortization. In May 1997, the Council repealed all of its zoning laws, and enacted Chapter 7 of the Unified Development Ordinance (UDO), carrying forward the protection from amortization afforded those "off-premises signs" that did not conform under the 1990 Regulations, but did conform under the 1977 Sign Regulations. On 16 September 1997, the City Council directed its planning and development staff to study possible revisions to the UDO as it pertained to outdoor advertising billboards. Specifically, the Council ordered studies of three proposed ordinances which would amend the text of Section 7-13 of the UDO. One of the proposed ordinances (Ordinance No. 2426) severely limited the area and height of "off-premises signs," effectively prohibiting future bill-

boards within the City's zoning jurisdiction. The other two proposals were alternative versions of an ordinance (Ordinance No. 2427) requiring amortization of "non-conforming" signs.

A public hearing before the City Council was scheduled for 11 November 1997 to consider these proposed amendments. Public notice of this hearing was given by newspaper publication.

Prior to the public hearing, plaintiffs Fairway and OCI obtained from the City's Planning and Development Office a list of "off-premises signs," including billboards and directional signs, located within the City's zoning jurisdiction. This list, which was compiled from the City's 1990 sign survey database and field survey updates conducted in 1996, identified the property owner, property address and acreage of each lot upon which an "off-premises sign" was located within the City's zoning jurisdiction. The list also identified the owner of each of these "off-premises signs." Based on this information, Fairway and OCI obtained protest petition signatures from the owners of 49 lots on which "off-premises signs" were located. Fairway and OCI also signed protest petitions as owners of property, and as owners of the vast majority of billboards required to be amortized under the proposed ordinances.

On 6 November 1997, three working days prior to the City Council's public hearing, plaintiffs filed with the City Clerk the aforementioned protest petitions pursuant to N.C. Gen. Stat. §§ 160A-385 and 160A-386. Each petition was entitled "Protest of Proposed Zoning Amendment" and referenced "Proposed Amendment of Section 7-13 of the Zoning Ordinance of the City of Asheville." The City Attorney and City Planning Director subsequently met to coordinate a review of the petitions to determine whether they were valid and effective under N.C.G.S. §§ 160A-385 and 160A-386, and to determine whether a three-fourths vote of the City Council would be required for passage of the proposed ordinances.

In making this determination, the City's planning and development staff calculated the acreage of the entire zoning jurisdiction of the City, including the City's extraterritorial jurisdiction, to be 32,700 acres. The staff also determined the acreage within the City's zoning jurisdiction that was at that time zoned to permit "off-premises signs" to be 4,928 acres. The staff then determined the acreage of the lots on which "off-premises signs" were located, based on the list generated from the City's updated 1990 sign survey database, to be 243.89 acres.

Having established these three figures, the City staff was advised to assume that each of the lots shown on the City's updated 1990 sign survey database in fact had an "off-premises sign" located on it. The City staff was also advised to assume that the persons whose signatures appeared on the protest petitions as signing for a particular lot had actual authority to do so. Using the acreage of the lots on which "off-premises signs" were located according to the sign survey database (243.89 acres) as the numerator and the acreage of the area within the City's zoning jurisdiction zoned to permit "off-premises signs" (4,928 acres) as the denominator, the staff determined that the protest petitions that had been filed represented 4.95% of the area of the lots included in the proposed change, well below the twenty percent (20%) required to trigger the three-fourths vote requirement under N.C.G.S. § 160A-385. The staff also made the calculation using the City's entire zoning jurisdiction (32,700 acres) as the denominator, and determined that the three-fourths vote requirement would, *a fortiori*, not be triggered by that calculation. Therefore, the City Attorney advised the City Council that only a simple majority vote was required for passage of the proposed ordinances.

At the 11 November 1997 public hearing, the City Council unanimously approved Ordinance No. 2426, prohibiting new "off-premises signs" larger than six (6) square feet in size. The City Council then approved Ordinance No. 2427, which required amortization within seven years of all "non-conforming" signs, whether "grand-fathered" by earlier regulations or not, by a vote of 4 to 3. As required by N.C. Gen. Stat. § 160A-75, the City Council held a second reading of Ordinance No. 2427, and it was finally adopted by a 4 to 3 vote on 25 November 1997.

On 9 January 1998, plaintiffs filed the complaint in the instant action. In count one, plaintiffs sought a declaratory judgment that Ordinance No. 2427 had been enacted in violation of N.C.G.S. §§ 160A-385 and 160A-386, thereby making it invalid. In count two, plaintiffs alleged that Ordinance No. 2427 was unconstitutional, or, in the alternative, that plaintiffs were entitled to just compensation for the taking of their private property. Defendant filed its answer on 30 March 1998.

On 4 August 1999, plaintiffs moved for summary judgment on count one of their complaint. On 5 August 1999, the City filed its own motion for summary judgment on count one. On 27 September 1999, Judge Loto Greenlee Caviness entered an order granting plaintiffs'

motion for partial summary judgment, and denying defendant's motion for partial summary judgment, making the following conclusions of law:

> 1. Asheville Ordinance 2427 and its passage are subject to the zoning laws of North Carolina including those applicable to protest petitions. G.S. § 160A-385 and § 160A-386.
>
> 2. The class of lots affected by Ordinance 2427 are the lots upon which off-premise signs affected by the seven (7) year amortization provisions of Ordinance 2427 were located at the time of its passage.
>
> 3. That there are disputes that are not resolved by this Order for Partial Summary Judgment as to whether or not the City of Asheville carried out its duties under the protest petition law as mandated by *Unruh v. City of Asheville*, 97 N.C. App. 287 (1990) and, if so, whether or not the protest petitions filed constitute twenty (20%) percent of the lots included in the affected class.

The trial court "[f]urther [o]rdered that there is no just reason for delay of an appeal of the denial of Defendant's Motion for Summary Judgment and the granting of Plaintiffs' Motion for Partial Summary Judgment," and "[t]his ruling affects a substantial right of Defendant pursuant of N.C.G.S. § 1-277 and Rule 54(b) of the North Carolina Rules of Civil Procedure."

Defendant filed notice of appeal on 25 October 1999, and a petition for writ of certiorari on 26 October 1999. Plaintiffs filed a cross appeal pursuant to N.C. R. App. P. 3(c) on 4 November 1999, along with their own petition for writ of certiorari. The parties' petitions for certiorari were dismissed without prejudice to the parties' rights to re-file them after the record on appeal was filed in this case. After the record on appeal was filed, both parties re-filed their petitions for writ of certiorari. Defendant subsequently filed a motion to dismiss plaintiffs' petition for certiorari. These petitions are currently pending before this Court.

We begin by noting that the denial of a motion for summary judgment does not qualify as an appealable order. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983). Likewise, "[a] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C.

App. 19, 23, 437 S.E.2d 674, 677 (1993). The order appealed from in the instant case granted partial summary judgment in favor of plaintiffs and denied defendant's motion for partial summary judgment; therefore, it is an interlocutory order.

"As a general rule, a party has no right to immediate appellate review of an interlocutory order." *Tise v. Yates Construction Co.*, 122 N.C. App. 582, 584, 471 S.E.2d 102, 105 (1996). However, appeal from an interlocutory order is permissible under two specific statutory exceptions. *Town Center Assoc. v. Y & C Corp.*, 127 N.C. App. 381, 384, 489 S.E.2d 434, 436 (1997). "First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). The order appealed from in the instant case contained the trial court's certification pursuant to Rule 54(b); however, a trial court cannot make its decree immediately appealable under Rule 54(b) by simply denominating it a final judgment if it is not such a judgment. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). Here, the trial court's order failed to fully resolve any of the parties' claims, and, therefore, it is not a final judgment under Rule 54(b).

The other situation in which an immediate appeal may be taken from an interlocutory order is when, pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(d), "the trial court's order (1) affects a substantial right, (2) in effect determines the action and prevents a judgment from which an appeal might be taken, (3) discontinues an action, or (4) grants or refuses a new trial." *Town Center Assoc.*, 127 N.C. App. at 385, 489 S.E.2d at 436; N.C. Gen. Stat. § 1-277 (2000); N.C. Gen. Stat. § 7A-27(d) (2000). Only the substantial right exception is potentially applicable in the instant case. However, we need not determine whether the trial court's order affects a "substantial right" pursuant to N.C.G.S. §§ 1-277 and 7A-27(d), because we have elected to exercise our discretionary authority under N.C. R. App. P. 21(a)(1) and allow each parties' petition for writ of certiorari in order to address the merits of this appeal. We have so chosen to exercise our discretion because the major issues presented on appeal are strictly legal and their resolution is not dependent on further factual development. *See Lamb*, 308 N.C. at 425, 302 S.E.2d at 872. Consequently, defendant's motion to dismiss plaintiffs' petition for writ of certiorari is hereby denied. We now proceed to the merits of this appeal.

Defendant's Appeal

On appeal, defendant contends the trial court erred in denying its motion for partial summary judgment and granting partial summary judgment for plaintiffs. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2000). The issues raised by defendant are not dependent on further factual development, but are purely legal in nature, and, thus, appropriately resolved at the summary judgment stage.

[1] By its first assignment of error, defendant argues the trial court erred in concluding that the passage of Ordinance No. 2427 was subject to the protest petition provisions of N.C.G.S. §§ 160A-385 and 160A-386. Defendant contends that the protest petition procedure does not apply to amendments to the text of a zoning ordinance, but that it only applies to zoning map amendments. We disagree.

While we realize that the protest petition procedure is generally applied to map amendments rather than text amendments, the language of the statute leads us to conclude that it also applies to text amendments, for it speaks of zoning regulations, restrictions, *and* zone boundaries. *See* David W. Owens, *Legislative Zoning Decisions* (2d ed. 1999). N.C.G.S. § 160A-385 provides, in pertinent part:

> (a) Zoning regulations and restrictions **and** zone boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against **such** change, signed by the owners of twenty percent (20%) or more either of the area of the lots included in a proposed change, or . . . .

N.C. Gen. Stat. § 160A-385(a) (1999) (emphases added). Further, N.C.G.S. § 160A-386, which sets out requirements for valid protest petitions under § 160A-385, reads in *pertinent* part:

> No protest against **any** change in or amendment to a zoning ordinance **or** zoning map shall be valid or effective for the purposes of G.S. 160A-385 unless it be in the form of a written petition actually bearing the signatures of the requisite number of

property owners and stating that the signers do protest the proposed change or amendment . . .

N.C. Gen. Stat. § 160A-386 (1999) (emphases added).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). "[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). "It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Id.*

The clear and unambiguous language of N.C.G.S. § 160A-385(a) states that zoning regulations and restrictions, as well as zone boundaries, are subject to change or amendment from time to time, and that a protest against any such change is subject to the twenty percent (20%) protest petition threshold. The protest language is not limited to changes or amendments to zone boundaries; it applies equally to changes or amendments to zoning regulations and restrictions. In addition, N.C.G.S. § 160A-386 expressly refers to changes in or amendments to zoning ordinances **or** zoning maps.

It is clear from this language that the Legislature intended to make a distinction between amendments to zoning maps and zone boundaries, on the one hand, and other regulations and restrictions found in the text of zoning ordinances, on the other. It is equally clear that the Legislature intended for the protest petition procedure in N.C.G.S. § 160A-385 to apply to both zoning map amendments and amendments to the text of zoning ordinances.

The interpretation sought by defendant would render the inclusion of the terms "zoning regulations and restrictions" in N.C.G.S. § 160A-385(a) and "zoning ordinance" in N.C.G.S. § 160A-386 mere surplusage. This Court cannot assume the Legislature intended for these words to have no effect. Further, we feel that a text amendment which adversely affects the rights of property owners should be treated no differently than a map amendment which has such adverse effect. Therefore, we hold that the protest petition procedure found

in N.C.G.S. §§ 160A-385 and 160A-386 applies to **text** amendments to zoning ordinances in the same manner as it applies to zoning map amendments. Thus, the passage of Ordinance No. 2427 was subject to the protest petition procedure. We affirm the portion of the trial court's order so holding, and overrule defendant's first assignment of error.

[2] Defendant next argues the trial court erred in concluding that the class of lots affected by Ordinance No. 2427 are those lots upon which signs affected by the seven-year amortization provisions of Ordinance No. 2427 were located at the time of its passage. We agree with defendant and reverse that portion of the trial court's order.

In relevant part, N.C.G.S. § 160A-385(a) reads:

> In case, however, of a protest against such change, signed by the owners of twenty percent (20%) or more either of the *area of the lots included in a proposed change*, or of those immediately adjacent thereto either in the rear thereof or on either side thereof, extending 100 feet therefrom, or of those directly opposite thereto extending 100 feet from the street frontage of the opposite lots, an amendment shall not become effective except by favorable vote of three-fourths of all the members of the city council.
>
> . . .

N.C. Gen. Stat. § 160A-385(1999) (emphasis added). The question for this Court is what meaning to give to the phrase "area of the lots included in a proposed change" as it relates to Ordinance No. 2427. Defendant contends that the phrase should be interpreted to include the entire zoning jurisdiction of the City, or, at a minimum, all of the zoning districts in the City where "off-premises signs" were permitted at the time Ordinance No. 2427 was passed.

The question of what meaning should be given to the phrase "area of the lots included in a proposed change" as found in N.C.G.S. § 160A-385, in the context of text amendments to zoning ordinances, is one of first impression. However, our Supreme Court has addressed the meaning of the word "lot" as it appears in N.C.G.S. § 160A-385 (formerly N.C.G.S. § 160-176), holding that there is nothing in the statute that indicates the word "lot" should be given any meaning other than its common and ordinary meaning. *Heaton v. City of Charlotte*, 277 N.C. 506, 526-27, 178 S.E.2d 352, 364 (1971).

Therefore, in determining what constitutes the lots included in Ordinance No. 2427, we must give the words of the phrase "area of the lots included in a proposed change" their common and ordinary meaning.

Prior to passage of Ordinance No. 2427, certain "off-premises signs" which did not conform with the 1990 Sign Regulations, but did conform with the original 1977 Sign Regulations, were allowed to escape amortization by being "grand-fathered" under the City's existing zoning regulations. Ordinance No. 2427 removed this protection by mandating that all "off-premises signs," whether "grand-fathered" under earlier regulations or not, which did not conform with Ordinance No. 2426 were required to be amortized by no later than 25 November 2004. It is true that this provision of Ordinance No. 2427 only immediately affects those existing signs that it requires to be amortized within seven years. However, Ordinance No. 2427 expressly encompasses "[a]ll off-premises signs (and their sign structures) which are made nonconforming by a subsequent amendment to this article, or by amendment to the official zoning maps, or by extension of the city's territorial jurisdiction." Asheville City Code § 7-13-8(d)(3). This provision of Ordinance No. 2427 applies to existing signs that conform with Ordinance No. 2426, as well as any conforming signs built in the future, which may be made "non-conforming" by subsequent action. It does not apply to those "nonconforming" signs which are immediately required to be amortized by Ordinance No. 2427. Therefore, it is clear that Ordinance No. 2427 included a larger area than just those lots on which "non-conforming" signs subject to amortization were located at the time of its passage. Accordingly, the trial court's ruling on this issue is reversed.

Plaintiffs' Cross Appeal

[3] Plaintiffs argue the trial court erred in not concluding, as a matter of law, that the City failed to carry out its duties under the protest petition statute as prescribed in *Unruh v. City of Asheville*, 97 N.C. App. 287, 388 S.E.2d 235, *disc. review denied*, 326 N.C. 487, 391 S.E.2d 813 (1990). We disagree.

In *Unruh*, the record showed that the City had not prescribed a form for protest petitions although N.C.G.S. § 160A-386 authorized it to do so. The record also showed that the City had received numerous writings from purported property owners opposing the proposed ordinance, and that the City had made no effort to determine either the accuracy or sufficiency of the protests or the percentage of

rezoned or adjacent land owned by the protestors. These facts led the court to conclude as a matter of law that:

> In undertaking to enact the ordinance over the protests of affected property owners the City had an affirmative duty to determine the sufficiency, timeliness, and percentage of the protests and to call for the vote that the law required; and its failure to determine those essential facts rendered the ordinance invalid on its face, since the 4 to 3 vote was insufficient to overcome a protest by property owners that complied with the provisions of G.S. 160A-385.

Id. at 290, 388 S.E.2d at 237.

The facts of the instant case are distinguishable from those in *Unruh*. Here, the City had a prescribed form for protest petitions under N.C.G.S. § 160A-386 which was used by plaintiffs and other protestors in submitting their protests to the proposed ordinances. The City Attorney reviewed the protest petitions and the proposed ordinances, and came to the legal conclusion that the protest petition procedure did not apply to text amendments. However, the City did not stop there. The City then performed calculations to determine whether the twenty percent (20%) threshold under N.C.G.S. § 160A-385 had been met. The City calculated the acreage of its entire zoning jurisdiction, as well as the acreage of the parts of the jurisdiction where "off-premises signs" were permitted at that time. The City also calculated the acreage of the lots on which "off-premises signs" were located, according to its updated 1990 sign survey database. Based on these calculations, the City determined that the twenty percent (20%) threshold of N.C.G.S. § 160A-385 had not been met. In *Unruh*, the City made no effort to determine whether N.C.G.S. § 160-385 required a three-fourths vote for passage of the ordinance in question. In the case *sub judice*, the City took substantial action to determine whether a three-fourths vote of the City Council was required. Therefore, we cannot hold as a matter of law that the City failed to meet its affirmative duties under *Unruh*. Thus, plaintiffs' first assignment of error is overruled.

Plaintiffs also argue the trial court erred in allowing defendant to support its summary judgment motion with affidavits from experts in the field of municipal zoning regulation containing their opinions related to the interpretation and construction of the protest petition statutes. However, we are unable to determine from the record what

consideration, if any, the affidavits were given by the trial court. Thus, we need not address this issue further.

In conclusion, we affirm that portion of the trial court's order concluding that the passage of Ordinance No. 2427 was subject to the protest petition statutes, and we reverse that portion of the trial court's order concluding that the class of lots affected by Ordinance No. 2427 only includes those upon which "off-premises signs" required to be amortized under Ordinance No. 2427 were located at the time of its passage. Further, we hold that the plaintiffs are not entitled to summary judgment under *Unruh*, because defendant has thus far met its affirmative duties under N.C.G.S. §§ 160A-385 and 160A-386. Finally, the case is remanded to determine whether those protest petitions that were filed with the City constitute twenty percent (20%) of the lots included in Ordinance No. 2427. In making this determination, the denominator to be used should be, at a minimum, the area within the City's zoning jurisdiction that was zoned to permit "off-premises signs" at the time Ordinance No. 2427 was passed. It is undisputed from the record that this figure is 4,928 acres. The numerator to be used is the area of the lots actually represented by the protest petitions which were timely filed. Thus, the matter is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges WALKER and HUNTER concur.

JAMES DEWEY MILON AND ROSA P. MILON, PLAINTIFFS V. DUKE UNIVERSITY; DUKE UNIVERSITY HEALTH SYSTEM, INC.; PRIVATE DIAGNOSTIC CLINIC, LLP; PRIVATE DIAGNOSTIC CLINIC, PLLC; DAVID F. PAULSON, M.D.; PETER S.A. GLASS, M.D.; AND MARY CRODELLE, CRNA, DEFENDANTS

No. COA00-1246

(Filed 21 August 2001)

1. Arbitration and Mediation— arbitration agreement—wife signing husband's name—apparent authority

The trial court erred in a medical malpractice action by concluding the parties' arbitration agreement was not binding based on the fact that plaintiff wife signed her husband's name to the

agreement, because: (1) the evidence is sufficiently strong to establish that at the times plaintiff wife signed her husband's name, she did so with apparent authority from her husband; and (2) defendants exercised reasonable prudence in relying on plaintiff wife's apparent authority to act on behalf of her husband in signing his name to the arbitration agreement.

2. Arbitration and Mediation— arbitration agreement—waiver

The trial court erred in a medical malpractice action by failing to determine whether defendants waived their right to compel arbitration by reason of prejudice to plaintiffs caused by any delay or actions defendants have taken which are inconsistent with arbitration.

3. Arbitration and Mediation— arbitration agreement—mistake—lack of mutual assent—overreaching—unfair advantage—undue influence—constructive fraud

The trial court erred in a medical malpractice action by failing to determine whether the parties' arbitration agreement was the result of mistake, lack of mutual assent, overreaching, unfair advantage, undue influence, and/or constructive fraud.

Judge THOMAS dissenting.

Appeal by defendants from an order entered 26 June 2000 by Judge James C. Spencer, Jr. in Durham County Superior Court. Heard in the Court of Appeals 6 June 2001.

Bugg, Wolf & Wilkerson, P.A., by John E. Bugg; and Miller & Martin, LLP, by Gayle Malone, Jr., for plaintiffs-appellees.

Fulbright & Jaworski L.L.P., by John M. Simpson and Karen M. Moran; and Moore & Van Allen, PLLC, by Charles R. Holton, for defendants-appellants Duke University, Duke University Health System, Inc., Private Diagnostic Clinic, LLP, Private Diagnostic Clinic, PLLC, Peter S.A. Glass, M.D., and Mary Crodelle, CRNA.

Patterson, Dilthey, Clay, & Bryson, by Mark E. Anderson, for defendant-appellant David F. Paulson, M.D.

WALKER, Judge.

This action involves a dispute over defendants' right to compel arbitration in a medical malpractice case. From 3 April 1995 through 24 March 2000, plaintiff James Dewey Milon, was treated regularly by Dr. Warren A. Blackburn at Franklin Family Medicine (Franklin) in Louisburg, North Carolina. On 1 May 1998, the Private Diagnostic Clinic, LLP and the Private Diagnostic Clinic, PLLC (collectively PDC), purchased the Franklin practice and Dr. Blackburn became a PDC member.

The PDC is a professional limited liability company that is separate from Duke University (Duke) and Duke University Health System (Duke Health). However, PDC members hold positions on the Duke University Medical School faculty and they have the option of providing health services to patients at Duke through their PDC affiliation. Upon PDC's purchase of Franklin, the office continued to operate under the name of Franklin Family Medicine.

Mr. Milon underwent surgery at Duke University Medical Center for prostate cancer on 22 December 1998. Immediately after the surgery, Mr. Milon suffered from irreversible paralysis from the waist down. Mr. and Mrs. Milon contended that the paralysis was the result of medical negligence on the part of defendants, and they retained counsel in February 1999 to represent them in their claims against defendants for injuries and damages.

As of June 1999, defendants Dr. Blackburn and the Franklin staff were aware that the Milons were represented by counsel concerning the malpractice claims. In July 1999, the Milons' counsel and defendants' counsel agreed to a pre-suit non-binding mediation of the Milons' malpractice claims. On 12 October 1999, defendants' counsel provided all medical records concerning Mr. Milon's treatment to his counsel. On 8 November 1999, the mediation was conducted but was unsuccessful.

On 8 December 1999, Mr. Milon saw Dr. Blackburn at Franklin for treatment of his ongoing pain and to review his medications. Defendants assert that plaintiffs were presented with an "Assignment of Benefits" form at this visit. The "Assignment of Benefits" form is a one-page document with three sections which are: (1) a Release of Medical Information to Insurance Company, (2) an Agreement to Alternative Dispute Resolution (arbitration agreement), and (3) a Statement of Financial Responsibility. Each of these three sections of the form has separate signature lines.

The second section is the arbitration agreement at issue, and it provides for final and binding arbitration as follows:

> AGREEMENT TO ALTERNATIVE DISPUTE RESOLUTION
>
> In accordance with the terms of the United States Arbitration Act, I agree that any dispute arising out of or related to the provision of health care services to me by Duke University, the Private Diagnostic Clinic (PDC), or their employees, physician partners, and agents, shall be subject to final and binding resolution exclusively through the Health Care Claim Settlement Procedures of the American Arbitration Association, a copy of which is available to me upon request. I understand that this agreement includes all health care services which previously have been or will in the future be provided to me and that this agreement is not restricted to those health care services rendered in connection with this admission or visit. I understand that this agreement is voluntary and is not a precondition to receiving health care services[.]
>
> NOTE: If the individual signing this agreement is doing so on behalf of his or her minor child or any other person for whom he or she is legally responsible, the signature below affirms that he or she has the authority or obligation to contract with Duke University and the PDC for the provision of health care services to that minor child or other person, and that his or her execution of this agreement is in furtherance of that authority or obligation.
>
> 12-8-1999 — James D. Milon (signature)
> DATE — Patient, Parent, Guardian, or Authorized Representative

The arbitration agreement also states under the signature line:

> If the signature is not that of the Patient, Parent, or Guardian, indicate below the relationship of person signing for the Patient and the reason Patient is unable to sign.
>
> Relationship:_____
>
> Reason Patient unable to sign:_____

The name James D. Milon or James Milon is written on the signature lines in each of the three sections. The line requesting the relationship between the person signing and the patient is blank. Neither Dr. Blackburn nor the Franklin staff witnessed the signing of Mr.

Milon's name on the form, but defendants' handwriting expert concluded that Mrs. Milon signed her husband's name to the form. Plaintiffs' handwriting expert did not dispute this finding.

Two members of the Franklin staff testified in their depositions that upon the execution of an arbitration agreement, the date of agreement is entered into the patient's records on the computer system. Additionally, a copy of the signed arbitration agreement is sent from Franklin to Duke.

Plaintiffs filed a complaint on 23 December 1999 alleging medical negligence and loss of consortium. Thereafter, they served defendants with interrogatories and requests for production of documents. On 6 March 2000, plaintiffs filed an amended complaint. On 10 March 2000, counsel for defendants conducted a search for all of Mr. Milon's medical records. This search revealed that Mr. Milon was being treated at Franklin and that his Franklin medical records contained the arbitration agreement dated 8 December 1999.

On 24 March 2000, defendants filed a motion to compel arbitration. In the alternative, defendants moved for dismissal of all of plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(3) of the North Carolina Rules of Civil Procedure. Thereafter, the parties engaged in further discovery, and after a hearing, the trial court denied defendants' motion to compel arbitration or to dismiss the complaint.

In its order, the trial court concluded that there was credible evidence that Mrs. Milon signed her husband's name to the agreement, but that there was "no credible evidence that James Dewey Milon knew of, authorized, consented to or ratified Rosa P. Milon so doing or that James Dewey Milon authorized Rosa P. Milon or any other person to act as his agent or authorized the writing of his name on the [arbitration agreement]." The trial court concluded that "there does not exist any valid or enforceable agreement between the parties that would require the arbitration of the plaintiffs' claims against the defendants."

I.

[1] Defendants contend that the arbitration agreement is binding, since Mrs. Milon acted as Mr. Milon's agent when she signed his name to the agreement. Plaintiffs maintain that Mrs. Milon did not have the authority to bind Mr. Milon to the arbitration agreement; and even if she did, the agreement is not valid because it is the result of mistake, lack of mutual assent, overreaching, unfair advantage, undue influ-

ence and/or constructive fraud. Furthermore, plaintiffs contend that defendants' delay and use of judicial discovery procedures prior to seeking arbitration are prejudicial such that defendants have waived any contractual right to compel arbitration.

Our Supreme Court has defined an agent as "one who acts for or in the place of another by authority from him." *Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980), *citing Julian v. Lawton*, 240 N.C. 436, 82 S.E.2d 210 (1954). Neither a husband nor a wife has the power to act as agent for the other simply by virtue of the marital relationship. *Beaver v. Ledbetter*, 269 N.C. 142, 146, 152 S.E.2d 165, 169 (1967). However, the agency of one spouse for the other "may be shown by direct evidence or by evidence of such facts and circumstances as will authorize a reasonable and logical inference that [one] was empowered to act for [the other]." *Boyd v. Drum*, 129 N.C. App. 586, 591, 501 S.E.2d 91, 96 (1998), *aff'd*, 350 N.C. 90, 511 S.E.2d 304 (1999).

In the case at bar, defendants contend that Mrs. Milon had either actual or apparent authority to act on behalf of her husband. Defendants point to the testimony by the Franklin staff, which reveals that, after Mr. Milon's surgery, Mrs. Milon would check her husband in at Franklin, fill out paperwork for him, and either sign her name or her husband's name to his medical records. Mrs. Milon also signed Mr. Milon's name to his medical records at various times when he was not well enough to do so himself, as well as times when he was capable of signing for himself. Further, Mrs. Milon had signed her husband's name in his presence, including when she signed his name on the arbitration agreement. Additionally, there was other evidence that Mrs. Milon had signed her husband's name on documents other than his medical records.

Even if the evidence does not establish that Mrs. Milon acted with the actual authority to sign her husband's name, we must decide whether she had apparent authority to so act. *See Research Corporation v. Hardware Co.*, 263 N.C. 718, 140 S.E.2d 416 (1965) (holding that the principle is bound not only by the acts of the agent within the agent's express authority, but also by the acts of the agent within his apparent authority). Apparent agency is created where "a person by words or conduct represents or permits it to be represented that another person is his agent" when no actual agency exists. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 278, 357 S.E.2d 394, 397 (1987).

In regard to apparent or implied authority, "a [husband] may constitute the [wife] his agent, but, to establish this the evidence must be clear and satisfactory, and sufficiently strong to explain and remove the equivocal character in which [he] is placed by reason of [his] relation of [husband]." *Pitt v. Speight*, 222 N.C. 585, 588, 24 S.E.2d 350, 352 (1943). "The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him." *McGarity v. Craighill, Randleman, Ingle & Blyth, P.A.*, 83 N.C. App. 106, 109, 349 S.E.2d 311, 313 (1986).

Here, contrary to the trial court's conclusion, the evidence is sufficiently strong to establish that at the times Mrs. Milon signed her husband's name, she did so with apparent authority from her husband. Therefore, we conclude Mrs. Milon had the apparent authority to bind her husband to the arbitration agreement by signing his name on 8 December 1999.

Even though Mrs. Milon acted with apparent authority in signing Mr. Milon's name to the arbitration agreement, it must still be determined if defendants acted in reliance on this apparent authority. Apparent authority, so far as third persons are concerned, is the real authority, as long as the third person "dealt with the agent in reliance, thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by the acts of the agent . . . ." *Norfolk Southern Ry. v. Smitherman*, 178 N.C. 595, 101 S.E. 208, 210 (1919). Also, this Court has held:

> Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.

Hayman at 278, 357 S.E.2d at 397.

In the present case, staff at Franklin had previously relied on Mrs. Milon's apparent authority to sign her husband's name to his medical records. Thus, defendants, through their Franklin office, exercised reasonable prudence in relying on Mrs. Milon's apparent authority to act on behalf of her husband in signing his name to the arbitration agreement.

II.

[2] Defendants next contend they "have not done or failed to do anything in the present lawsuit that would estop them from seeking arbitration or that would constitute a waiver of their rights to have the Milons' claim arbitrated."

Initially, we note the strong public policy in North Carolina favors settling disputes by means of arbitration. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). Because of this strong policy, courts must closely scrutinize any allegation of waiver of such a favored right. *Id.* Arbitration is not a legal right; it is a matter of contract which may be waived. *Sullivan v. Bright*, 129 N.C. App. 84, 497 S.E.2d 118 (1998). Whether waiver has occurred is a question of fact. *Id.*

In *Cyclone*, our Supreme Court addressed the issue of waiver and held:

> Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.
>
> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Id. at 229, 230, 321 S.E.2d at 876-77 (citations omitted).

Here, the trial court did not address the issue of whether defendants waived their right to compel arbitration by reason of prejudice to plaintiffs. The lawsuit was initially filed on 23 December 1999. Defendants did not immediately file a responsive pleading, but were granted an extension of time. Plaintiffs then filed an amended complaint on 6 March 2000. Even though discovery was ongoing, defendants contend they first became aware of the arbitration agreement on 10 March 2000. Subsequently, defendants moved to compel arbitration on 24 March 2000. On remand, the trial court must determine

whether plaintiffs have been prejudiced such that defendants have waived their right to compel arbitration.

III.

[3] Plaintiffs contend that the arbitration agreement was not the result of mutual assent, but rather was the result of mistake, lack of mutual assent, overreaching, unfair advantage, undue influence, and/or constructive fraud.

Before a dispute may be arbitrated, there must first exist a valid agreement to arbitrate. N.C. Gen. Stat. § 1-567.2 (1999). A party seeking to compel arbitration must show that the parties mutually agreed to arbitrate their disputes. *Routh v. Snap-On Tools*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992).

Here, the trial court failed to address whether the arbitration agreement was the result of mistake, lack of mutual assent, overreaching, unfair advantage, undue influence, and/or constructive fraud. Therefore, the order is reversed and the matter is remanded to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

Judge McCULLOUGH concurs.

Judge THOMAS dissents.

THOMAS, Judge, dissenting.

Because Mrs. Milon did not have apparent authority to enter into an arbitration agreement on behalf of her husband, and because defendants could not have reasonably and prudently relied on the arbitration form as signed by her, I respectfully dissent.

Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). Apparent authority does not arise simply by virtue of marriage. *Beaver v. Ledbetter*, 269 N.C. 142, 146, 152 S.E.2d 165, 169 (1967). Thus, Mrs. Milon, as Mr. Milon's wife alone, did not have apparent authority to contract on his behalf.

The majority holds Mrs. Milon had the apparent authority to bind her husband to an arbitration agreement because there was evidence

she earlier signed some documents for him. When deciding whether past conduct gives rise to apparent authority, however, it is the purported principal's conduct, not that of the agent, which must be considered. *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 83 N.C. App. 106, 349 S.E.2d 311 (1986), *disc. rev. denied*, 319 N.C. 105, 353 S.E.2d 112 (1987). Thus, Mrs. Milon's past conduct alone is not determinative of whether she had apparent authority to bind her husband to an arbitration contract.

Under *McGarity*, the primary focus should be the conduct of Mr. Milon in determining whether Mrs. Milon had apparent authority to bind him to the arbitration contract. *Id.* There is *no* evidence that Mr. Milon ever permitted Mrs. Milon to sign his name to any documents. Mr. Milon has neither held Mrs. Milon out as possessing the authority to act as his agent in signing contracts for him, nor has he permitted Mrs. Milon to represent that she possesses such authority. On the occasion in question, in fact, Mr. Milon denied having seen the form or seen his wife sign the form and denied allowing her in any way to sign it for him.

The trial court's findings in this regard are unequivocal. The trial court found

> there has been *no credible evidence* presented that James Dewey Milon signed the Agreement to Alternative Dispute Resolution, agreed to submit the claims which are the subject of this action to arbitration, authorized any person to bind him to such arbitration or authorized any person to act as his agent in writing his name on the Agreement to Alternative Dispute Resolution.

(Emphasis added). Further, the court found "there is *no credible evidence* that James Dewey Milon knew of, authorized, consented to or ratified Rosa P. Milon so doing or that James Dewey Milon authorized Rosa P. Milon or any other person to act as his agent or authorized the writing of his name on the Agreement to Alternative Dispute Resolution." (Emphasis added). When the trial court is the fact-finder, its findings of fact are conclusive on appeal if they are supported by any competent evidence, even though there is evidence which might support a contrary finding. *See Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Here, there is competent evidence to support the above findings.

Even simply considering Mrs. Milon's past conduct alone in determining whether she had apparent authority, however, there is no evi-

dence Mrs. Milon had previously signed her husband's name in his presence. In fact, there is evidence that the only instances she ever signed for him were in situations where he was unable to do so himself—when he was receiving medical treatment in an emergency room on one occasion, and when she went to a pharmacy without him to fill his prescriptions.

It is not insignificant that Mrs. Milon merely signed Mr. Milon's name, not her own name, on the arbitration form. The clear language of the form requires the signer to sign his or her own name and states that if the signer is not the patient, or the parent or guardian of the patient, then the signer is to indicate his/her relationship to the patient, as well as the reason the patient is unable to sign the form. Mrs. Milon, as the signer, did not indicate her relationship to Mr. Milon and the reason he was unable to sign the form himself. The arbitration contract, therefore, would appear unenforceable under its own terms.

While the trial court correctly concluded Mrs. Milon did not have apparent authority to bind her husband to the terms of an arbitration agreement, even if she had such authority under the circumstances to enter into an arbitration agreement, defendants did not reasonably and prudently rely on it.

A third party, in order to avail itself of the privileges of a contract between itself and a principal's apparent agent, must have relied on the agent's authority "in good faith, and in the exercise of reasonable prudence[.]" *Norfolk Southern Ry. Co. v. Smitherman*, 178 N.C. 595, 599, 101 S.E. 208, 210 (1919). *See also Lucas v. Li'l General Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976); *Zimmerman*, 286 N.C. 24, 209 S.E.2d 795 (1974); *Edgecombe Bonded Warehouse Co. v. Security Nat'l Bank*, 216 N.C. 246, 4 S.E.2d 863 (1939). Further, the third party must have "*actually relied* upon the assertions of the principal regarding the purported agent's power at the time of the transaction." *Knight Publishing Co., Inc. v. Chase Manhattan Bank*, 125 N.C. App. 1, 15, 479 S.E.2d 478, 487 (1997), *disc. rev. denied*, 346 N.C. 280, 487 S.E.2d 548 (1997) (emphasis in original).

Defendants were entirely unaware of the signed form until the parties were well into the discovery phase of the litigation. However, they were aware that Mr. Milon had retained counsel, mediation had failed and suit was imminent. Furthermore, defendants may not claim that they relied on the arbitration agreement when they finally did move to compel arbitration, because they did not do so *at the time of*

the transaction, as *Knight* requires. *Id.* Mr. Milon's surgery was on 22 December 1998. The mediation took place on 8 November 1999. The form was signed at Dr. Blackburn's office on 8 December 1999. Plaintiffs filed their complaint on 23 December 1999 and amended it on 6 March 2000. Defendants did not file their motion to compel arbitration until 24 March 2000. Defendants thus may not rely on apparent authority to assert that Mrs. Milon effectively contracted with defendants on his behalf.

In this case, there can be no reasonable and prudent reliance, essential for apparent authority to develop into a binding contract, where: (1) the form was given to plaintiffs after all of the parties had obtained legal representation, mediation failed and suit was imminent; (2) the IQ of Mr. Milon was sixty-nine and that of his wife, sixty-five; (3) the record supports a finding that the signing was a mistake; and (4) both Mr. and Mrs. Milon were on medication, including anti-depressants to help them deal with the stress of their worsening situation.

The majority correctly points out that "[a] party seeking to compel arbitration must show that the parties mutually agreed to arbitrate their disputes." They go on to hold, however, that the trial court failed to address certain issues in making that determination. I believe those issues were addressed in the trial court's finding that there was no authority (apparent or otherwise) to bind Mr. Milon to a contract. While ordinarily the IQs of the Milons, their medical condition and the fact they were on anti-depressants would not defeat a contract under apparent authority, here defendants were in the unique position of having dealt with plaintiffs for years. Their medical records were in the possession of some of defendants with the anti-depressants having been prescribed by Dr. Blackburn, an affiliate of PDC. The lack of a meeting of the minds here is inherent in the trial court's finding of there being no credible evidence presented by defendants to show otherwise. Thus, there is no enforceable agreement.

Because of the lack of apparent authority and no reliance on the part of defendants as to the arbitration agreement, I respectfully dissent and vote to affirm the trial court.

FRANCES K. HENDERSON, LINDSAY ANNE BULLOCK, SETH BULLOCK, AND KAITLIN STELL, MINORS; PATRICK RYAN MCDUFFY, MINOR; AND ANNE LAMM MCDUFFY, MINOR; BY AND THROUGH THEIR GUARDIAN AD LITEM, PHILIP R. ISLEY, PLAINTIFFS v. WACHOVIA BANK OF NORTH CAROLINA, N.A., DEFENDANT

No. COA00-610

(Filed 21 August 2001)

1. Trials— alleged failure to exercise discretion—consideration of motion and attachments

The trial court did not abuse its discretion by denying without a hearing defendant's motion for reconsideration of a default judgment entered for failure to appear at depositions where defendant claimed that its attorneys did not keep it abreast of salient dates and issues. Although defendant contends that the court failed to exercise its discretion and that the court had to believe the evidence before it because there was no conflicting evidence, the court's order indicated careful consideration of the motion and its attachments and the court did evaluate evidence from both sides.

2. Judgments— Rule 60 relief—default judgment—party not informed of deposition dates by attorney

The trial court did not abuse its discretion by denying defendant's motion for relief from a default judgment following its failure to appear for depositions where defendant contended that its attorneys had neglected to keep it informed and that this neglect rose to the level of fraud. Attorney negligence is not excusable neglect warranting relief under Rule 60(b), the fraud for which Rule 60(b)(3) provides relief is the misconduct of an adverse party rather than the fraud of a party's attorney, and Rule 60(b)(6) does not apply because defendant's attorneys did not bribe or improperly influence the court and their conduct did not constitute a fraud upon the court or upon defendant.

3. Discovery— sanctions—failure to appear at depositions—default judgment

The trial court did not abuse its discretion by entering a default judgment as to one of plaintiff's five causes of action as a sanction for failure to appear at depositions where defendant contended that its attorneys had failed to keep it informed. The plain language of Rule 37 does not require a showing of willfulness; even so, it was reasonable for the court to infer intent from

defendant's conduct, the history of the case and defendant's repeated failure to appear at deposition hearings. Rule 37 gave the court the authority to dismiss the entire case and it was reasonable for the court to enter a default judgment as to the first cause of action.

Appeal by defendant from orders entered 20 March 2000 and 29 March 2000 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Court of Appeals 25 April 2001.

The Sanford Holshouser Law Firm P.L.L.C., by Kieran J. Shanahan, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Burley B. Mitchell, Jr., for defendant-appellant.

TIMMONS-GOODSON, Judge.

Frances K. Henderson et al. (plaintiffs), originally instituted an action against Wachovia Bank of North Carolina, N.A. (defendant) on 31 May 1994, which they voluntarily dismissed without prejudice. Plaintiffs again filed an action on 18 January 1996, claiming, *inter alia*, breach of fiduciary duty and unfair trade practices in regard to the alleged mismanagement and administration of three testamentary family trusts for which defendant served as trustee. Between 1996 and 1999, both parties engaged in extensive discovery. On 15 November 1999, plaintiffs filed an amended complaint, which defendant answered on 30 November 1999.

After many years of discovery, a trial date was set and calendared to begin 24 January 2000. Judge Abraham Penn Jones (Judge Jones) entered an order to provide for a schedule for completing the necessary discovery before trial. All depositions were ordered to be completed by 7 January 2000, with the exception of rebuttal depositions which were ordered to be completed by 14 January 2000.

On 2 December 1999, plaintiffs gave notice to defendant's counsel of their intention to depose Wachovia pursuant to Rule 30(b)(6) of our Rules of Civil Procedure. The deposition was set for 17 December 1999. However, no defense witnesses appeared for the deposition. Plaintiffs then moved the court to compel defendant's appearance at a later Rule 30(b)(6) deposition. On 12 January 2000, Judge Jones ordered defendant to appear for a deposition on 17 January 2000. Again, defendant did not attend. Based on defendant's failure to

appear, the court again ordered defendant to appear at a Rule 30(b)(6) deposition, scheduled for 16 February 2000. Defendant was also ordered to pay $2363.95 in sanctions. Furthermore, the court informed defendant that another failure to appear could result in a default judgment.

Defendant again failed to appear for the deposition on 16 February 2000. Plaintiff moved the court to strike defendant's answer to the complaint and to enter default judgment against defendant. Following a 15 March 2000 default judgment hearing, Judge Robert H. Hobgood (Judge Hobgood) entered default judgment against defendant as to plaintiffs' claim for breach of fiduciary duties for "willfully and without just cause failing to abide by an Order of the Court." The order was entered 20 March 2000.

Defendant claims to have first learned of the default hearing via an anonymous phone call received on 15 March 2000, just prior to the default hearing. Defendant further claims to have learned at the default hearing of the attorneys' repeated failure to keep defendant abreast of salient dates and issues regarding the depositions. Defendant summarily fired its original attorneys and hired new counsel.

Defendant thereafter moved the court for reconsideration of the 20 March 2000 default judgment. In its motion, defendant argued that its attorneys had never informed it of the original deposition notice, of the court-ordered deposition, of the sanction for failure to appear as ordered, or of the second court-ordered deposition.

On 29 March 2000, the court denied the motion for reconsideration. From the order of default judgment entered 20 March 2000 and the order denying the motion for reconsideration entered 29 March 2000, defendant appeals to this Court.

The two issues presented by this appeal are whether the trial court erred in (I) denying defendant's motion for reconsideration without a hearing; (II) entering default judgment against defendant.

I.

The dispositive issue of the case is whether the trial court erred by denying defendant's motion for reconsideration without a hearing. Defendant argues that its attorneys' repeated failure to keep defendant informed of upcoming depositions amounted to fraud. Defendant further argues that fraud by an attorney must not be imputed to the

client. Consequently, defendant argues that it should have received a full hearing to present evidence that it was defrauded. We disagree.

Because no case has directly spoken to the argument that attorney fraud should not be imputed to a client, we will review the history of our jurisprudence in this area of law. An examination of our legal foundations reveals a preference in the law to impute lawyer conduct to clients, even where the attorney has not been hired by a client. *See, e.g.* Anonymous case, 91 Eng. Rep. 82 (K.B. 1703); Anonymous case, 91 Eng. Rep. 81 (K.B. 1698); *Alleley v. Colley*, 79 Eng. Rep. 603 (K.B. 1624). This history has been briefly summarized as follows:

> [T]he early rule followed both in England and in this country was that . . . an unauthorized appearance (by an attorney) conferred jurisdiction over the party thus represented and that his only remedy after judgment was an action or other proceeding against the attorney, unless the latter were insolvent.
>
> . . . . If the attorney has acted without authority, the defendant has his remedy against him; but the judgment is still regular, and the appearance entered by the attorney, without warrant, is a good appearance as to the court.

Howard v. Boyce, 254 N.C. 255, 260, 118 S.E.2d 897, 901-02 (1961).

Our appellate courts did not continue to adhere to this strict rule of law, and generally a client today will be "entitled to show such want of authority and to be relieved against the judgment on that ground, in a direct proceeding instituted for the purpose." *Id.* at 261, 118 S.E.2d at 902. Nonetheless, this history indicates our fundamental preference for imputing attorney action to clients. As recently as 1896, "neither the courts nor other parties could look behind such acts on the part of attorneys to inquire into their authority or the extent and purport of clients' instructions—especially when innocent third parties would be prejudiced thereby." *Id.* at 262, 118 S.E.2d at 903; *see, e.g. Chadbourn v. Johnston*, 119 N.C. 165, 25 S.E. 705 (1896); *University Trustees v. Lassiter*, 83 N.C. 38 (1880). However, these cases suggest that "judgments entered as a result of unauthorized appearance or consent of counsel could not be set aside or modified *except* on the ground of mutual mistake or *fraud*." *Howard* at 262, 118 S.E.2d at 902-03 (emphasis added). Similarly,

> [i]t is very generally understood, uniformly so far as examined, that an attorney at law, by virtue of his employment as such in a

> given case, has the control and management of a suit in all matters of procedure, and *in the absence of fraud and collusion* can make such stipulations and agreements as may commend themselves to his judgment in so far as they may affect the remedy he is endeavoring to pursue.

Bizzell v. Equipment Co., 182 N.C. 104, 107, 108 S.E. 439, 440 (1921) (emphasis added). The law prefers imputation but has hesitated to directly impute, or not impute, when attorney fraud is involved.

Analogous to the case at bar is *McNeil v. Caro Community Hospital*, 423 N.W.2d 241 (Mich. Ct. App. 1988). In *McNeil*, a Michigan trial court dismissed the plaintiff's case after the plaintiff's attorney failed to submit a valid complaint that could withstand a motion for summary judgment. After the plaintiff's attorney failed to inform the plaintiff of a second opportunity to amend the complaint, the plaintiff's case was dismissed with prejudice. The plaintiff's attorney claimed that the plaintiff consented to such dismissal with prejudice. The plaintiff then, with a new attorney, moved to set aside the order of dismissal, arguing that the first attorney did not inform the plaintiff of the opportunity to amend or of the dismissal, and that the plaintiff did not in fact agree to a dismissal with prejudice. The trial court granted the motion to set aside the dismissal.

On appeal, the Michigan Court of Appeals held that the trial court erred in reinstating the plaintiff's case. The Court stated that "[i]n general, relief is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Id.* at 243. The Court concluded that because the judgment was rendered due to the improper conduct of the plaintiff's attorney, and not because of the improper conduct of the defendant, it would not be appropriate to grant relief to the plaintiff. *Id.* The Court noted that the trial court, in its decision to grant relief, had improperly relied on *Coates v. Drake*, 346 N.W.2d 858 (Mich. Ct. App. 1984). In *Coates*, the Michigan Court granted relief to a party upon evidence that the attorney had settled the party's case without the party's consent, had forged the party's signature on settlement checks, had used the money for attorney's personal use, had signed an order dismissing the case with prejudice, and had not informed the party of the settlement for nine months. The *McNeil* Court agreed that extraordinary circumstances existed in *Coates* to warrant the relief, but that the circumstances in *McNeil* were not so extraordinary, and that an action against the attorney for malpractice would be a sufficient remedy for

the plaintiff. *See McNeil.* The Court therefore held that the trial court abused its discretion in granting relief, as the plaintiff's case was properly dismissed in the first instance.

The Michigan cases appear to draw a distinction between attorney negligence and attorney fraud, choosing to impute attorney negligence onto a client, but not attorney fraud. Our appellate courts have never addressed the issue.

In North Carolina, a judge "may relieve a party" from a judgment or order for, among other reasons, "excusable neglect," fraud "of an adverse party" or "[a]ny other reason justifying relief." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1),(3),(6) (1999). In a landmark 1998 decision, the North Carolina Supreme Court decided that "[c]learly, an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1)." *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998). In deciding *Briley*, the Supreme Court noted that "[a]llowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court-imposed rules and deadlines." *Id.* It would be too tempting for a party to extricate himself from legal difficulties by claiming insulation from an attorney's negligence, leading to "undesirable results." *Id.* Instead, the *Briley* result helps ensure that a party will be responsible in protecting his own case rather than simply handing the full responsibility over to the attorney. Other similar areas of the law also highlight this preference for keeping a client responsible for his case. *See, e.g. Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989) (sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation).

In the case at bar, defendant acknowledges that if the attorneys' actions and inactions are in the realm of negligence, *Briley* is the controlling precedent, and this Court must affirm the trial court's denial of defendant's motion to reconsider. Defendant urges this Court to consider that, according to the facts in the case *sub judice*, the attorneys' conduct was so egregious as to amount to fraud. Defendant thus implores us to create a rule of law protecting a party from attorney fraud. To that end, defendant argues that we should reverse the trial court's decision to deny its motion for reconsideration and remand for a full hearing in concert with a new rule of law.

[1] Defendant argues that the trial court abused its discretion in denying the motion to reconsider without a hearing. The argument is set out in three distinct sub-arguments, any one of which, according to defendant, gives us the power to reverse the trial court order. We will take each part in turn.

First, defendant argues that the trial court abused its discretion in failing to exercise its discretion in relation to defendant's motion to reconsider. It is error for a trial court to rule as a matter of law when the ruling requires the trial court's discretion. *Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655 (1988). Defendant's argument has no force, however, because there is no indication that the trial court did not exercise its discretion. Instead, the trial court's order indicates that it made a "careful consideration of the Motion and its attachments, including all affidavits," before denying the motion. From this we can find no abuse of discretion.

Second, defendant argues that the trial court had no choice but to believe the evidence before it in regard to the motion for reconsideration, because no conflicting evidence had been presented (the trial court denied the motion without finding the need to hold a hearing). Defendant cites authority, however, that does not support its argument. "Whether credibility is established as a matter of law depends on the evidence in each case." *Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). Defendant argues that *Bank* stands for the proposition that evidence is manifest "[w]here there are only latent doubts as to the credibility of oral testimony and the opposing party has 'failed to point to specific areas of impeachment and contradictions.' " *Id.* at 537-8, 256 S.E.2d at 376 (quoting *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976)). Defendant misapplies *Bank* to the present case. While the trial court did not conduct a hearing to defendant's satisfaction, it did evaluate evidence available from both sides and based upon that evaluation, made a reasoned decision.

[2] We now turn to the third and most important sub-argument presented by defendant. Defendant contends that if the trial court indeed assigned credibility to the affidavits submitted in conjunction with the motion for reconsideration, the trial court abused its discretion in denying the motion, as the affidavits justify granting relief under Rule 60(b). Given the present state of the law, we disagree.

Defendant's argument that it is entitled to relief from the trial court's order is not assisted by Rule 60(b)(1) because, as previously noted, attorney negligence is not excusable neglect warranting relief.

See Briley. Thus, assuming defendant's affidavits show attorney negligence, this negligence is imputed to defendant. If, as defendant submits, the affidavits show fraud, then Rule 60(b)(1) is inapplicable, because the rule does not cover fraud. Rule 60(b)(3), which provides for relief from a judgment upon a showing of fraud also affords defendant no relief because the rule governs "[f]raud . . . , misrepresentation, or other misconduct of an adverse party," not fraud of a party's attorney. N.C. Gen. Stat. § 1A-1, Rule 60(b)(3). The alleged misconduct at issue is the fraud of defendant's own counsel. Thus, Rule 60(b)(3) is likewise inapplicable.

Finally, Rule 60(b)(6), which provides for relief from an order based on "[a]ny other reason justifying relief," does not support defendant's position. N.C. Gen. State. § 1A-1, Rule 60(b)(6). Defendant argues that the conduct of its attorneys amounted to either fraud on them as clients or fraud upon the court, and therefore defendant is entitled to relief from the trial court's order. We are not persuaded.

North Carolina's Rule 60(b) is identical to Federal Rule of Civil Procedure 60(b). Under Fed. R. Civ. P. 60(b)(6), courts have "previously found that fraud on the court embodies a concept of a deliberate, egregious scheme of directly subverting the judicial process which cannot be exposed by the normal adversarial process, such as bribery of a judge or juror or improper influence exerted by an attorney on the court." *Matter of Tudor Associates, Ltd., II*, 1990 WL 546146 (E.D.N.C. 1990), *affirmed*, 20 F.3d 115 (4th Cir. 1994). Defendant's attorneys did not bribe or improperly influence the court, nor did their conduct constitute a fraud upon the court or upon defendant. At most the affidavits show that defendant's attorneys did not fully apprise defendant of court orders to appear for depositions. Without so holding today, there may be situations so egregious that would entitle a party to be relieved of fraud on it by its own attorney, but this is not one of those situations. Therefore, we are unable to say that the trial court abused its discretion in its decision to deny defendant's motion for reconsideration without a hearing.

II.

[3] By its second argument, defendant argues that the trial court abused its discretion in entering a 20 March 2000 default judgment and that the judgment was too severe of a sanction. Defendant contends there was insufficient evidence to support the court's conclusion that defendant "willfully and without just cause failed to abide

an Order of the Court." Defendant argues that there was no evidence before the court that defendant's failure to abide by the court order was willful, and so the order should be reversed. We are not persuaded.

For the order to be upheld on appeal, it must contain conclusions of law that are supported by findings of fact. *Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339 (1993). The default judgment in the case at bar was entered pursuant to Rule 37(b)(2) of our Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (1999). Rule 37 is reviewed by this Court under an abuse of discretion standard. *Bumgarner v. Reneau*, 332 N.C. 624, 422 S.E.2d 686 (1992). As such, we have the authority to reverse the trial court's order only if it is "manifestly unsupported by reason." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999).

Rule 37(b)(2) allows for "a judgment by default against the disobedient party" when "a party or an officer, director or managing agent of a party . . . fails to obey an order to provide or permit discovery." Defendant relies on *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992) to argue that the trial court's conclusion that defendant willfully failed to obey the court is fatally flawed in that no evidence supported the conclusion of willfulness. Despite defendant's contentions to the contrary, we find that *Foy* is distinguishable from the present case. *Foy* involved Rule 41(b), providing that "a trial court may enter sanctions for failure to prosecute *only* where the plaintiff or his attorney 'manifests an intention to thwart the progress of the action to its conclusion' or 'fails to progress the action towards its conclusion' by engaging in some delaying tactic." *Id.* at 618, 418 S.E.2d at 302 (quoting *Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973)). In other words, *Foy* implicated Rule 41(b) under which it is necessary for specific evidence to be introduced as to the intention of the party in order for sanctions to lawfully be entered.

In contrast, the plain language of Rule 37 does not require a showing of willfullness. The order of default judgment may be entered against a defendant pursuant to Rule 37(b)(2) for failure to obey a court order whether the failure was willful or not. Even so, it was reasonable for the trial court to infer the intent of defendant from the course of conduct. *See, e.g. Link v. Wabash R.R. Co.*, 370 U.S. 626, 633, 8 L.E.2d 734, 740 (1962) (holding that a party's deliberate conduct can be reasonably inferred from facts including a

"drawn-out history of the litigation"). Likewise, it would be reasonable for the court to have inferred deliberate or willful conduct by the defendant in this case based on the drawn-out history of years of discovery in this case. It would also be reasonable for the court to have inferred willful conduct by the defendant based on the repeated failure to appear at deposition hearings. *See e.g. Green* at 672, 197 S.E.2d at 600-01 (stating that whether a party or a party's attorney has an intent to delay or thwart the progress of an action may be inferred from the facts).

We do not find that the order is unsupported by reason. Interestingly, it seems that neither does defendant's counsel. During oral argument before this Court, defendant's counsel, in asserting that the denial of the motion to reconsider was the more important issue of the case, admitted that it was "understandable" that the trial court would rule as it did at the default hearing based on the evidence. We also believe that it was "understandable" that the trial court would enter default judgment against defendant. Because the ruling was supported by reason, we cannot find that the trial court abused its discretion. We therefore uphold the default judgment order of 20 March 2000.

Likewise, we also reject defendant's argument that the trial court abused its discretion by entering too severe of a sanction against defendant. Defendant was found to disobey not one, but two court orders. The trial court determined that a "severe sanction" was necessary for defendant's repeated willful failure. Rule 37 gives the trial court the authority to enter default as to the entire cause of action for one failure to comply with a court order. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2). Even so, the trial court decided to enter default judgment against defendant only as to the first cause of action, not as to the second, third, fourth, or fifth causes of action. We conclude that it was reasonable for the trial court to sanction defendant with an entry of default judgment as to the first cause of action, given defendant's repeated failures to comply with the court's orders and the authority granted to the court under Rule 37. Accordingly, we find no abuse of discretion.

Based on the foregoing analysis, we conclude that the trial court did not abuse its discretion in denying defendant's motion for reconsideration without a hearing or in ordering the sanction of default as to plaintiffs' first cause of action.

Affirmed.

Judges TYSON and CAMPBELL concur.

HUDSON INTERNATIONAL, INC., OLD SARATOGA, INC., HUDSON GROUP LIMITED PARTNERSHIP, CHRISTOPHER A. HUDSON, FITZGERALD D. HUDSON, MERIWETHER HUDSON MORRIS, AND WILLIAM B.L. HUDSON, PLAINTIFFS v. FITZGERALD S. HUDSON AND SUSAN W. HUDSON, DEFENDANTS

No. COA00-613

(Filed 21 August 2001)

Divorce— equitable distribution—dismissal of declaratory judgment action—jurisdiction

The superior court did not err by dismissing plaintiffs' declaratory judgment action without prejudice concerning the ownership of arguably marital property subject to equitable distribution when defendant wife had already filed a separate action against defendant husband seeking equitable distribution of marital property in district court, because: (1) where an action listed in N.C.G.S. § 7A-244 has been previously filed in district court and another action relating to the subject matter of the previously filed action is then filed in superior court, the district court's jurisdiction over the subject matter has already been invoked by the parties to the first action, and it follows that the superior court does not have jurisdiction in the subsequently filed action; and (2) although dismissal of such actions without prejudice allows litigants to intervene in the pending district court action under N.C.G.S. § 1A-1, Rule 24(a), this procedure is unnecessary since plaintiffs have been made parties to the district court action and joinder and pleading options are available to plaintiffs.

Judge WYNN concurring in a separate opinion.

Appeal by plaintiffs from order entered 3 February 2000 by Judge John Mull Gardner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 March 2001.

Kennedy Covington Lobdell & Hickman, L.L.P., by Kiran H. Mehta, Richard D. Stephens and Samuel T. Reaves, for plaintiffs-appellants.

Robinson & Lawing, L.L.P., by Norwood Robinson, C. Ray Grantham, Jr. and H. Brent Helms, for defendant-appellee Susan W. Hudson.

TIMMONS-GOODSON, Judge.

Hudson International, Inc. ("Hudson International"), Old Saratoga, Inc., and Hudson Group Limited Partnership ("the Hudson businesses"), along with Christopher Hudson, Fitzgerald D. Hudson, Meriwether Hudson Morris, and William B.L. Hudson ("the Hudson children" or "the children") (collectively "plaintiffs") appeal an order entered by the Superior Court, Mecklenburg County, dismissing without prejudice their action for declaratory relief. For the reasons herein stated, we affirm the order of the Superior Court.

The relevant factual and procedural history is as follows: On 29 December 1997, Susan W. Hudson ("Susan") filed an action in District Court, Wilson County, against her husband Fitzgerald D. Hudson ("Fitzgerald"), from whom she had separated, seeking alimony, postseparation support, attorneys' fees, and equitable distribution. Fitzgerald filed a motion to dismiss the complaint, arguing that the parties' antenuptial agreement invalidated the majority of Susan's claims.

The District Court subsequently granted Susan postseparation support and further denied Fitzgerald's motion to dismiss. In its postseparation support order, the court found as fact that Fitzgerald had retained an ownership interest in the Hudson businesses. The court further found that during his marriage, Fitzgerald had transferred the majority of his interest in the Hudson businesses to the Hudson children, while retaining positions as general partner and/or chief executive officer. The court also found that Fitzgerald had the "final direction and control of these entities in his capacities as general partner and chief executive officer."

In its order denying Fitzgerald's motion to dismiss, the court found that the proceeds from the parties' marital residence had been used to build a large residence in Maine known as "Southerly." The court further found that Fitzgerald titled "Southerly" in the name of one of his corporations, without Susan's consent, in a

"calculated" effort "to divest the [p]laintiff of her marital property rights."

In the interim, Hudson International filed the present action in Superior Court, Mecklenburg County, against Susan and Fitzgerald (collectively "defendants") seeking declaratory relief as to whether defendants had any ownership interest in "Southerly" or any other property owned by the corporation. Hudson International alleged that it was the owner of "Southerly," that Fitzgerald was not an officer in the corporation, and that his only title was an honorary one. The corporation further alleged that upon its attempt to sell the estate in question, Susan had asserted a claim that Southerly was a marital asset. Hudson International requested that the Superior Court, Mecklenburg County, declare that it was the sole owner of Southerly and that neither defendant has any ownership interest in the property.

On 30 June 1999, Susan filed a motion in District Court, Wilson County, seeking to amend her complaint to add the Hudson businesses and the Hudson children as defendants. Susan's proposed amended complaint alleged that the Hudson businesses, children, and Fitzgerald conspired to deprive her of marital rights and requested that the court impose a constructive trust on any assets transferred to the Hudson businesses and the children during her marriage.

On 5 August 1999, Hudson International amended its Mecklenburg County complaint, as of right, to add the remainder of the Hudson businesses and the children as plaintiffs. The Wilson County court thereafter granted Susan's motion to amend her complaint.

On 6 October 1999, Susan moved to dismiss the amended complaint for declaratory relief in Superior Court, Mecklenburg County, based upon a variety of legal theories and Rules 12(b)(1), (3), and (6) of our Rules of Civil Procedure. Susan also moved, in the alternative, to transfer the case to District Court, Wilson County, where the equitable distribution action remained pending. The Mecklenburg County court granted Susan's motion to dismiss without prejudice. The court concluded, "pursuant to N.C. Gen. Stat. § 7A-244 and the decisions of *Garrison v. Garrison*, 90 N.C. App. 670, [369] S.E.2d 628 (1988) and *Sparks v.* [*Peacock*], 129 N.C. App. 640, 500 S.E.2d 116 (1998), that it lack[ed] authority to enter a declaratory judgment on the issues presented." From this order, plaintiffs now appeal.

By their first argument, plaintiffs contend that the trial court erred in dismissing the declaratory judgment action. Plaintiffs argue that the statute upon which the court relied, section 7A-244 of our General Statutes, concerns the administrative allocation of cases between the district and superior court divisions and is, therefore, not jurisdictional in nature. As such, plaintiffs contend that the proper course of action was not to dismiss the case but to transfer it to the proper division—District Court, Wilson County. We disagree.

Section 7A-244 of our General Statutes provides:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.

N.C. Gen. Stat. § 7A-244 (1999).

To support their argument that dismissal under section 7A-244 was improper, plaintiffs rely on *Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975). In *Stanback*, the superior court entered child custody and support orders in a case filed prior to the formation of the North Carolina district court. Subsequent to the creation of the district court, the *Stanback* defendant moved to modify the support order. The plaintiff filed a motion to transfer the case to the district court, which was denied.

The Supreme Court concluded that because the superior court had previously entered the support order, the order remained under its jurisdiction and thus it could not transfer the case to district court. In so holding, the Court stated in reference to section 7A-244:

> It is plain these allocations are not jurisdictional since a judgment is not void or voidable for reason that it was rendered by a court of the trial division which by [section 7A-244] was the improper division for hearing and determining the matter. Hence, G.S. [§] 7A-244 is merely an administrative allocation of annulment, divorce, alimony, child support and child custody actions to the district court division, and does not divest the . . . Superior Court of jurisdiction to hear the motion in the cause filed by defendant *in this action.*

Id. at 457, 215 S.E.2d at 37 (emphasis added).

Despite plaintiffs' arguments to the contrary we find *Stanback* wholly distinguishable from the issues raised by the present appeal. The most obvious distinction is that *Stanback* concerned a matter by which the superior court acquired jurisdiction prior to the formation of the district court. Unlike the instant case, the *Stanback* superior court was the court of original jurisdiction over the child support issue and had, in fact, already reduced that issue to a written judgment. Moreover, by stating that section 7A-244 did not divest the superior court of jurisdiction *in that particular case*, the Supreme Court clearly limited its holding to the situation presented by the *Stanback* case. However, the Court did not examine the question presented *sub judice*: whether section 7A-244 divests the superior court of jurisdiction to enter a declaratory judgment concerning alleged marital property, where a previously filed domestic action concerning that property is pending in the district court.

It is our belief that this Court addressed the aforementioned question in *Garrison*, 90 N.C. App. 670, 369 S.E.2d 628, and affirmed that answer in *Sparks*, 129 N.C. App. 640, 500 S.E.2d 116. We therefore conclude that both *Garrison* and *Sparks* are dispositive of the issues presented by the instant case.

In *Garrison*, the defendant in a divorce action filed a partition proceeding in superior court, seeking partition of property allegedly held in a joint tenancy with his wife. In the divorce action, the district court had previously granted the parties an absolute divorce, but had not entered an order concerning the plaintiff's claim for equitable distribution. Pursuant to the husband's complaint, the superior court granted the requested partition.

Relying specifically upon section 7A-244, this Court vacated the superior court's order, holding:

> The parties in the present case *invoked the jurisdiction* of the district court to equitably distribute their marital property. . . . The district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. The superior court has no authority to partition marital property . . . where, as here, the jurisdiction of the district court has been properly invoked to equitably distribute such marital property. Had the parties not asserted their right to have the property equitably dis-

> tributed . . . , either . . . could have filed a special proceeding to have the property partitioned . . . .

Id. at 672, 369 S.E.2d at 629 (emphasis added).

Similarly, in *Sparks v. Peacock*, plaintiff husband filed an action in superior court seeking contributions for payments on promissory notes executed by both he and his wife. Unlike the *Garrison* litigants, however, the parties in *Sparks* had not brought an action for equitable distribution in district court. Based on the wife's motion, the superior court dismissed the action for lack of subject matter jurisdiction.

On appeal, this Court acknowledged the jurisdictional nature of section 7A-244, stating that if the parties had indeed brought an equitable distribution action and such action was pending pursuant to section 7A-244, the superior court would not have jurisdiction over the propriety of payments on the promissory note. *Id.* at 641, 500 S.E.2d at 118 (recognizing that "[d]efendant correctly state[d] that the district court has jurisdiction over equitable distribution actions" and citing section 7A-244); *see also Ward v. Ward*, 116 N.C. App. 643, 646, 448 S.E.2d 862, 864 (1994) (citing section 7A-244 and noting that "[t]he General Assembly has specifically conferred on the district court division subject matter jurisdiction over domestic relations cases"). However, the *Sparks* Court held that because neither party had brought an equitable distribution action in district court, the superior court had jurisdiction over the action and had erred in dismissing the partition action. *Id.*

In the present case, Susan filed an action seeking, among other relief, equitable distribution of marital property in District Court, Wilson County. In proceedings concerning postseparation support and the parties' antenuptial agreement, the District Court, Wilson County, determined that assets from the sale of the marital home were used to purchase the Southerly estate. The District Court further determined that Fitzgerald titled the estate in the name of one of the Hudson businesses, over which Fitzgerald retained control, despite subsequently transferring his interest to the Hudson children. The Mecklenburg County declaratory judgment action concerned Southerly, arguably a marital asset subject to equitable distribution in the Wilson County court. Clearly, the District Court, Wilson County, obtained jurisdiction per section 7A-244 to determine whether Southerly was a marital asset. Therefore, the Superior Court, Mecklenburg County, was correct in concluding that it had no au-

thority to determine the nature of or divide the alleged marital asset.

Plaintiffs argue that unlike the litigants in *Garrison*, they were not parties to the Wilson County action when it was filed and therefore are not bound by that action in relation to the declaratory judgment action. Plaintiffs further argue that section 7A-244 is inapplicable in the present case, because by its plain language, section 7A-244 does not mandate that declaratory judgment actions concerning marital assets must be filed in district court, nor does it prohibit the filing of such actions in superior court. With plaintiffs' arguments, we disagree.

We recognize that *Garrison* involved the same parties in both the pending district court action and the action subsequently filed in superior court. However, based upon our aforementioned review of *Garrison*, we conclude that the decision did not limit its application to the situations specified therein.

Furthermore, construing *Garrison*, *Sparks*, section 7A-244, and the rules governing the transfer of cases to the proper court divisions *in para materia*, we conclude that it is irrelevant in the present case whether or not section 7A-244 lists declaratory judgment actions as actions for which the district court is the proper division. Section 7A-244 instructs litigants that the "proper division" for the specified domestic related actions is the district court. N.C. Gen. Stat. § 7A-244. By its plain language, when the actions listed therein are erroneously filed in superior court and no other such action has been previously filed in district court, the superior court may, upon a parties' motion, transfer that action to the proper division—the district court, via section 7A-258 of our General Statutes. *See* N.C. Gen. Stat. § 7A-258 (1999) (stating that any party may move to transfer civil actions "to the proper division when the division in which the case is pending is improper" under the rules specified in Chapter 7A). This is not the situation presented by the present case.

Rather, in accordance with *Garrison* and *Sparks*, where, as here, an action listed in section 7A-244 has been previously filed in district court and another action relating to the subject matter of the previously filed action is then filed in superior court, the district court's jurisdiction over the subject matter has already been invoked by the parties to the first action. It follows that the superior court does not have jurisdiction in the subsequently filed action, irrespective of the parties to the first action.

Because the Superior Court, Mecklenburg County, was divested of subject matter jurisdiction in the case *sub judice*, it properly dismissed the action without prejudice. *Cf. Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 810-11, 513 S.E.2d 572, 574 (1999) (stating that where court dismisses case because it lacks jurisdiction over the subject matter, the dismissal operates to nullify the action and does not bar action by plaintiff in court where jurisdiction exists). We note that dismissal of such actions without prejudice further allows litigants to then intervene in the pending district court action by virtue of Rule 24 of our Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 24(a) (1999). Because plaintiffs *sub judice* have been made parties to the Wilson County action, the above-noted procedure pursuant to Rule 24 is unnecessary, as other joinder and pleading options are now available to them via our Rules of Civil Procedure.

Having determined that the Superior Court, Mecklenburg County, was divested of jurisdiction by virtue of the action pending in Wilson County, we find it unnecessary to address plaintiffs' remaining arguments.

For the foregoing reasons, we affirm the order of the Superior Court dismissing plaintiffs' action without prejudice.

Affirmed.

Judge HUDSON concurs.

Judge WYNN concurs with separate opinion.

WYNN, Judge concurring.

I concur with the majority opinion affirming the order of the superior court dismissing the declaratory action brought by Hudson International, Inc., et. al. I write separately to note that in this case, there exists an unusually close relationship between Fitzgerald S. Hudson and Hudson International. Furthermore, the trial court in the action filed in District Court, Wilson County, found that the "Southerly" property was within the jurisdiction of the district court to be equitably distributed as marital property; additionally, the trial court found that Fitzgerald Hudson's actions with respect to "Southerly" evidenced his "calculated intent . . . to divest the Plaintiff of her marital property rights" therein. Thus, the decision

of *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988) (holding that the superior court had no jurisdiction over the division of marital property when the district court had properly invoked jurisdiction over the property), controls the outcome of this case.

However, we do not confront in this appeal the specific issue of whether a third party with no privity of relationship with either party in an equitable distribution matter, is prohibited by *Garrison* from seeking a declaratory judgment to establish its ownership to the exclusion of the equitable distribution parties.

STATE OF NORTH CAROLINA v. JONATHAN MAURICE LINTON

No. COA00-832

(Filed 21 August 2001)

1. Confessions and Other Incriminating Statements— Miranda warnings—defendant not told he could leave—not in custody

The trial court did not err in a prosecution for the first-degree sexual offense of a child and attempted first-degree rape of a child by admitting a statement which defendant contended he gave to police without Miranda warnings while he was in custody. Defendant went to the police station of his own volition and gave a statement without any promises being made; while he did not know that he was a suspect and contends that no one told him that he was free to go, he was not in custody and Miranda warnings were not required.

2. Evidence— hearsay—out-of-court statements of witness refusing to testify—witness unavailable—order to testify required

There was no plain error in a prosecution for the first-degree sexual offense of a child and the attempted first-degree rape of a child where the victim refused to testify, the court ruled that she was unavailable, and a number of witnesses were allowed to testify regarding her out-of-court statements. While the court exerted some pressure on the victim, she was never ordered to testify; an order from the trial court is an essential component in

a declaration of unavailability under N.C.G.S. § 8C-1, Rule 804(a)(2). However, the statements in question are very similar to others admitted in evidence and it cannot be said that the jury would probably have reached a different result without these statements.

3. Constitutional Law— effective assistance of counsel—failure to object to hearsay—other similar statements admitted—no prejudice

A defendant in a prosecution for the first-degree sexual offense of a child and first-degree attempted rape was not denied the effective assistance of counsel where his counsel did not object to hearsay testimony which was similar to statements given by defendant which were admitted.

Appeal by defendant from judgments entered 23 February 2000 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 30 May 2001.

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

The Law Offices of James Williams, Jr., P.A., by James D. Williams, Jr., for defendant-appellant.

HUNTER, Judge.

Jonathan Linton (defendant) appeals from judgments entered upon the jury's verdicts finding him guilty of first degree sexual offense of a child and attempted first degree rape of a child. Defendant argues that the trial court erred by: (1) admitting into evidence his statement to the police; and (2) admitting testimony by various witnesses regarding out-of-court statements by the victim, "K." Defendant further argues that he received ineffective assistance of counsel in violation of his Sixth Amendment right to counsel. We find no prejudicial error.

The pertinent facts leading up to defendant's conviction follow. The record tends to show that defendant met K in an electronic (internet) chat room in June or July of 1999. The two gave each other fake names, defendant calling himself "Majestic," and/or "Maurice," and K identifying herself as "Toya." Over the next few weeks, having exchanged telephone numbers, the two "talked on the telephone several times a day . . . and during those conversations K[] told him that

she was sixteen years old and they made plans to go out together." Contrary to her assertions, K was only twelve.

On 7 August 1999, K and her girlfriend, Megan, went to the movies with defendant, after which defendant and K drove Megan home. Defendant and K then drove to the Southern High School parking lot where they engaged in sexual activity. In a written statement given to police three days later and testified to by Investigator Jacqueline Fountain, K stated that she and defendant

> were on the way to bring me home [and] he [defendant] pulled in[to the] . . . parking lot [and] he told me to get out of the car . . . . Then he told me to get in the back seat [and] I got in the back seat [and] he told me to unbutton my pants [and] I said no. Then he said I'll do it for you. Then I just gave up. He got in the back seat [and] took off his pants. Then he got on top of me [and] stuck his penis in my vagina.

K went on to describe defendant having oral sex with her and then continuing to have intercourse with her outside on the ground. She then stated, "[w]hile he was having sex with me I was trying to push him off but he kept hugging me." Then she stated that she remembered walking home. However, K did not tell anyone about the incident when she initially returned to her home, and her mother testified that when K came home from the movies, "there were no signs of physical or emotional trauma and that K[] said she had a good time."

The record reflects that, after taking K's statement, Investigator Fountain contacted defendant, informed him that she was investigating a sexual assault, and "asked him to come down to the police station" to talk. However, Investigator Fountain never informed defendant that he was her only suspect or that she fully intended to charge and arrest him at a later time. As defendant discussed the incident, Investigator Fountain reduced defendant's statement to writing and later had him sign it. In his statement, defendant said:

> On Saturday [the day in question] I parked in front of K[]'s house [and] she came out, we were going to the movies. I went to pick up a friend of hers, Megan, and then . . . we went to the movies . . . . After the movie, I asked her if she was ready to go home [and] she said no, so we rode around. . . . We then went to Southern High School, got out of the car [and] we kissed. I unbuttoned her pants. Then she asked me did I have any condoms, I

> said no. Then she said, "don't come in me because I don't want to get pregnant.["] Then we started having sex, I could never get all the way in there. She got on top of me and tried. We were in the back seat . . . [and] went to the front of the car [and] tried to have sex on the hood. That didn't work, [and] then, last, we got on the street, on the ground. I wanted to stop because it wasn't working but she said no she didn't want me to stop. So I continued to try to have sex with her. . . . [When I drove her home, s]he wanted me to stop up the street from her house. . . . She left messages after that saying that she wanted to do it again [and] she wanted me to come over to her house to get her. . . . She called me [again] from . . . her friend[']s house. I asked her again if she was really sixteen, she said yes. I didn't know she was twelve until I called her at her house today and her father told me. . . . When she was lying on the ground I had oral sex with her because nothing else was working.

Shortly after giving his statement, defendant left the police station. He was arrested for the crimes against K five days later.

[1] In his brief, defendant sets forth six assignments of error, condensed into three arguments for our review. The remaining seven assignments of error appearing in the record but not raised in defendant's brief are deemed abandoned. N.C.R. App. P. 28(b)(5). Defendant first argues that the trial court erred by denying his motion to suppress his statement to the police, which, defendant argues, was given while defendant was in custody without having been read his *Miranda* rights. We are unconvinced.

" 'The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law.' " *State v. Cabe*, 136 N.C. App. 510, 512, 524 S.E.2d 828, 830 (citation omitted), *appeal dismissed and disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). As to the merits of defendant's argument, "the initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). "[I]n determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of

the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977)).

In applying the law to the facts of this case, we hold that defendant was not in custody when he chose, by his own volition, to go to the police station and give a statement without any promises being made to him, even if he did not know he was a suspect at the time. The record discloses no evidence of defendant being handcuffed or affirmatively placed in custody, neither is there evidence of any officer telling defendant he was not free to go. Defendant simply contends that at no time did anyone tell him he *was* free to go. That fact, standing alone, does not compel the conclusion that *Miranda* warnings should have been given. Without any evidence to the contrary, we hold that defendant was not in custody when he gave his statement to police and, thus, *Miranda* warnings were not required. His statement was admissible, and the trial court did not err in denying his motion to suppress.

[2] In his second argument, defendant contends that the trial court erred in admitting the testimony of a number of witnesses regarding out-of-court statements made by K. Specifically, defendant argues that the testimony of Elese Black, Nathaniel Keith, Cecelia Black, Barbara Sanders, Howard Alexander, Jacqueline Fountain, and Susan Rowe, regarding statements allegedly made by K, should not have been admitted by the trial court because K was not "unavailable as a witness" as required by N.C. Gen. Stat. § 8C-1, Rule 804 (1999) (Rule 804). Although we agree that K was not "unavailable as a witness," and that the admission of the testimony in question pursuant to Rule 804 was error, we hold that the error does not require reversal because it does not amount to plain error.

At the outset we note that defendant failed to object to the admission of the testimony when it was offered (which was before K refused to testify) and thereby failed to preserve the issue for review. However, an alleged error by the trial court not objected to at trial may be made the basis of an assignment of error where a defendant contends that the judicial action amounts to plain error, and defendant here does so contend. N.C.R. App. P. 10(c)(4). Thus, we review

the alleged error under the plain error standard of review although it was not preserved at trial. If we find that the admission of the testimony constitutes error, in order for the error to warrant reversal, this Court "must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' . . . ."

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.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). In addition, a defendant asserting plain error on appeal bears the burden of proving that the trial court committed plain error. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

Turning to the merits of defendant's argument, the first question is whether the trial court's admission of the testimony at issue was, in fact, error. "Hearsay" is an out-of-court statement "offered in evidence to prove the truth of the matter asserted," N.C. Gen. Stat. § 8C-1, Rule 801(c) (1999), and is "not admissible except as provided by statute or by the North Carolina Rules of Evidence." *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 598 (1988). Rule 804 provides various exceptions to the general prohibition against the admission of hearsay where the declarant is "unavailable as a witness." Subdivision (a) of Rule 804 enumerates the circumstances in which a witness may be deemed unavailable for purposes of admitting hearsay testimony under subdivision (b) of the rule:

> (a) *Definition of unavailability.*—"Unavailability as a witness" includes situations in which the declarant:
>
> . . . .
>
> (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so . . . .

Rule 804(a)(2). Subdivision (b)(5) of the rule, which provides a "catch all" exception for hearsay not falling under any other hearsay exception, states in pertinent part:

> (b) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Rule 804(b)(5).

In the case at bar, K entered the courtroom to testify on behalf of the State, but once she arrived she refused to testify. The following discourse transpired during *voir dire* by the trial court:

> THE COURT: Do you understand that the Court could require you to testify?
>
> [K]: Yes.
>
> THE COURT: Are you currently unwilling to testify on behalf of the State?
>
> [K]: Yes.
>
> THE COURT: Do you refuse to testify at this point?
>
> [K]: Yes.

The trial court then excused K from testifying, declaring that she was "unavailable within the meaning of [Rule 804(a)(2)] in that she persists in refusing to testify concerning the subject matter of her statement despite some admonitions and directives of the Court."

Defendant argues that because the trial court "never ordered K[] to testify," it was improper to find her unavailable pursuant to Rule 804(a)(2), and therefore error to admit the statements pursuant to

Rule 804(b)(5). We have not found any cases from this State directly addressing the issue.[1] However, because Rule 804(a)(2) is identical to Rule 804(a)(2) in the Federal Rules of Evidence, *see* Fed. R. Evid. 804(a)(2), opinions from federal courts that have addressed this issue are instructive. *See, e.g., Stone v. Lynch, Sec. of Revenue*, 68 N.C. App. 441, 443, 315 S.E.2d 350, 352 (1984), *aff'd*, 312 N.C. 739, 325 S.E.2d 230 (1985).

In *United States v. Zappola*, 646 F.2d 48 (2d Cir. 1981), the Court held that the trial court erred in ruling that a witness, who refused to testify, was unavailable pursuant to Rule 804(a)(2) because "the district court did not order [the witness] to testify," but "[i]nstead . . . relied on [the witness's] assertion that he would refuse to testify even if ordered to by the court." *Id.* at 54. The Court stated:

> The procedure that should have been followed by the court when faced with [the witness's] refusal to testify was (1) the issuance of an order, outside the presence of the jury, directing him to testify and (2) a warning that continued refusal to testify despite the court's order would be punishable by contempt.

Id. In a similar case, *United States v. Oliver*, 626 F.2d 254 (2d Cir. 1980), the same Court held that an order from the trial court is an essential component in a declaration of unavailability under Rule 804(a)(2). In *Oliver*, the trial court had put pressure on the witness to testify; "[h]owever, the court never *ordered* him to testify, which is an essential requisite to the invocation of Rule 804(a)(2)." *Id.* at 261. The Court also noted that "[i]t is always possible that a recalcitrant witness who does not respond to judicial pressure will testify when ordered to do so." *Id.*

Here, during *voir dire*, the trial court asked K whether she intended to refuse to testify although she could be required to do so by the court. K responded affirmatively, indicating that she refused to testify. While the court exerted some pressure on K to testify, the court never ordered K to testify and never warned her of the possibility of punishment for her continued refusal. We believe it is possible that K would have testified had she been ordered to do so by the court. We agree with the rule set forth in *Zapolla* and *Oliver* that an

1. The State's reliance upon *State v. Chandler*, 324 N.C. 172, 376 S.E.2d 728 (1989), is misplaced because the trial court in that case deemed the witness unavailable under Rule 804(a)(4), which allows a finding of unavailability when the declarant "[i]s unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Rule 804(a)(4).

order from the trial court is an essential component in a declaration of unavailability under Rule 804(a)(2). Therefore, we conclude that the trial court erred in declaring K unavailable without first giving the required order to testify.

The next question is whether this error warrants reversal. The record shows that the statements in question are extremely similar (in terms of providing evidence of the offenses charged) to the statement that defendant gave to the police, and the statement that K gave to the police, both of which were admitted in evidence and considered by the jury. For this reason, we cannot say that, absent the admission of the statements in question, the jury would probably have reached a different verdict. Furthermore, we agree with the trial court that the fact that the statements in question were made shortly after the incident indicates a significant degree of reliability as to the accuracy of these statements. Thus, we also cannot say that admission of the statements resulted in a miscarriage of justice. In sum, although the trial court erred in deeming K unavailable without ordering her to testify, we conclude that defendant has failed to carry his burden under a plain error analysis and that the error does not warrant reversal. This assignment of error is overruled.

[3] In defendant's final argument, he contends that he received ineffective assistance of counsel in violation of his Sixth Amendment right to counsel. "Defendant argues that he was denied effective assistance of counsel when, during the testimony of Elese Black, Cecelia Black, Nathan Keith, Rosalyn Keith, Investigator Jacqueline Fountain and Corporal Howard Alexander, defense counsel failed to object to their hearsay testimony about what K[] said to them" regarding the incident in question. Defendant further contends that "[e]ven the [trial] court recognized the flawed proceedings," because when defense counsel finally did object, the trial court stated:

> As far as the defendant's general objection to the testimony of the alleged victim as given through other witnesses, the defendant having failed to object to any of that evidence offered through other witnesses at the time offered by the State, the Court overrules that objection.

We are unpersuaded by defendant's argument.

> It is well-established that
>
> [a] defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction

on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden defendant must satisfy a two part test.

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*"

. . . .

The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.

. . . .

Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Braswell, 312 N.C. 553, 561-63, 324 S.E.2d 241, 247-49 (1985) (citations omitted).

Here, our examination of the record convinces us that there is no reasonable probability that defense counsel's failure to object to the admission of the testimony in question affected the outcome of the trial. This is because, as discussed above, the statements in question are extremely similar (in terms of providing evidence of the offenses charged) to the statement that defendant gave to the police, and the statement that K gave to the police, both of which were admitted in evidence and considered by the jury. As a result, we believe the evidence of defendant's guilt was more than substantial to prove defendant committed the crimes with which he was charged, even without the hearsay testimony being allowed. Looking to the totality of the circumstances in the present case, we hold that defend-

ant has failed to show that any errors by defense counsel prejudiced defendant.

No error.

Judges MARTIN and HUDSON concur.

OCCANEECHI BAND OF THE SAPONI NATION, PETITIONER v. NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS, RESPONDENT

No. COA00-561

(Filed 21 August 2001)

1. Administrative Law— final agency decision—deadline for agency action

The trial court erred by finding that N.C.G.S. § 150B-44 is merely presumptive where petitioner sought recognition as an Indian tribe; an administrative law judge recommended that respondent Commission of Indian Affairs grant recognition; respondent denied that recognition; and petitioner contended that the administrative law judge's recommended decision had by then become the final agency decision. The plain language of N.C.G.S. § 150B-44 provides that an Article 3 agency has the longer of 90 days from the day the official record is received by the agency or 90 days after its regularly scheduled meeting to issue its final decision, with two provisions for extensions, and that the administrative law judge's recommended decision then becomes the final agency decision. There is no ambiguity in the statutory language that would give the trial court need to further explore legislative intent.

2. Administrative Law— delayed final agency decision—recommended decision as final decision

An administrative law judge's recommended decision that petitioner be recognized as a North Carolina Indian Tribe became the final agency decision where the official record was transmitted to the Commission of Indian Affairs on 26 January 1999, no decision was made at the next regularly scheduled meeting on 11 March, the 90-day deadline of N.C.G.S. § 150B-44 expired on 9 June, petitioner agreed to a two-day extension to the next regu-

larly scheduled meeting on 11 June, a vote was taken at that meeting rejecting the recommended decision, and the decision was issued in writing on 11 July. A final agency decision is not made until it is in writing and neither party contends that there was an express agreement to an additional extension. The Commission invoked its statutory authority to extend the deadline "for good cause," citing the complexity of the issues and the length of the recommended decision, but lacked the authority to retroactively extend the statutory deadline; the agreement for the two-day extension only stated that the Commission could hear the matter and make its final decision at the 11 June meeting; and petitioner did not consent by lack of objection because it notified the Commission three days after the hearing that the recommended decision had become the law of the case and filed a motion for relief in superior court stating the same thing a month after the hearing.

Appeal by petitioners from judgment entered 7 February 2000 by Judge Henry V. Barnette, Jr. in Orange County Superior Court. Heard in the Court of Appeals 14 March 2001.

McSurely & Osment, Alan McSurely and Ashley Osment, for petitioners-appellants.

Michael F. Easley, Attorney General, by D. David Steinbock, Assistant Attorney General, for the State.

BIGGS, Judge.

This appeal arises from the trial court's order affirming the Final Agency Decision of the North Carolina Commission of Indian Affairs which denied tribal recognition to the Occaneechi Band of the Saponi Nation. For the reasons stated herein, we reverse the decision of the trial court and remand this matter for an order consistent with this opinion.

Pertinent facts and procedural history are as follows: In January 1990, the Eno Occaneechi Indian Association petitioned the North Carolina Commission of Indian Affairs (Commission) to be recognized as a North Carolina Indian tribe. This petition was referred to the Recognition Committee of the Commission, whose staff reviewed and supplemented the petition with independent research. In 1994, during the review process, the "Eno Occaneechi Indian Association" held an annual meeting and changed the name of the Association to

the "Occaneechi Band of the Saponi Nation." (Occaneechi). After several years of review and deliberation, on 24 August 1995, the Recognition Committee voted to deny State recognition to the Occaneechi, citing petitioner's failure to meet the required five of eight criteria necessary for such recognition and their failure to establish heritage to an Indian tribe indigenous to North Carolina for at least the last 200 years. The Occaneechi appealed to the Full Commission, which subsequently voted to uphold the decision of the Recognition Committee.

On 3 January 1996, the Occaneechi filed a petition for contested case hearing with the Office of Administrative Hearings. The matter came on for hearing on 24 February 1997 before an administrative law judge (ALJ). After one day of hearing, the parties requested and agreed to have the matter heard by a mediator. However, after approximately a year and a half, the mediation reached an impasse, and the matter proceeded to hearing before the ALJ. The hearing concluded on 28 July 1998. After considering the testimony and evidence presented, on 7 December 1998, the ALJ recommended that the Commission grant tribal recognition to the Petitioners. The ALJ's Recommended Decision along with the official record was transmitted to the Commission on 27 January 1999. A hearing was held on 11 June 1999. On 11 July 1999, the Commission issued its Final Agency Decision denying the Occaneechi's petition for tribal recognition.

On 16 August 1999 the Occaneechi filed a petition for review with Orange County Superior Court. Upon review of the record and the agency's final decision, the trial court affirmed the Commission's decision and ordered that judgment be granted in favor of Respondent, the North Carolina Commission of Indian Affairs. From this order, petitioner now appeals.

[1] In the record on appeal, petitioner sets forth five assignments of error. In its first assignment, petitioner contends that the trial court erred in its construction of N.C.G.S. § 150B-44 (1999) as applied in this case. Petitioner maintains that the pertinent portion of G.S. § 150B-44 is self-executing. Accordingly, when Respondent failed to issue a final decision on or before 11 June 1999, the Recommended Decision of the ALJ became the Final Agency Decision. We agree.

When reviewing a trial court's order regarding an agency decision, it is the duty of the appellate court to examine the order for

errors of law. *Pisgah Oil Co. v. Western N.C. Reg'l Air Pollution Control Agency*, 139 N.C. App. 402, 405, 533 S.E.2d 290, 293, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 111 (2000). The issue to be resolved in the present case is whether the trial court properly interpreted N.C.G.S. § 150B-44. Since statutory interpretation presents a question of law, the matter is properly before this Court. *N.C. State Bar v. Barrett*, 132 N.C. App. 110, 113, 511 S.E.2d 15, 17 (1999) (stating that an incorrect statutory interpretation constitutes an error of law).

In the case *sub judice*, the disputed language of G.S. § 150B-44 is as follows:

> An agency that is subject to Article 3 of this Chapter and is a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 90 days after its regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. **If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision**. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 180 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

The trial court, in affirming the decision of the Commission, stated that the statutory time limit in G.S. § 150B-44 was intended to be presumptive, not absolute, and therefore, if an agency can demonstrate reasonableness in issuing a final decision beyond the statutory limit, the agency is not considered to have adopted the recommended decision of the ALJ. As further support for its decision, the trial court noted that G.S. § 150B-44 must be construed in light of N.C.G.S. § 143B-406 (1999), which expressly grants the Commission authority to make decisions regarding tribal status. We find no support for the trial court's conclusions.

The rules of statutory construction are well established. It is the function of the judiciary to construe a statute when the meaning of a statute is in doubt. *In re Declaratory Ruling by N.C. Comm'r of Ins.*, 134 N.C. App. 22, 27, 517 S.E.2d 134, 139, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 356 (1999).

> "In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' "

Id. (quoting *Com'r of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d. 547, 561 (1980)). However,

> [w]hen 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.

State v. Green, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998).

The plain language of G.S. § 150B-44 provides that an agency subject to Article 3, such as the respondent, has 90 days from the day the official record is received by the Commission or 90 days after its regularly scheduled meeting, whichever is longer, to issue its final decision in the case. This first 90 days can be extended for an additional 90 days under two specific circumstances: (1) by agreement of the parties and (2) for good cause shown. G.S. § 150B-44. The statute is clear that if a final decision has not been made "within these time limits" the agency is considered to have adopted the ALJ's recommended decision. *Id.* We find no ambiguity in this statutory language that would give the trial court need to further explore legislative intent.

Moreover, in *Holland Group v. N.C. Dept. of Administration*, 130 N.C. App. 721, 504 S.E.2d 300 (1998), this Court recognized that G.S. § 150B-44 has definite time limits. While the facts in *Holland* are distinguishable from those in the present case, the Court's interpretation of the subject statutory provision is relevant. The Court stated:

> G.S. § 150B-44 allots ninety days from receipt of the record within which an agency may render a final decision in a case. The section further provides that the agency may extend that time limitation "for an additional period of up to 90 days." G.S. § 150B-44. Pointedly, the statute does not allow for additional periods, thus limiting the agency to a single extension.

Id. at 728, 504 S.E.2d at 305. The Court reasoned that G.S. § 150B-44 is contained within the North Carolina Administrative Procedure Act, which has as its primary purpose is to "provide procedural protection for persons aggrieved by an agency decision." Thus, according to the Court, the provisions are to be "liberally construed . . . to preserve and effectuate such right." *Id.* at 725, 504 S.E.2d at 304. The Court in *Holland* further states "[t]he plain language of G.S. 150B-44 indicates the section is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay." *Id.* To interpret the statutory time limit as presumptive rather than absolute would undermine the stated purpose of the Act. Accordingly, we find that the trial court incorrectly interpreted G.S. § 150B-44 in concluding that the statutory time limits were merely presumptive.

Furthermore, we reject the trial court's assertion that G.S. § 150B-44 is in conflict with G.S. § 143B-406. When multiple statutes address a single matter or subject, the statutes must by construed *in pari materia*, "as together constituting one law," and harmonized to give effect to each statute whenever possible. *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d. 406, 408 (1998). If however, an irreconcilable ambiguity exists, the conflict should be resolved so as to effectuate the true legislative intent. *Petty v. Owens*, 140 N.C. App. 494, 499, 537 S.E.2d 216, 219 (2000), *disc. review denied*, 353 N.C. 379, 547 S.E.2d 16 (2001). Our reading of the two statutes results in no conflict.

Nor are we persuaded by respondent's argument that petitioner's sole remedy under G.S. § 150B-44 was to seek a court order compelling action by the agency or administrative law judge. To support this proposition, the respondent cites a 1976 case, *Stevenson v. Dept. of Insurance*, 31 N.C. App. 299, 229 S.E.2d 209, *disc. review denied*, 291 N.C. 450, 230 S.E.2d 767 (1976). In *Stevenson*, this Court held that the remedy for persons whose rights or privileges are adversely affected by unreasonable delay on the part of the agency, is to seek a court order to compel the agency to act. *Id.* at 303, 229 S.E.2d at 211;

see also, *Davis v. Vance County DSS*, 91 N.C. App. 428, 430, 372 S.E.2d 88, 89 (1988) (holding that the right to judicial intervention when a final decision is unreasonably delayed is the only remedy available to an aggrieved petitioner). However, *Stevenson* was decided before the legislature amended G.S. § 150B-44[1] in 1991. Unlike the pre-1991 version, the amendment specifically provides that if a Commission, subject to Article 3, fails to issue a final decision within the prescribed time, the recommended decision of the ALJ becomes the final decision. *See*, *Holland Group*, 130 N.C. App. 721, 504 S.E.2d 300 (upholding trial court ruling that when a final decision is not issued in a timely manner, the recommended decision of the administrative law judge becomes the final agency decision by operation of law).

Additionally, the amended statute distinguishes Article 3 agencies such as the Commission in question here, and agencies subject to Article 3A. Article 3A agencies are required by the statute "to seek a court order compelling action by the agency" if a final decision is not made in the time limit imposed in G.S. § 150B-44. Had the legislature intended for Article 3 agencies to seek a court order compelling compliance, it would so state. *See*, *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706 446 S.E.2d 594, 596 (1994).

In conclusion, we hold that when an Article 3 agency fails to issue a final decision within the time limits set forth in G.S. § 150B-44, the recommended decision of the ALJ becomes the final decision in the case by operation of law.

Having concluded that the statutory limits in G.S. § 150B-44 are not merely presumptive as found by the trial court and further that no court action is needed where the time limits are not met for adoption of the ALJ's decision; we next consider whether the final decision of the Commission in the case *sub judice* was rendered within the time prescribed by the statute.

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1. Compare statute prior to 1991 Amendment. N.C.G.S. § 150B-44 (1976) (repealed 1991) Right to judicial intervention when decision unreasonably delayed. Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. Except for an agency that is a board or commission, an agency's failure to make a final decision within 60 days of the date on which all exceptions or arguments are filed under G.S. 150B-36(a) with the agency constitutes an unreasonable delay. A board or commission's failure to make a final decision within the later of the 60 days allowed other agencies or 60 days after the board's or commission's next regularly scheduled meeting constitutes an unreasonable delay.

[2] The official record was transmitted to the Commission on 26 January 1999. The next regularly scheduled meeting was set for 11 March 1999. No decision was rendered at the March meeting. Ninety days from the March meeting was 9 June 1999, however, petitioner agreed to a two-day extension such that the hearing could be held on 11 June 1999 when the Commission was to have its next regularly scheduled quarterly meeting. The hearing was held on 11 June 1999 in accordance with this agreement and a vote was taken rejecting the ALJ's Recommended Decision. On 11 July 1999, the Commission issued its final decision, in writing[2], denying the Occaneechi's petition for tribal recognition. The issuance of the final decision clearly exceeded both the 90 days from the receipt of the record by the Commission and the 90 days from the next regularly scheduled meeting as prescribed by G.S. § 150B-44. As stated earlier, there are two circumstances by which the time limit can be extended for an additional 90 days: (1) by agreement of the parties and (2) for good cause shown.

Neither party asserts that there was an express agreement of the parties to an additional extension other than the two day extension discussed here. However, the Commission by stating what they deemed to be "good cause," argues that it properly invoked its authority to extend the deadline for issuing a final decision. *See*, G.S. § 150B-44 ("This time limit may be extended by the parties or, for good cause shown, by the agency.") The Respondent points to a paragraph in the Final Agency Decision:

> In order to allow an appropriate time to prepare and sign the Final Agency Decision document, the Commission through its Chairman found that the complexity of the case and the length of the Recommended Decision constitute good cause to extend the time for formal preparation, execution and service of this document for a period of 58 days, through and including 6 August 1999.

However, we find that respondent was without authority to unilaterally extend the deadline for issuing its final decision. In *Holland*, this Court rejected the attempt by an agency to retroactively extend the statutory time limit holding that "such action appears contrary to the purport of G.S. § 150B-44, *i.e.*, protection from unreason-

2. A final decision is not made until it is in writing. *In re Savings and Loan Assoc.*, 53 N.C. App. 326, 330, 250 S.E.2d 748, 750, *disc. review denied*, 304 N.C. 588, 291 S.E.2d 148 (1981).

able delays." 130 N.C. App. at 728, 504 S.E.2d at 305. Additionally, the final decision of the Commission, which memorialized the parties agreement regarding the two-day extension states that "both parties stipulated that the Commission could hear this matter *and make its final decision* at the June 11, 1999 meeting without violating N.C.G.S. § 150B-44." (emphasis added). *See*, N.C.G.S. § 150B-36(b) (1999) ("[a] final decision or order in a contested case shall be made by the agency in writing. . . ."). Here, as in *Holland*, "[w]ithout question, it would be unfair and unjust to allow the [agency] to deny the self-imposed deadline it formally communicated to [the petitioner]." *Id.* at 728, 504 S.E.2d. at 305 (citation omitted).

Respondent would contend that, in failing to object to the Commission's decision at the 11 June meeting to allow its Chairman, Paul Brooks to sign the order after the decision was reduced to writing, the petitioner consented to a further extension of the statutory deadline. We disagree.

On 14 June 1999, three days after the 11 June 1999 hearing, petitioner, through counsel, notified the Commission that although they had agreed to the earlier two-day extension for the convenience of the respondent, since no additional extension has been agreed to by the parties, the ALJ's Recommended Decision became the law of the case. When no decision had been issued a month after the hearing, the petitioner filed a "Motion for Relief" in Orange County Superior Court relaying their understanding that by the operation of law, the recommended decision was now the final decision.

We conclude that since the Commission did not issue its final decision in accordance with G.S § 150B-44, by operation of the statute, the recommended decision of the Administrative Law Judge became the final decision of the case as of 11 June 1999. Accordingly, we hold that the trial court erred in denying the Petitioner appropriate relief pursuant to G.S. § 150B-44.

Having determined that the Commission's failure to issue a timely final decision resulted in an automatic adoption of the Administrative Law Judge's Recommended Decision, we find it unnecessary to address Petitioner's remaining assignments of error.

Reversed and Remanded.

Judges GREENE and JOHN concurs.

STATE OF NORTH CAROLINA, APPELLEE v. WAYNE RUSSELL ROBINSON AND CARLYLE POINDEXTER, SURETY-PETITIONER-APPELLANT

No. COA00-47

(Filed 21 August 2001)

1. Bail and Pretrial Release— forfeiture of bond—extraordinary cause—failure to secure defendant's appearance

The trial court did not fail to make appropriate and necessary findings of fact and conclusions of law to support its decision that the surety did not demonstrate extraordinary cause entitling him to relief from the forfeiture of a surety bond in the amount of $40,000, because the trial court found that despite the surety's efforts, he was unable to secure the appearance of defendant in court, which is the primary purpose of the bond system.

2. Bail and Pretrial Release— forfeiture of bond—extraordinary cause—statutory goal to produce defendant at trial

The trial court did not abuse its discretion by denying a surety's petition to remit forfeiture of a bond before execution by allegedly failing to conclude as a matter of law that the surety's evidence demonstrated extraordinary cause under N.C.G.S. § 15A-544(h), because: (1) N.C.G.S. § 15A-544(e) provides that justice requires a defendant's presence, and a surety has the responsibility to produce the defendant; and (2) the surety in this case, who was a professional in the bonding business, failed to produce the defendant and thus failed to meet the statutory goal of N.C.G.S. § 15A-544 to ensure the production of defendant for trial.

Judge WYNN dissenting.

Appeal by surety-petitioner from order entered 2 September 1999 by Judge Wade Barber, Jr. in Superior Court, Granville County. Heard in the Court of Appeals 21 February 2001.

Royster, Cross & Currin, LLP, by James E. Cross, Jr. and Dale W. Hensley, for the State.

Edmundson & Burnette, L.L.P., by R. Gene Edmundson and James T. Duckworth III; Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn, for surety-petitioner-appellant.

McGEE, Judge.

Carlyle Poindexter (petitioner) appeals an order filed 2 September 1999 denying his petition to remit forfeiture of a bond before execution. Wayne Russell Robinson (Robinson) was arrested 20 March 1998 on a charge of trafficking in cocaine and attempting to obtain property by false pretenses. His bond was set at $40,000. Petitioner executed a surety appearance bond for Robinson in the amount of $40,000. Robinson failed to appear on his trial date. An order of bond forfeiture was entered 20 January 1999.

Petitioner's agent, Aric W. Swanger, obtained custody of a suspect in Stone Mountain, Georgia on 22 March 1999 and believing the suspect to be Robinson returned him to North Carolina. After the suspect was incarcerated, it was determined by a Granville County detective that the fingerprints of the suspect did not match the fingerprints of Robinson. The suspect was released and flown back to Georgia by petitioner. Petitioner did not locate Robinson and was unable to obtain his custody.

Judgment of forfeiture was entered against petitioner on 14 July 1999 and the trial court's order stipulated "that this ruling is without prejudice to the surety to request by proper verified written petition that the judgment be remitted, in whole or in part, pursuant to N.C.G.S. 15A-544(e)." Petitioner filed a petition to remit forfeiture before execution on 4 August 1999 along with an affidavit signed by petitioner stating the case "is extraordinary and I request special consideration be given to this matter for two reasons: (a) Extraordinary effort of surety and (b) the State's failure to properly identify the defendant." Petitioner submitted extensive records asserting that numerous hours of searching, calling, paying informants and meeting with law enforcement officials had been spent in search of Robinson.

The trial court made the following findings of fact in its order denying petitioner's petition to remit forfeiture before execution:

> 3. On 4 August, 1999 the bondsman [Poindexter], surety for the defendant in this matter, filed a verified Petition to Remit Forfeiture Before Execution on the basis of extraordinary cause pursuant to G.S. 15A-544. The defendant has not been surrendered by the surety and has not otherwise been apprehended.

4. The surety has made extensive efforts to apprehend the defendant as set forth in the verified petition and his testimony. Those efforts have been unsuccessful.

5. [Poindexter] testified that although he reported to the North Carolina Department of Insurance that the defendant had paid a premium of $6,000.00, in truth, the defendant paid a premium of only $4,000.00 for the bond. He said this practice was per the instructions of the Department of Insurance.

Petitioner appeals from this order.

I.

[1] Petitioner argues that the trial court erred by failing to make appropriate and necessary findings of fact and conclusions of law to support its decision that petitioner did not demonstrate extraordinary cause entitling him to relief. Petitioner contends that our Court's holding in *State v. Lanier*, 93 N.C. App. 779, 379 S.E.2d 109 (1989) controls the present case. In *Lanier*, our Court held that the trial court's comment that "the school board needs this money more than the [s]urety and I am not going to make any remissions" did not meet the test required by N.C. Gen. Stat. § 15A-544(h) (1999). *Id.* at 781, 379 S.E.2d at 110. Our Court noted that "[t]he required test is whether 'extraordinary cause' is shown. Without the trial court making appropriate findings of fact and conclusions of law . . . we are unable to give effective review of the trial court's decision." *Id.* at 781, 379 S.E.2d at 110-11.

We note that the Court's holding in *Lanier* was based on the standard of "extraordinary cause" pursuant to N.C.G.S. § 15A-544(h). For reasons that we will review in the second part of our analysis, the case before us is on appeal pursuant to the "justice requires" standard enunciated in N.C.G.S. § 15A-544(e).

The State argues that the trial court is not required to give a lengthy explanation of its decision. "Under Rule 52(a), N.C. Rules Civ. Proc., the court need only make brief, definite, pertinent findings and conclusions upon the contested matters. A finding of such essential facts as lay a basis for the decision is sufficient." *State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 540-41, 272 S.E.2d 3, 5 (1980), *disc. review denied*, 302 N.C. 221, 277 S.E.2d 70 (1981) (citation omitted).

The findings of fact by the trial court in the case before us are sufficient and support its conclusion that "the petition of the surety to

remit the $40,000.00 bond be denied in full." "The goal of the bonding system is the production of the defendant[.]" *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979) (citation omitted). In *Locklear*, our Court affirmed the trial court's order to remit the bond to the surety because "[t]he efforts of the bondsman, while not dramatic, did result in the principal's detention on the charge for which the bond had secured the principal's appearance." *Id.* In *State v. Vikre*, our Court affirmed the trial court's denial of the surety's petition to remit and held that "the efforts made by the sureties . . . did not lead to [defendant's] appearance in [court], the primary goal of the bonds." *Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804 (citations omitted), *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987). Therefore our Court found that "we cannot say, as a matter of law, that the sureties' evidence conclusively demonstrates . . . justifying remission of the bonds[.]" *Id. See also State v. Pelley*, 222 N.C. 684, 688, 24 S.E.2d 635, 638 (1943) ("[t]he very purpose of the bond was not to enrich the treasury of [the] County, but to make the sureties responsible for the appearance of the defendant at the proper time").

In the case before us, the trial court found that petitioner, despite his efforts, was unable to secure the appearance of Robinson in Granville County Superior Court, which is the primary purpose of the bond system. The trial court's findings of fact support its conclusion of law that petitioner be denied remission of the $40,000 bond. Petitioner's first assignment of error is dismissed.

II.

[2] Petitioner next argues that the trial court erred in denying his petition for remission by failing to conclude as a matter of law that petitioner's evidence demonstrated "extraordinary cause" pursuant to N.C.G.S. § 15A-544(h). We disagree. N.C.G.S. § 15A-544(e) states that

> [a]t any time within 90 days after entry of the judgment against a principal or surety, the principal or surety, by verified written petition, may request that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

Our Court in *Rakina* confirmed that "[u]nder subsection (e) the court is guided in its discretion as 'justice requires.' Execution is manda-

tory under subsection (f) '[i]f a judgment has not been remitted within the period provided in subsection (e) above. . . .' Subsection (h) becomes applicable *after* execution of the judgment." *Rakina*, 49 N.C. App. at 539, 272 S.E.2d at 4. (emphasis added) (quoting N.C.G.S. § 15A-544).

The record in this case shows no execution of the judgment of forfeiture. In addition, the record shows that petitioner filed his petition to remit forfeiture before execution within ninety days after the 14 July 1999 judgment of forfeiture and that the trial court's order stated that its "ruling is without prejudice to the surety to request by proper verified written petition that the judgment be remitted in whole or in part, pursuant to N.C.G.S. 15A-544(e)." Although the 2 September 1999 order uses the "extraordinary cause" language within its findings, the trial court entitled its order as an "Order Upon Surety's Petition To Remit Forfeiture *Before* Execution" and stated that the matter was before the trial court as "a verified Petition to Remit Forfeiture *Before* Execution." (Emphasis added). Our Court found in *State v. Horne*, 68 N.C. App. 480, 483, 315 S.E.2d 321, 323 (1984), that in a review of an order pursuant to N.C.G.S. § 15A-544(e) "[i]t is immaterial . . . that the judge's order did not include a use of the statutory words 'justice requires.' " Under these facts, subsection (h) is inapplicable, and we apply subsection (e) alone.

Our Court in *Horne* held that since N.C.G.S. § 15A-544(e) "says 'may' remit, the decision to do so or not is a discretionary one." *Horne*, 68 N.C. App. at 483, 315 S.E.2d at 323. Thus, "[i]n order to exercise judicial discretion in a manner favorable to a surety, the judge must determine in his discretion that justice requires remission." *Id.* The *Horne* court found "that justice required the defendant's presence, rather than his absence" and that the sureties, although not professionals in the bonding business, "knowingly executed a defendant's bail bond and had the responsibility to produce the defendant for all his required court appearances." *Id.*

Applying the decision in *Horne* to the facts before us, petitioner, who is a professional in the bonding business, testified that his agent conducted an investigative interview with Robinson and then executed a surety appearance bond for him. Petitioner testified that all the information given him by Robinson during the interview was false. When Robinson failed to appear for his court date, petitioner was unable to locate him based on the false information given by Robinson. As stated in *Horne*, "justice required defendant's presence"

and petitioner "had the responsibility to produce the defendant[.]" *Id.* We cannot say the trial court abused its discretion in denying petitioner's petition for remission when petitioner failed to produce Robinson and thus failed to meet the statutory goal of N.C.G.S. § 15A-544 to ensure the production of the defendant for trial.

The trial court's order denying petitioner's petition to remit forfeiture before execution is affirmed.

Affirmed.

Judge THOMAS concurs.

Judge WYNN dissents.

WYNN, Judge, dissenting.

Because I believe that the trial court failed to make adequate findings of fact and conclusions of law to support its order denying surety's petition to remit forfeiture of the bond, I respectfully dissent from the majority opinion.

Our Rules of Civil Procedure require the trial court, at a minimum, to "make brief, definite, pertinent findings and conclusions upon the contested matters. A finding of such essential facts as lay a basis for the decision is sufficient." *State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 540-41, 272 S.E.2d 3, 5 (1980), *disc. review denied*, 302 N.C. 221, 277 S.E.2d 70 (1981) (citation omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 52(a) (1999).

In my opinion, the trial court's findings in this case are primarily statements of the disposition of this case, not findings of fact on the disputed issues. Indeed, the trial court made only two relevant "findings of fact": (1) "The defendant has not been surrendered by the surety and has not otherwise been apprehended"; and (2) "The surety has made extensive efforts to apprehend the defendant as set forth in the verified petition and his testimony. Those efforts have been unsuccessful." Based on those scant findings, the trial court "conclude[d], in its discretion, that the Surety's Petition should be denied."

The majority opinion states:

> In the case before us, the trial court found that petitioner, despite his efforts, was unable to secure the appearance of Robinson in

> Granville County Superior Court, which is the primary purpose of the bond system. The trial court's *finding* of fact supports its conclusion of law that petitioner be denied remission of the $40,000 bond.

This conclusion implies that the sole and determinative factor in the "justice requires" analysis under G.S. § 15A-544(e) is whether the surety is able to procure the appearance of the defendant. I disagree with that implication.

While the recovery of a defendant who has "jumped" bail is important and a defendant's appearance is the ultimate goal of the bond system, it should not be the *sole* determinative factor in deciding whether to remit a bond forfeiture under G.S. § 15A-544(e). For instance, in *State v. Horne*, 68 N.C. App. 480, 315 S.E.2d 321 (1984), the trial court made fourteen extensive findings of fact, which were not challenged by the appellants. Instead, the appellants there challenged the trial court's conclusion that there was no meritorious defense for the remission of any of the judgment. On review, this Court concluded that "[t]he facts as found do not compel the conclusion that 'justice requires' the forfeiture be remitted in whole or in part." In contrast, the surety in the instant case does not challenge the scant findings made, but instead contends that there were inadequate findings of fact and conclusions of law.

Furthermore, *State v. Vikre*, 86 N.C. App. 196, 356 S.E.2d 802 (1987), is inapposite in that it involved remission under G.S. § 15A-544(h), and thus involved application of the "extraordinary cause" standard instead of the "justice requires" formula.

In summary, I believe this matter should be remanded to the trial court for further findings of fact and conclusions of law. I offer no opinion on the issue of whether "justice requires" remission in the instant case, but believe that there were inadequate findings of fact to support the trial court's conclusion denying remission on the basis that justice did *not* so require.

COUNTY OF DURHAM v. LUTHER D. ROBERTS AND SHEILA C. ROBERTS v. KENT FOGLEMAN; LINDA FOGLEMAN; RALPH L. EMORY; TONY A. FOGLEMAN; ARDIS GEDDINGS; GERALD M. KENDRICK; JUDITH W. KENDRICK; CARLA R. WALL, STEVEN B. WALL; AND DAISY WALL

No. COA00-751

(Filed 21 August 2001)

1. Zoning— city/county ordinance—soil extraction—bona fide farm purpose—livestock

The trial court did not err by finding that defendant landowner's soil extraction on land that defendant planned to operate a horse farm for her family's enjoyment constituted a bona fide farm purpose within the meaning of N.C.G.S. § 153A-340 and was therefore exempt from a city/county zoning ordinance, because: (1)N.C.G.S. § 153A-340(b) provides that all bona fide farms with the exception of swine farms are exempt from zoning regulations; (2) the term "livestock" under the statute includes horses; and (3) defendant's plan to breed and raise horses means she is involved in the production and activities relating or incidental to the production of livestock as required by the statute.

2. Injunction— soil extraction—dissolution of preliminary injunction—denial of permanent injunction

The trial court did not err by dissolving a preliminary injunction and by denying intervenors' request for a permanent injunction to prevent defendant landowner's soil extraction on land that defendant planned to operate a horse farm for her family's enjoyment, because no basis for injunctive relief exists when defendant's activities are bona fide farm purposes within the meaning of N.C.G.S. § 153A-340(b)(2) that are exempt from a city/county zoning ordinance.

3. Appeal and Error— abandonment of assignment of error—documents in appendix to brief—failure to cite case authority

Although defendant landowner contends the trial court erred by concluding as a matter of law that the removal and excavation of soil constitutes "resource extraction" as defined under a city/county zoning ordinance, this assignment of error is abandoned because: (1) external documents included in an appendix to a brief but not included in the record are not considered; and (2) defendant sets forth no case authority in the text of her argument.

Appeal by intervenors-appellants from judgment entered 19 January 2000 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 April 2001.

Lowell L. Siler for plaintiff-appellee Durham County.

No brief filed for defendant-appellee Luther Roberts.

Thomas H. Stark for defendant-appellee Sheila Roberts.

The Brough Law Firm by Michael B. Brough and Pulley, Watson, King & Lischer by Richard N. Watson for intervenors-appellants.

THOMAS, Judge.

Intervenors appeal a decision by the trial court that found soil extraction a legitimate farm purpose where the landowner planned to operate a horse farm for her family's enjoyment. Defendant, landowner Sheila Roberts, cross-appeals the trial court's finding that the operation in question constituted soil extraction within the meaning of the Durham County Ordinances.

For the reasons discussed herein, we affirm the trial court.

At the time of this action, defendants Luther and Sheila Roberts, then married, owned approximately 113 acres of land in northern Durham County. Defendants subsequently divorced and Sheila Roberts became the sole owner of the land. Pursuant to the local zoning ordinance, the land was zoned Rural District and located in the Falls-Jordan Watershed, outside of the Urban Growth Area. The zoning ordinance precludes resource extraction, which is only allowed in industrial districts or with a permit.

In the fall of 1998, defendants hired a contractor to excavate and remove soil consisting of jurassic clay so they could operate a horse farm. The original soil was of negligible nutritional value and the ponds were inadequate, such that the original landscape would not support a horse farm. The removal of less than three feet of the clay allowed the soil to become better drained and support a pasture necessary to breed and raise horses. The drainage was directed to the existing ponds, which kept them filled. To finance this expensive undertaking, defendants sold the excavated clay to the excavation contractor, who had a landfill contract with the City of Durham.

In the midst of the excavation and removal, on 12 October 1998, zoning enforcement officer Dennis Doty (Doty) observed several dump trucks being filled by a trackhoe and then exiting the property. Doty informed Luther Roberts, who was present at the site, that the Durham City/County Zoning Ordinance prohibited resource extraction in their Rural District and in the Watershed District.

Subsequently, Doty delivered a written notice of violation to Luther Roberts and his attorney on 16 October 1998, stating that the resource extraction must immediately cease to correct the violation. On 19 October 1998, Doty returned to the site only to find the extraction continuing. He then issued a $100 civil citation to Luther Roberts. Afterward, from October 20-22, 24, 26 and 27 of 1998, Doty observed trackhoes excavating and dump trucks removing the soil from the site. Doty issued four additional citations totaling $1100 and, on 30 October 1998, plaintiff Durham County requested a temporary restraining order, alleging defendants were violating the zoning ordinance and that Durham County would suffer immediate and irreparable injury, loss or damage. Plaintiff further requested a declaratory judgment, alleging defendants were engaged in the operation of resource extraction, as well as a $1200 money judgment for the five citations issued to defendants.

The temporary restraining order was granted and defendants were ordered to "cease all activities in connect[ion] with the operation of resource extraction in violation of the [various Durham ordinances.]" On 20 November 1998, the trial court issued a preliminary injunction, finding *inter alia*, that defendants had violated the Durham City/County Zoning Ordinance by engaging in resource extraction. The trial court concluded defendants knowingly engaged in the operation of resource extraction, as they were issued a notice of violation and several civil citations and that injunctive relief was appropriate. Luther Roberts was enjoined from further resource extraction or soil removal from the site.

Following the granting of the preliminary injunction, Sheila Roberts filed a motion on 24 November 1998 to modify the preliminary injunction to allow her to finish the two ponds on the site and have the extracted dirt transported to the landfill site. She noted she was the sole owner of the site and had never been served with any legal process connected to the action. She further stated that if the project, already half-finished, were left unfinished, she would suffer irreparable harm.

On 24 February 1999, Luther Roberts filed a motion to dismiss and an answer. He based his motion to dismiss on failure of service of process and failure to state a claim upon which relief can be granted. In his answer, Luther Roberts claimed the site was a "local historic site and [had] been used primarily for farming and agricultural purposes for decades." He contended the site was therefore exempt from the zoning ordinance because he was carrying on a bona fide farming and/or agricultural activity.

Defendant Sheila Roberts filed an answer on 23 April 1999, moving to dismiss based on insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief can be granted. She also claimed her actions did not violate the zoning ordinance and were only permissible agricultural improvements.

On 3 December 1999, appellants, Kent and Linda Fogleman, Ralph Emory, Tony A. Fogleman, Ardis Geddings, Gerald and Judith Kendrick, and Carla, Steven and Daisy Wall, who owned real property adjacent to or in the vicinity of the site, filed a motion to intervene, stating the district regulations were designed to encourage the maintenance of the area's open and rural character. They further alleged the removal of the soil would disturb the quality of the district's drinking water. Intervenors filed an amended motion to intervene on 9 December 1999, adding: (1) the dump trucks created too much noise; (2) the dump trucks showered the area with dirt and dust; (3) defendants' illegal operation lowered the intervenors' property values; (4) intervenors had been advised that plaintiff would consent to defendants' actions; and (5) intervenors' interest thus could not be adequately represented by plaintiff. Intervenors filed a complaint requesting a permanent injunction such that defendants could not continue the extraction and could not sell the dirt to the State of North Carolina Department of Transportation under a settlement agreement. The motion to intervene was granted and, on 19 January 2000, the trial court filed a memorandum of decision and order.

In the order, the trial court found the soil extraction was not violative of the zoning ordinance because of an exemption set out in N.C. Gen. Stat. § 74-67, which provides in pertinent part:

> The provisions of this Article shall not apply to those activities of the Department of Transportation, nor of any person, firm, or corporation acting under contract with said Department of Transportation, on highway rights-of-way or borrow pits main-

> tained solely in connection with the construction, repair, and maintenance of the public road systems of North Carolina[.]

N.C. Gen. Stat. § 74-67 (1999). The trial court further found (1) excavating for the Durham landfill was not exempted; (2) the soil excavation and removal constituted "soil extraction" as defined by the zoning ordinance; (3) the project was for bona fide farm and agricultural purposes and; (4) it was therefore exempt from the zoning ordinance under N.C. Gen. Stat. § 153A-340, which provides that zoning regulations do not affect bona fide farms. The trial court then granted defendants' motion to dissolve the preliminary injunction.

Intervenors appeal the trial court's conclusion that the soil extraction is exempt from the zoning ordinance under N.C. Gen. Stat. § 153A-340, setting forth two assignments of error. Defendant Sheila Roberts moved to dismiss the intervenors' appeal due to an untimely filing and service of the transcript agreement, but was denied. Sheila Roberts then cross-appealed, setting forth one assignment of error.

[1] By intervenors' first assignment of error, they argue the trial court erred in concluding defendant's soil extraction operation constituted a bona fide farm purpose within the meaning of N.C. Gen. Stat. § 153A-340. We disagree.

The North Carolina General Statutes discuss the grant of power to counties via zoning regulations in section 153A-340(a). *See* N.C. Gen. Stat. § 153A-340(a) (1999). However, zoning regulations are limited in how they may affect lands used for bona fide farms. All bona fide farms, with the exception of swine farms, are exempt from zoning regulations. N.C. Gen. Stat. § 153A-340(b) (1999).

Bona fide farm purposes are defined in section 153A-340 as including "the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market." N.C. Gen. Stat. § 153A-340(b)(2) (1999). Intervenors contend "livestock" as used in the statute does not include raising horses.

We note livestock includes horses in several of our statutes. For example, the Livestock Dealer Licensing Act defines livestock as "cattle, sheep, goats, swine, horses and mules." N.C. Gen. Stat. § 106-418.8(2) (2000). Under Chapter 68's livestock law, "livestock" includes "equine animals, bovine animals, sheep, goats, llamas, and

swine." N.C. Gen. Stat. § 68-15 (2000). The Regulations of the Interstate Commerce Commission include horses in its rates applicable to "livestock." *See Schroader v. Railway Express Agency*, 237 N.C. 456, 75 S.E.2d 393 (1953). Under N.C. Gen. Stat. § 1-322, titled "Cost of Keeping Livestock," horses are listed. In the statutes criminalizing the pursuing or injuring of livestock with the intent to steal, and poisoning livestock, horses are the first of the listed animals in both statutes. *See* N.C. Gen. Stat. § 14-85 (2000); N.C. Gen. Stat. § 14-163 (2000). In the statute protecting livestock running at large, horses are also included. *See* N.C. Gen. Stat. § 14-367 (2000). Under the statutory registration and protection of livestock brands, "livestock" is defined as "cattle, horses, ponies, mules, and asses." N.C. Gen. Stat. § 80-58(d) (2000). The Sedimentation Pollution Control Act of 1973 defines "livestock" as including "beef cattle, llamas, sheep, swine, horses, ponies, mules, and goats." N.C. Gen. Stat. § 113A-52.01(1)(d) (2000).

Further, as the statute at issue is silent as to the definition of "livestock," the term must be given its ordinary meaning. Dictionaries define "livestock" as "[d]omestic animals, such as cattle or horses, raised for home use or for profit," and "[d]omestic animals used or raised on a farm." American Heritage Dictionary 737 (2d. Coll. Ed. 1985); Black's Law Dictionary 935 (6th ed. 1990). Therefore, there are ample instances in which horses are considered to be livestock and we hold that, in the instant case as well, horses are deemed livestock.

Intervenors next contend even if horses are "livestock," Sheila Roberts is not involved in the "production and activities relating or incidental to the production" of livestock, as is required in section 153A-340. Intervenors take the phrase "producing livestock" to mean defendant must breed horses for commercial uses. Sheila Roberts has clarified that she plans to breed and raise horses for the enjoyment of her family, not for commercial purposes. However, we find nothing in intervenors' brief to suggest why "breeding" horses is not "producing" them. "Produce" is not defined by the applicable statute. However, it is defined in a common dictionary as "[t]o bring forth; yield: *produce offspring*." American Heritage College Dictionary 1091 (3d ed. 1997) (emphasis in original). We thus hold defendant's breeding and raising of horses for the benefit of herself and her family is the production of livestock.

Intervenors further contend the excavation was not necessary for defendant's purposes. However, that issue is not appropriately before

this Court. Intervenors cite no authority for this contention and appear to ask this Court to impose a requirement not present in the statute itself. This we refuse to do. Section 153A-340(b)(2) provides that the activity need only be "relating or incidental to" bona fide farm purposes, not "necessary and customary." It is clear that the activity undertaken by defendant was related and incidental to the farming activities of boarding, breeding, raising, pasturing and watering horses. Accordingly, this assignment of error is rejected. As we have already held defendant's activities fall under the bona fide farm purposes exception, we do not address intervenors' other concerns in connection with this issue.

[2] By their second assignment of error, intervenors argue the trial court erred in dissolving the preliminary injunction and in denying their request for a permanent injunction. We have held defendant's activities are bona fide farm purposes within the meaning of N.C. Gen. Stat. § 153A-340(b)(2) and exempt from the zoning ordinance. Therefore, no basis for injunctive relief exists. We accordingly reject this assignment of error.

[3] By her first and only cross-assignment of error, Sheila Roberts argues the trial court erred in concluding as a matter of law that the removal and excavation of soil constitutes "resource extraction" as that term is described under the Durham Zoning Ordinance.

None of the documents attached to defendant's brief in support of this contention were admitted at trial or otherwise included in the official record of this case. It is well established that this Court can judicially know only what appears in the record. *In re Warrick*, 1 N.C. App. 387, 390, 161 S.E.2d 630, 632 (1968). Further, concerns which are addressed in a brief, or exhibits in an appendix to the brief, which are outside the record will not be addressed. *Id.* Therefore, the external documents included in the appendix to defendant's brief are not considered here. Because defendant sets forth no case authority in the text of her argument, this assignment of error is deemed abandoned. *See* Joyner v. Adams, 97 N.C. App. 65, 387 S.E.2d 235 (1990).

For the reasons stated above, we affirm the trial court.

AFFIRMED.

Judges MARTIN and BIGGS concur.

IN THE MATTER OF: APPEAL OF BERMUDA RUN PROPERTY OWNERS FROM THE DECISION OF THE DAVIE COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 1999

No. COA00-833

(Filed 21 August 2001)

Taxation— real property appraisal—country club fees included

A decision by the Property Tax Commission was affirmed where the property owners objected to the inclusion in their tax appraisal of their country club initiation fee where they were required by their restrictive covenants to join the country club and to pay the difference between the initiation fee of the previous owner and the current fee. Although the homeowners contend membership in the country club is a form of intangible personal property, a challenge to tax valuation requires a taxpayer to demonstrate that an erroneous standard was employed by the assessor and that the use of this standard caused the valuation to be substantially in excess of its true value. The taxpayers in this case failed to produce any evidence that their properties were appraised at an amount substantially exceeding true value.

Appeal by property owners from decision of the Property Tax Commission sitting as the State Board of Equalization and Review, entered in Wake County 16 May 2000. Heard in the Court of Appeals 26 April 2001.

Blanco Tackabery Combs & Matamoros, P.A., by George E. Hollodick and Stephen C. Minnich, for appellants.

Robert E. Price, Jr. & Associates, P.A. by Robert E. Price, Jr., for appellees.

BIGGS, Judge.

Appellants, property owners in the Bermuda Run communities (subject communities) of Hamilton Court, Pembrooke Ridge, Warwicke Place, St. George Place, River Hill, James Way, and The Highlands, all located in Davie County, appeal from a final order of the North Carolina Property Tax Commission (Commission) sitting as the State Board of Equalization and Review. The Commission's

order confirmed the decision of the Davie County Board of Equalization, which affirmed the Davie County Assessor's inclusion in the tax appraisals of appellants' properties, an amount attributable to country club membership. We affirm the Commission's order.

The appellants are required, by the terms of restrictive covenants encumbering their properties, to join the Bermuda Run Country Club (Country Club) when they acquire a property in a subject community. The restrictive covenants are recorded in a Declaration of Covenants, Conditions, and Restrictions, applicable to each of the subject communities. The initiation fee for joining the Country Club is due when title to the property is transferred. The purchaser gets a credit towards the total initiation fee in the amount of the fee in effect at the time that the previous owner obtained the property. Each new purchaser is only obligated to pay the difference, if any, between the initiation fee in effect at the time of purchase and the fee paid by the previous owner. Thus, a membership in the Country Club is associated with each property, and all the new buyer needs to do is bring the initiation fee up to date.

Several provisions of the restrictive covenants serve to link a membership in the Country Club to every property in the subject communities. The restrictive covenants make Country Club membership mandatory for each purchaser of real property. The covenants also state that "[s]uch membership shall not be a personal right, but shall run with the ownership of a Dwelling Unit." Further, the restrictive covenants reserve for the Country Club a right of first refusal to purchase property that has been offered for sale. The exercise of this right enables the Country Club to prevent the transfer of any property that is not subject to the payment of an initiation fee.

Since 1994, the Davie County assessor has included $10,000 in his calculations of the appraised value of real estate in the subject communities, to represent an amount equal to the initiation fee in effect at the time of the last revaluation. It is this element of the appraised value of their properties to which appellants object. In 1999, appellants filed objections to the valuation of their properties with the Davie County Board of Equalization. On 29 July 1999, the County Board affirmed the practice of the County Assessor of including the initiation fee as an element of the value of real property in the subject communities. Appellants then appealed to the Commission, which heard the matter on 25 February 2000. After considering the evidence and arguments presented by the appellants, the Commission, on 16

May 2000, entered an order confirming the County Board's decision affirming the County Assessor's assessments of appellants properties for 1999. The Commission's order was based on conclusions of law that may be summarized as follows:

> 1. The County Assessor properly appraised and assessed the appellants' real properties by including amounts attributable to the Country Club membership fee.
>
> 2. The Country Club memberships are rights and privileges "belonging to" and "appertaining to" the appellants' real property, and are not "intangible personal property."
>
> 3. The appellants did not show by competent, material, and substantial evidence that the County employed an arbitrary or illegal method of appraisal of their properties.
>
> 4. The appellants did not produce competent, material, and substantial evidence that the County's assessments of their properties substantially exceeded the true value in money of the subject properties.
>
> 5. The appellants failed to present any evidence challenging the accuracy or legality of the 1994 schedules of values, standards, and rules used by the County.

On 9 June 2000, appellants gave notice of appeal from the Commission's order. For the reasons discussed below, we affirm the Commission's order.

This Court's review of a final order of the Commission is governed by N.C.G.S. § 105-345.2. *See In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981). This statute states that:

> . . . (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. . . .

Other established principles guiding our review of the Commission's decision are: (1) the reviewing court is not free to weigh the evidence and substitute its evaluation for that of the Commission; (2) the correctness of tax assessments, the good faith of tax assessors, and the validity of their actions are presumed; (3) *ad valorem* tax assessments are presumed to be correct; and (4) the taxpayer has the burden of showing that the assessment was erroneous. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975); *In re Appeal of Owens*, 144 N.C. App. 349, 547 S.E.2d 827 (2001); *In re Appeal of Parsons*, 123 N.C. App. 32, 472 S.E.2d 182 (1996).

The policy behind the presumption of correctness "arises out of the obvious futility of allowing a taxpayer to fix the final value of his property for purposes of *ad valorem* taxation. . . . If the presumption did not attach, then every taxpayer would have unlimited freedom to challenge the valuation placed upon his property, regardless of the merit of such challenge." *In re Appeal of Amp, Inc.*, 287 N.C. at 563, 215 S.E.2d at 762. The presumption is one of fact, and is, therefore, rebuttable. *In re Appeal of Winston-Salem Joint Venture*, 144 N.C. App. 706, 551 S.E.2d 450 (2001). North Carolina case law clearly establishes the requirements for overcoming the presumption of correctness of *ad valorem* tax assessments:

> A taxpayer may rebut this presumption by producing '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[.]

In re Appeal of Camel City Laundry, 123 N.C. App. 210, 214, 472 S.E.2d 402, 404 (1996), *disc. rev. denied*, 345 N.C. 342, 483 S.E.2d 162 (1997), citing *In re Appeal of Amp, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975) (emphasis in original). North Carolina appellate courts have consistently adhered to the rule of *Amp*, that a successful challenge to tax valuation requires a taxpayer to demonstrate both that an erroneous standard was employed by the assessor, **and also** that the use of this standard prejudiced the taxpayer by causing the valuation of his property to be "substantially in excess" of its true value. *See, e.g., In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981)

(after valuation method found to be both illegal and arbitrary, Court proceeds to calculate whether appraised value substantially over true value); *In re Appeal of Philip Morris*, 130 N.C. App. 529, 503 S.E.2d 679, *disc. review denied*, 349 N.C. 359, 525 S.E.2d 456 (1998) (although county concedes that it used arbitrary assessment method, appraisal affirmed where taxpayer fails to prove that the arbitrary method resulted in excessive valuation).

In the instant case, the appellants have argued that the initiation fee of $10,000 was improperly considered as a factor in the value of their properties. They contend that membership in the Country Club is a form of intangible personal property, as defined in N.C.G.S. § 105-273(8). Intangible personal property is excluded from *ad valorem* taxation under N.C.G.S. § 105-275(31). Appellants argue that the County's inclusion of the amount attributable to the initiation fee in the appraised tax value of their properties is a tax on intangible personal property. In contrast, the County's position is that, under the specific facts of this case, the initiation fee may properly be treated as a part of the appellants' real property, as defined by N.C.G.S. § 105-273(13). While the parties have presented arguments concerning the appropriate way to characterize the mandatory Country Club initiation fee, their contentions are relevant only to the first prong of the *Amp* test: whether the County employed an illegal or arbitrary method of valuation. Because we conclude that the appellants have presented no evidence with respect to the second prong of this test, we need not address whether the method used was proper. *In re Appeal of Philip Morris*, 130 N.C. App. 529, 503 S.E.2d 679, *disc. review denied*, 349 N.C. 359, 525 S.E.2d 456 (1998).

Under the *Amp* test, appellants are required to present evidence that the *ad valorem* tax values arrived at by the Davie County assessor are "substantially greater" than the true value of the subject properties:

> Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably* high. . . . Whether the county used the correct *method* of computing *ad valorem* valuation is not the determinative issue. Of more importance than the method used in determining the valuation is the result reached. (emphasis in original)

In re Appeal of Amp, Inc., 287 N.C. 547, 563, 575, 215 S.E.2d 752, 762, 769 (1975). The determination of the true value of real estate is governed by N.C.G.S. § 105-283, Uniform Appraisal Standards, which directs that property is to be appraised at its "true value," defined as follows:

> [T]he words "true value" shall be interpreted as meaning market value, that is, 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. . . .

In the instant case, the Commission concluded in its order that the appellants "did not produce competent, material, and substantial evidence that the County's assessments of their properties substantially exceeded the true value in money of the subject properties." We agree with this conclusion.

The record is devoid of any evidence of either the appraised value of the subject properties, or of some other dollar amount that the appellants propose as the true value. The appellants' brief states that, although they object to the inclusion of the 1994 Country Club initiation fee as an element of the appraised value of their properties, appellants "are not otherwise contesting the appraised value of their real property." Further, during the hearing before the Commission, the appellants acknowledged their failure to present evidence on valuation:

> MR. MINNICH (APPELLANTS' ATTORNEY): ONE THING THAT MR. PRICE (COUNTY'S ATTORNEY) POINTED OUT IS THAT WE HAVE NOT PRESENTED, AND WE DO NOT INTEND TO PRESENT, ANY SPECIFIC EVIDENCE ON VALUATION OF THESE PROPERTIES. AND THAT'S ABSOLUTELY THE CASE. WE'RE REPRESENTING 80 TO 90 TAXPAYERS, SOMEWHERE IN THAT RANGE. IT'S JUST NOT PRACTICAL.
>
> . . .
>
> MR. WHEELER (CHAIR OF PROPERTY TAX COMMISSION): OKAY. DO YOU—ARE YOU AWARE OF THE *AMP* TEST AND THE PROPERTY TAX COMMISSION?
>
> MR. MINNICH: I APOLOGIZE, I AM NOT.

MR. WHEELER: WELL, PART OF THAT IS THAT TAXPAYER APPEALS BEFORE THE PROPERTY TAX COMMISSION HAS—THE TAXPAYER HAS THE BURDEN HERE, NOT THE COUNTY BUT THE TAXPAYER.

MR. MINNICH: SURE.

MR. WHEELER: AND ONE OF THOSE TESTS IS THAT THE DIFFERENCE IN VALUE SHOULD—HAS TO BE SUBSTANTIAL.

Although informed by the Commission of the burden of proof and of the need to present valuation evidence, the appellants did not do so. A determination of the true value of property requires numerical data, dollar amounts, or other statistical information. *See, e.g., In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981) (Commission reversed where court finds that appellants have demonstrated by competent evidence that the dollar amount per acre proposed by appellants represented the true value of their property); *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 484 S.E.2d 450 (1997) (county's method of calculating value of shopping center analyzed in relation to the dollar amount thus arrived at for property's true value); *In re Appeal of Senseney*, 95 N.C. App. 407, 382 S.E.2d 765 (1989) (court looks at competing proposed values of land in question). Without such evidence, this Court is unable to determine whether or not the appraised value "substantially exceeds" a property's true value.

The amount of the challenged element of real property appraisal is $10,000. However, the appellants have not alleged that the appraised valuation of their properties was too high by an average of $10,000. Assuming, *arguendo*, that it was improper for the County to include the initiation fee in making its appraisal, we have no basis to conclude that the resultant assessment would be $10,000 over the true value. Moreover, the appellants have not presented evidence to suggest any specific amount by which the appraised value of the subject properties exceeds their true value, or what amount they propose for that true value. We therefore hold that the appellants failed to "produce competent, material, and substantial evidence that the County's assessments of their properties substantially exceeded the true value in money of the subject properties." Accordingly, the appellants have not met their burden of proof to show that the assessment of their properties was erroneous.

Having found that the appellants failed to produce any evidence that their properties were appraised at an amount substantially

exceeding the true value, we have no need to decide whether it was proper for the assessor to include the amount of the 1994 initiation fee in calculating the tax appraisal value of these properties.

For the reasons discussed herein, we affirm the order of the Commission.

Affirmed.

Judges MARTIN and THOMAS concur.

JOSEPH CLIFF LASSITER AND WIFE, EVA C. LASSITER, PLAINTIFF-APPELLANTS v. RONALD JEFFREY CECIL, INDIVIDUALLY, AND CASTLE CONSTRUCTION COMPANY, INC., DEFENDANT-APPELLEES

No. COA00-607

(Filed 21 August 2001)

1. **Emotional Distress— fee construction contract—exclusion of evidence**

The trial court did not err in an action arising out of a fee construction contract to build a house by excluding evidence of plaintiff wife's emotional distress as a component of damages for both breach of contract and for negligence, because: (1) neither plaintiffs' original complaint nor their amended complaint includes any mention of emotional distress or of personal injury of any type; and (2) plaintiffs' motion for leave to amend their complaint was not a pleading and was therefore inadequate to provide the requisite notice to defendants.

2. **Negligence— fee construction contract—judgment notwithstanding the verdict**

The trial court did not err in an action arising out of a fee construction contract to build a house by granting judgment notwithstanding the verdict on the issue of defendant corporate officer's negligence, because: (1) there is no corporate tort for which defendant corporate officer could be held liable when the trial court established that defendant corporation committed no tort; and (2) plaintiffs were not owed a duty under the North Carolina Building Code and therefore could not bring a negligence per se claim against defendant corporate officer.

3. Costs— deposition costs—expert witness fees—photographs—photocopies

The trial court did not err in an action arising out of a fee construction contract to build a house by awarding plaintiffs $16,740.06 for deposition costs and expert witness fees but declining to compensate plaintiffs for the cost of photographs, photocopies, several years of property taxes on the uncompleted house, and other miscellaneous expenses totaling approximately $6,000.00, because: (1) although defendants did not object to plaintiffs' list of expenses, neither did they stipulate to it; and (2) the trial court's finding of fact that plaintiffs' deposition costs and expert witness fees were plaintiffs' reasonable costs and expenses incurred in the proceeding is supported by competent evidence.

Appeal by plaintiffs from judgment entered 6 December 1999 by Judge Sanford L. Steelman, Jr. in Superior Court, Davidson County. Heard in the Court of Appeals 27 March 2001.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith and Seth R. Cohen, for plaintiff-appellants.

Burton & Sue, L.L.P., by Gary K. Sue, Walter K. Burton and James D. Secor, III, for defendant-appellees.

McGEE, Judge.

Plaintiffs signed a fee construction contract with defendant Castle Construction Company, Inc. (Castle) on 10 June 1996 to build a house on plaintiffs' land. Defendant Ronald Jeffrey Cecil (Cecil) signed the contract as president of Castle. The contract provided that Cecil, as Castle's representative, would personally oversee and provide general supervision in connection with the construction project. Construction began immediately, and plaintiffs paid defendants every month as billed. Then, in December 1996, plaintiffs withheld several thousand dollars from their payment because of obvious defects in the construction of the house. Defendants demanded the remainder of the payment and, when plaintiffs refused to pay, defendants ceased all work on the house.

Plaintiffs filed their complaint on 20 February 1997, alleging that Castle had breached the fee construction contract through numerous faults and defects in the construction, and alleging that Castle had been negligent in constructing the house. Plaintiffs

also sought attorney's fees and costs as provided for in the fee construction contract. Plaintiffs amended their complaint with leave of the trial court on 18 August 1998, adding Cecil to their claim of negligence.

At trial, plaintiffs sought to introduce evidence of plaintiff Eva C. Lassiter's (Eva's) emotional distress arising from the difficulties in constructing the house. The trial court denied plaintiffs' request, holding that plaintiffs had not adequately pled a claim for emotional distress.

At the close of plaintiffs' evidence, defendants moved for directed verdicts on all claims. The trial court granted defendants' motion for a directed verdict on the claim of negligence against Castle, but denied defendants' motions on the remaining claims of breach of contract against Castle and negligence against Cecil.

During defendants' presentation of evidence, Cecil testified that the fee construction contract was a contract between plaintiffs and Castle, and that Cecil was involved only in his capacity as president of Castle. Cecil acknowledged, however, that he had been the construction superintendent for plaintiffs' house, and that he also had done some work as a laborer for Castle's framing subcontractor.

At the close of all the evidence, the jury returned verdicts finding Castle liable for breach of contract and finding Cecil liable for negligence. Upon defendants' motion, the trial court granted judgment notwithstanding the verdict on the issue of Cecil's negligence.

Plaintiffs waived their right to jury trial on the issue of reasonable attorney's fees and expenses under the fee construction contract. The trial court accordingly awarded plaintiffs $22,794.75 in attorney's fees and $16,740.06 in expert witness fees and deposition costs, as well as the filing fees and service fees for all subpoenas issued by plaintiffs.

Plaintiffs appeal, assigning error to the trial court's (1) exclusion of evidence of Eva's emotional distress, (2) grant of judgment notwithstanding the verdict on the issue of Cecil's negligence, and (3) award to plaintiffs of only $16,740.06 in costs.

I.

[1] Plaintiffs assert that they were entitled to present evidence of Eva's emotional distress as a component of damages both for breach

of contract and for negligence. However, neither plaintiffs' original complaint, nor their amended complaint, includes any mention of emotional distress or of personal injury of any type.

In *McAllister v. Ha*, 347 N.C. 638, 496 S.E.2d 577 (1998), our Supreme Court indicated that a complaint alleging negligent infliction of emotional distress must include an assertion of injury due to emotional distress " 'sufficient to give . . . defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial.' " *Id.* at 646, 496 S.E.2d at 583 (citation omitted). By failing to make any reference to emotional distress in their claim for recovery for negligence, plaintiffs have failed to give defendants sufficient notice of such a claim for damages. We hold that the same standard applies with respect to damages for emotional distress due to breach of contract.

Plaintiffs suggest that defendants received adequate notice of plaintiffs' claim for damages due to emotional distress, insofar as plaintiffs' motion for leave to amend their initial complaint includes an assertion that plaintiffs suffered "personal injuries" as a result of Cecil's negligent acts. However, once the trial court had entered its order allowing amendment, plaintiffs failed to allege emotional distress or personal injury in their actual amendment to the complaint. We conclude that, regardless of whether a bare assertion of "personal injuries" would be adequate under *McAllister* to support a claim for damages due to emotional distress, plaintiffs' motion for leave to amend their complaint was not a pleading and was therefore inadequate to provide the requisite notice to defendants. *See Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988) ("Under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading."); *Jacobs v. Royal Ins. Co. of America*, 128 N.C. App. 528, 530, 495 S.E.2d 185, 187 (1998) ("The motion to add . . . a party was not part of the pleadings[.]"); N.C. Gen. Stat. § 1A-1, Rule 7 (1999).

Because plaintiffs failed to plead a claim for damages for emotional distress, the trial court did not err in excluding plaintiffs' evidence of Eva's emotional distress.

II.

[2] Plaintiffs next assert that the trial court erred in granting judgment notwithstanding the verdict on plaintiffs' claim of negligence against Cecil.

> [T]he standard of review for a 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 Ctr., 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000) (citation omitted). We therefore consider whether sufficient evidence was presented to the jury to find Cecil negligent.

"Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *Moore v. Moore*, 268 N.C. 110, 112, 150 S.E.2d 75, 77 (1966) (citation omitted). Plaintiffs argue that Castle committed negligence through breach of its legal duties under the fee construction contract. "Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Ports Authority v. Roofing Co.*, 294 N.C. 73, 81, 240 S.E.2d 345, 350 (1978). However, plaintiffs assert that Castle's breach falls within one of the exceptions described in *Ports Authority*. *See id.* at 82, 240 S.E.2d at 350-51. Moreover, plaintiffs contend that Cecil, as a corporate officer who actively participated in Castle's tort, is liable for Castle's tort under *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) ("A corporate officer can be held personally liable for torts in which he actively participates.").

However, the trial court held that Castle's contractual duty did *not* create an action in tort under *Ports Authority* when it granted defendants' directed verdict on Castle's negligence liability. Because plaintiffs do not assign error to that directed verdict, the issue of Castle's negligence has not been challenged on appeal. *See* N.C.R. App. P. 10(a). It follows that, insofar as the trial court established that Castle committed no tort, there is no corporate tort for which Cecil could be held liable under *Wilson*.

In the alternative, plaintiffs assert that Cecil is personally liable for his negligent acts as construction supervisor and as a framing laborer, under the doctrine of *per se* negligence for violations of the

North Carolina Building Code. "[T]he Code imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto, and violates the Code such that the violation proximately causes injury or damage." *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862, 366 S.E.2d 863 (1988). However, a violation of the North Carolina Building Code constitutes negligence *per se* because the Code is a statute to promote the safety of others. *See Lamm v. Bissette Realty*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990). To benefit from negligence *per se* for a violation of the Code, plaintiffs must first demonstrate that they fall "within the class intended to be protected by the statute[][.]" *Lynn v. Overlook Development*, 328 N.C. 689, 695, 403 S.E.2d 469, 472 (1991). We hold that, insofar as the Code is intended "for the protection of the occupants of the building or structure, its neighbors, and members of the public at large[,]" N.C. Gen. Stat. § 143-138(b) (1999), plaintiffs do not fall within that class. The house was never finished and certified for occupancy, and plaintiffs do not assert that they were damaged as members of the general public. We conclude that, regardless of whether Cecil could otherwise be held personally liable for violations of the North Carolina Building Code under *Olympic Products*, plaintiffs were not owed a duty under the Code and therefore could not bring such a claim.

Because plaintiffs failed to present evidence to the jury that Cecil negligently breached a duty he owed, we find no error in the trial court's grant of judgment notwithstanding the verdict on the issue of Cecil's negligence.

III.

[3] Finally, plaintiffs assert that the trial court did not adequately award plaintiffs their costs, as provided for in the fee construction contract. The contract provides:

> If either party to this Contract shall seek to enforce this Contract, or any duties or obligations arising out of this Contract, against the other party to this Contract, by legal or equitable proceedings, then the prevailing party in such proceedings shall receive, in addition to all other rights and remedies to which such party is entitled, such party's reasonable costs and expenses incurred in such proceedings, including reasonable attorney's fees.

During trial, plaintiffs waived their right to have the issue of reasonable costs heard by the jury. At the close of the trial, plaintiffs provided the trial court with a list of their litigation expenses. In addition to attorney's fees, the trial court awarded plaintiffs their deposition costs and expert witness fees, but declined to compensate plaintiffs for the cost of photographs, photocopies, several years of property taxes on the uncompleted house, and other miscellaneous expenses totaling approximately $6,000. Plaintiffs assert that, because defendants did not explicitly challenge their list of expenses, the trial court was required under the fee construction contract to award plaintiffs everything included on their list.

However, while defendants did not object to plaintiffs' list of expenses, neither did they stipulate to it. Plaintiffs simply presented the trial court with their list of expenses, divided into categories. We hold that the trial court's finding of fact that plaintiffs' deposition costs and expert witness fees were plaintiffs' "reasonable costs and expenses" incurred in the proceeding is supported by competent evidence. *See Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000) ("[O]n appeal, the appellate courts are bound by the trial court's findings [of fact] if competent evidence in the record supports these findings."). We therefore find no error in the trial court's award of costs to plaintiffs.

We affirm the 6 December 1999 judgment of the trial court.

Affirmed.

Judges GREENE and CAMPBELL concur.

CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, PLAINTIFF-APPELLANT, AND PETER EGGIMANN, INTERVENOR-APPELLANT v. THE TOWN OF PINE KNOLL SHORES, A NORTH CAROLINA MUNICIPAL CORPORATION, C. REESE MUSGRAVE, IN HIS OFFICIAL CAPACITY AS MAYOR OF PINE KNOLL SHORES; ROBERT F. GALLO, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF FINANCE AND ADMINISTRATION FOR PINE KNOLL SHORES, AND MARY I. KANYHA, EMILY WHITE, WADE LAMSON, AND TED GOTZINGER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF PINE KNOLL SHORES, DEFENDANT-APPELLEES, AND KENNETH V. BENSON, ALICE D. BENSON, CARL J. HEFFELFINGER, LOIS A. HEFFELFINGER, W. JACK MILLIS, JOSEPHINE K. MILLIS, ROBERT F. GALLO (IN HIS INDIVIDUAL CAPACITY), AND DOLORES P. GALLO, INTERVENOR-APPELLEES

No. COA00-1001

(Filed 21 August 2001)

Cities and Towns— exclusive private water service—void as against public policy

The trial court did not err by declaring unenforceable plaintiff's exclusive water service agreement for the Town of Pine Knoll Shores where the family who developed the tract that became the town entered into an exclusive agreement with plaintiff's predecessor in 1966; the agreement was recorded in the subdivision's covenants; the town has grown and plaintiff has expanded its facilities to serve the entire town; the Town decided to build its own municipal water system; plaintiff brought suit to enjoin the Town from establishing a municipal water system; and the Town counterclaimed to have the 1966 agreement declared unenforceable. The Legislature has the power to create public policy and has given broad, ultimate authority to municipalities to provide water to their citizens. The agreement is void as against public policy because it is exclusive, extends indefinitely into the future, and cannot be enforced without preventing the Town from exercising its statutory powers.

Appeal by plaintiffs from judgment entered 9 June 2000 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 7 June 2001.

Hunton and Williams, by Edward S. Finley, Jr., and Smith, Helms, Mulliss, and Moore, L.L.P., by James G. Exum, Jr., for plaintiff-appellant and intervenor-appellant.

Poyner and Spruill, L.L.P., by Nancy Bentson Essex, and Kirkman, Whitford, and Brady, P.A., by Neil B. Whitford, for defendant-appellees and intervenor-appellees.

Andrew L. Romanet, Jr. and John M. Phelps, II, for North Carolina League of Municipalities, amicus curiae.

William E. Grantmyre, for Carolinas Chapter of the National Association of Water Companies, amicus curiae.

HUDSON, Judge.

Carolina Water Service filed this suit seeking to enjoin the Town of Pine Knoll Shores from establishing a municipal water system and to enforce exclusive water service provisions in its favor. The trial court declared unenforceable the exclusive water service provisions in favor of Carolina Water, denied an injunction against the Town, and permanently enjoined Carolina Water from using the provisions to interfere with the Town's right to build its own water system. We agree that the exclusive rights provisions contravene public policy which favors municipalities and which prohibits private monopolies and perpetuities. We affirm the order of the trial court.

Facts helpful to an understanding of this case are as follows: in 1966, members of the Roosevelt family began plans to develop a 379-acre tract of land (the Tract) in what is now part of Pine Knoll Shores in Carteret County, North Carolina. The Roosevelts entered into an agreement (the 1966 Agreement) with Southern Gulf, South Carolina Utilities Division, Inc. (Southern Gulf) giving Southern Gulf the exclusive right to construct and operate a central water facility to serve the Tract. By the terms of the agreement, all owners and occupants within the Tract were to purchase their water only from Southern Gulf and were prevented from allowing other water providers to construct water service facilities within the Tract. The 1966 Agreement described these promises as "covenant[s] running with the land," binding upon subsequent purchasers of land within the tract and benefitting future successors of Southern Gulf.

In the 1966 Agreement, the Roosevelts also promised to include the covenants in favor of Southern Gulf in the general subdivision restrictions. From 1967 until 1971, the Roosevelts developed the Tract and conveyed lots. As promised, the covenants were recorded in the subdivision's Declarations of Covenants and Restrictions (Declarations) which were filed with the Carteret County Register of Deeds. Conveyances to lot owners were made subject to the Declarations and the easements and restrictive covenants they created. In turn, Southern Gulf constructed water supply and distribution facilities to serve the subdivision.

Carolina Water Service (Carolina Water) acquired title to the water facilities in 1972, and the Town of Pine Knoll Shores (the Town) incorporated in 1973. In 1974, the Roosevelts executed a deed conveying the streets in Pine Knoll Shores to the Town, "subject to the easements heretofore granted for utilities." The Town now includes approximately 1,120 acres in addition to the 379 acre tract and is home to an estimated 2,000 water customers. Carolina Water has expanded its water facilities to serve the entire Pine Knoll Shores city limits.

In 1995, the Town informed Carolina Water that it wanted to build its own municipal water system. Carolina Water insisted that the exclusive rights provisions in the 1966 Agreement and the 1967-71 Declarations barred the Town from constructing a water system. On 20 September 1995, the Town filed a complaint seeking an order authorizing the Town to construct its own water system and to provide water service to its citizens. The trial court entered judgment for the Town, but this Court vacated that judgment on 6 January 1998, finding no actual controversy and no jurisdiction. *See Town of Pine Knoll Shores v. Carolina Water Service*, 128 N.C. App. 321, 494 S.E.2d 618 (1998).

The Town began construction of its own system in 1999 by laying approximately 2000 feet of pipe within the Tract. When the system is completed, the Town intends to offer water service to all residents and property owners within the Tract and to charge a $10 per month availability fee to all owners who choose to continue receiving service from Carolina Water.

In April 1999, Carolina Water brought suit to enjoin the Town from establishing a municipal water system within the Tract. In its counterclaim, the Town again sought to have the 1966 Agreement and 1967-71 Declarations declared unenforceable. In its judgment for the Town, the trial court concluded in pertinent part: (1) the exclusive rights provisions of the 1966 Agreement are contrary to public policy; (2) the description of the Tract in the 1966 Agreement is void for vagueness; and (3) the water service provisions are unlawful restraints of trade. Therefore, the trial court declared the exclusive rights provisions unenforceable, denied the injunction sought by Carolina Water, and permanently enjoined Carolina Water from using the provisions to interfere with the rights of the Town to construct a municipal water system. From the trial court's order, Carolina Water appeals.

Carolina Water contends the trial court erred in concluding that the exclusive rights provisions "are contrary to public policy to the extent they purport to prevent the Town of Pine Knoll Shores or any other municipality from providing public water utility service to any property located within municipal limits." Carolina Water argues that any authority the Town has to construct a municipal water system neither supersedes valid restrictive covenants nor requires provision of duplicative services. Carolina Water insists that no statutory grounds exist to invalidate the provisions as a matter of public policy. Because the statutes allowing municipal water service do not address competition with private suppliers, Carolina Water maintains that public policy does not favor municipal systems. We disagree.

Our state legislature has the power to create public policy. *See Riegel v. Lyerly*, 265 N.C. 204, 209, 143 S.E.2d 65, 68 (1965). "[W]here the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts." *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947). An agreement which cannot be performed without violation of a statute is illegal and void. *Id.*

North Carolina's legislature has given municipalities the authority to construct and operate their own water systems. *See* N.C.G.S. §§ 160A-311 and 160A-312 (1999). It has granted to all municipalities the power to fix and enforce rates and even to require land owners to connect to their water systems or else pay an availability fee. *See* N.C.G.S. §§ 160A-314 and 160A-317 (1999). In these provisions, the legislature made no exceptions for situations in which a private system exists or exclusive rights have purportedly been granted to a private supplier. *See* G.S. §§ 160A-311, 312, 314, and 317. Nor did it enact any statutory provisions which permit a municipality to permanently convey or contract away its statutory rights to provide water service. Unless and until the legislature enacts such exceptions, the authority of municipalities to construct and operate their own water systems remains absolute.

Numerous United States Supreme Court cases, as well as cases decided in North Carolina, pronounce public policy in favor of broad discretion for municipalities regarding the construction and operation of their own utilities. *See, e.g., Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 50 L. Ed. 353 (1906) (holding that a city's covenant "not to grant [a water service franchise] to any other person or corporation" did not bar the city from establishing its own system); *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E.2d

209 (1983) (holding that a municipality could provide electric service, even where the Utilities Commission had assigned that area to an electric cooperative, as long as service by the municipality was authorized by Chapter 160A); *Power Co. v. Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924) (holding that a franchise from the Utilities Commission for a utility to operate in an area does not bar a municipality from operating a competing system). A compelling example is *Carolina Water Service v. Town of Atlantic Beach*, 121 N.C. App. 23, 464 S.E.2d 317 (1995), *disc. review denied*, 342 N.C. 894, 467 S.E.2d 901 (1996), in which Carolina Water sued the Town of Atlantic Beach when that town attempted to provide a water system that would duplicate Carolina Water's service to Atlantic Beach. Carolina Water argued that it had relied upon language in annexation ordinances to the effect that it had an exclusive right to provide water service within the annexed area. In affirming the trial court's order in favor of Atlantic Beach, this Court emphasized that "the Town has the authority under the public enterprise statute to construct and administer its *own* water system." *Id.* at 32, 464 S.E.2d at 323 (emphasis added). We conclude that these cases plainly reveal public policy in favor of municipalities' rights to construct and operate water systems, even when private systems are already in operation.

Additionally, monopolizing or attempting to monopolize trade or commerce in North Carolina is strictly prohibited. N.C.G.S. § 75-2.1 (1999) ("It is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina."); *see also* N.C. Constitution. art. I, § 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."). The attempt by the Roosevelts to give a private water supplier perpetual exclusive rights to serve an area violates this prohibition. In addition, under N.C.G.S. § 160A-322 (1999), cities can enter into contracts for the supply of water for a period of no more than forty years. We find it difficult to conceive how Southern Gulf and the Roosevelts, a group of private individuals, could be allowed to bind other citizens in their choice of a water provider forever, when a municipality cannot bind itself for more than forty years. The provisions of the 1966 Agreement and the 1967-71 Declarations that purport to give Carolina Water exclusive easements and exclusive rights to supply water to Pine Knoll Shores for an unlimited period of time cannot be enforced because they are in violation of our state's public policy against monopolies and perpetuities.

Our legislature has given broad, ultimate authority to municipalities to provide water to their citizens. Because the exclusive rights provisions in favor of Carolina Water cannot be enforced without preventing the Town from exercising its statutory powers regarding municipal water systems, and because they are exclusive and extend indefinitely into the future, the provisions are void as against public policy. Accordingly, we affirm the trial court's judgment declaring the exclusive water service provisions unenforceable, denying the permanent injunction sought by Carolina Water, and permanently enjoining Carolina Water from using the 1966 Agreement or the restrictive covenants to interfere with the Town's right to construct a municipal water system and supply water to its citizens.

Affirmed.

Judges HUNTER and SMITH concur.

CAROLINA PLACE JOINT VENTURE, PLAINTIFF-APPELLEE v. FLAMERS CHARBURGERS, INC. D/B/A FLAMERS CHARBROILED HAMBURGERS, AND F.A. INTERNATIONAL, INC., DEFENDANTS-APPELLANTS

No. COA00-506

(Filed 21 August 2001)

Appeal and Error— dismissal of appeal—failure to timely file brief—failure to reference assignments of error

Defendants' appeal from an order and judgment granting plaintiff's motion for summary judgment under N.C.G.S. § 1A-1, Rule 56 and awarding plaintiff damages for unpaid rent, unpaid double rent, and other costs arising from defendants' default on the pertinent lease agreement is dismissed, because: (1) one defendant failed to file an appellate brief and the other defendant submitted its brief after the proper deadline in violation of N.C. R. App. P. 13(c); and (2) the defendant filing the late brief failed to reference the assignments of error as required by N.C. R. App. P. 28(b)(5).

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal by defendants from order and judgment entered 20 January 2000 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court.[1] Heard in the Court of Appeals 5 June 2001.

No brief filed for defendant-appellant Flamers Charburgers, Inc.

Parker, Poe, Adams & Bernstein L.L.P., by John W. Francisco, for defendant-appellant F.A. International.

BRYANT, Judge.

On 21 January 1999, plaintiff filed a complaint demanding judgment for all rent, interest and fees owed from defendants' default on a lease agreement between plaintiff and defendants for certain commercial property; attorney fees incurred in enforcement of the lease; and such other relief as the court deemed just and proper. This matter came for hearing before the Honorable Jesse B. Caldwell, Judge Presiding, during the 10 January 2000 Civil Session of Superior Court for Mecklenburg County.

An order and judgment was entered on 20 January 2000 granting plaintiff's motion for summary judgment pursuant to N.C. R. Civ. P. 56 and awarding plaintiff damages for unpaid rent, unpaid double rent and other costs arising from defendants' default on the lease agreement. The defendants filed notices of appeal on 16 February 2000.

Plaintiff seeks to dismiss defendants' appeals on two grounds: 1) defendant Flamers Charburgers, Inc. d/b/a Flamers Charbroiled Hamburgers (Flamers) did not file a brief on appeal, and 2) defendant F.A. International, Inc. (FAI) allegedly filed its brief late and failed to reference and departed from its assignments of error in its appellate brief. We grant plaintiff's motion and dismiss this appeal.

N.C. R. App. P. 13(c) (2001) states, "[i]f 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." The facts indicate that in addition to defendant Flamers failing to submit an appellate brief, defendant FAI submitted its appellate brief after the proper deadline. *See* N.C. R. App. P. 13(a)(1) (2001) (stating that

1. By order entered 19 January 2001 the Court allowed cases COA00-506, COA00-745, and COA00-1231 to be consolidated for purposes of hearing only. Companion cases COA00-745 and COA00-1231 have been consolidated for decision in a separate opinion.

an appellant has "30 days after the clerk of the appellate court has mailed the printed record to the parties" to file the appellate brief). In the case *sub judice*, the Clerk of the Court of Appeals mailed the printed record to the parties on 23 May 2000. Defendant FAI did not file its brief until 27 June 2000—several days after the proper deadline. Therefore, we dismiss defendants' appeal.

Further, defendant FAI failed to reference the assignments of error in its appellate brief in violation of N.C. R. App. P. 28(b)(5). N.C. R. App. P. 28(b)(5) (2001) ("Immediately following each question shall be a reference to the assignments of error pertinent to the question . . . [a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated . . . will be taken as abandoned."). This failure alone subjects defendant FAI's appeal to dismissal as FAI is deemed to have abandoned these arguments. *See Hines v. Arnold*, 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991) ("[W]e do not address the merits of the plaintiff's argument regarding alleged fraudulent conveyances because she violated N.C. R. App. P. 28(b)(5) in that she failed to reference in her brief the assignments of error supporting the argument. This part of the plaintiff's appeal is dismissed." (citation omitted)).

For all the reasons stated above, we dismiss defendants' appeal.

DISMISSED.

Judge GREENE concurs.

Judge TIMMONS-GOODSON concurs in part and dissents in part with separate opinion.

TIMMONS-GOODSON, Judge, concurring in part, dissenting in part.

I vote to exercise our discretion under Rule 2 and review the issue of the sublease on the merits. The two violations of our rules are minor and no prejudice has resulted to any party. I agree with the majority concerning the trial court's ruling granting summary judgment in favor of plaintiff, Carolina Place Joint Venture ("Carolina Place"), and awarding damages against defendant, Flamers Charburgers, Inc. ("Flamers"). However, I respectfully dissent from the order of the trial court granting summary judgment in favor of Carolina Place against third-party defendant, F.A. International

("FAI"). Based on the merits, the trial court should have granted summary judgment in favor of FAI.

Carolina Place instituted this action against Flamers and FAI seeking all past and future rent owed under the lease. Flamers entered into a ten-year lease with landlord, Carolina Place, for space in the food court in a Charlotte mall. The lease term began on 1 August 1991 and was set to expire on 1 August 2001. FAI was not a party to the original lease. Flamers sublet the space to FAI through a sublease which began 20 September 1994 and was set to expire 7 March 2001.

The original lease between Carolina Place and Flamers provided that in the event that Carolina Place terminated Flamers' right to possession, but not the lease, Flamers would be held liable for 1) all past-due rent; 2) remaining rent due under the lease until the space was re-let; 3) attorney's fees and expenses incurred by Carolina Place in regaining possession; 4) all costs to re-let; 5) "double-rent" for any holdover period during which Flamers remained in possession after Carolina Place terminated such possession.

Carolina Place filed an action in summary ejectment against Flamers and FAI for failure to comply with certain requirements in the lease related to the maintenance of the store, and the court awarded possession of the premises to Carolina Place on 10 June 1998. FAI remained in possession until 30 June 1998, continued to pay rent until July, but did not pay double-rent.

Carolina Place filed the present action in March 1999 and filed a motion for summary judgment in December 1999. The trial court granted the motion in favor of Carolina Place and held Flamers and FAI jointly and severally liable for $214,520.00 in damages. This amount included unpaid rent, unpaid holdover double-rent and Carolina Place's cost to re-let the premises.

Summary judgment is to be granted when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). In order to determine whether a party was entitled to a judgment as a matter of law, we must review the merits.

The dispositive issue in this case was whether an agreement in which the tenant transferred its interest in the leased premises, reserving some interest unto itself before expiration of the original lease, was an assignment.

"[O]ur courts have adopted the traditional 'bright line' test for determining whether a conveyance by a tenant of leased premises is an assignment or a sublease. Under this test, a conveyance is an assignment if the tenant conveys his 'entire interest in the premises, without retaining any reversionary interest in the term itself.' " *Northside Station Associates Partnership v. Maddry*, 105 N.C. App. 384, 388, 413 S.E.2d 319, 321 (1992) (citing James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 241 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed. 1988). "A sublease, on the other hand, is a conveyance in which the tenant retains a reversion in some portion of the original lease term, however short." *Id.*; *see also Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915 (1987); *J.D. Cornell Millinery Co. v. Little-Long Co.*, 197 N.C. 168, 170, 148 S.E. 26, 27 (1929) ("The reservation by the lessee . . . of some portion of the term [is] the chief distinction between a sublease and an assignment."). "If the conveyance is an assignment, 'privity of estate' is created between the original lessor and the assignee with regard to lease covenants that run with the land, and the original lessor has a right of action *directly* against the assignee. The original lessor has no such right against a sublessee." Northside Station Associates Partnership, 105 N.C. App. at 389, 413 S.E.2d at 322 (emphasis added).

Carolina Place's lease signed with Flamers and the subsequent lease Flamers signed with FAI, included as exhibits with Carolina Place's motion for summary judgment, reveal that the subsequent lease was to expire 7 March 2001 and the original lease was to expire 1 August 2001. Thus, Flamers retained four months reversionary interest in the term of the lease. Because Flamers did not convey its entire interest in the leased premises, its subsequent lease agreement with FAI constituted a sublease and not an assignment. Therefore, no privity of estate existed between Carolina Place and FAI, allowing Carolina Place no right to assert a direct claim against FAI based on the provisions of the lease.

FAI, under the theory of joint and several liability, may become obligated to pay the entire damage amount, although Flamers is the lawfully liable party. Moreover, Flamers has the remedy of recovering from FAI damages it owes Carolina Place. As sublessor and sublessee, privity of estate exists between FAI and Flamers through their agreement. Flamers may, therefore, assert a direct claim against FAI.

Based on the foregoing, I respectfully dissent from the trial court's ruling granting summary judgment against FAI.

CAROLINA PLACE JOINT VENTURE, PLAINTIFF v. FLAMERS CHARBURGERS, INC. D/B/A FLAMERS CHARBROILED HAMBURGERS, AND F.A. INTERNATIONAL, INC., DEFENDANTS v. F.A. INTERNATIONAL, INC. AND SHAFIQUE ALRUMAIH, THIRD-PARTY DEFENDANTS

No. COA00-745 and COA00-1231

(Filed 21 August 2001)

Guaranty— personal guaranty—franchise agreement

The trial court did not err by granting summary judgment in favor of a franchisor on the issue of indemnity under a personal guaranty by the franchisee's president for unpaid rent under the lease and sublease and for reasonable attorney fees, because: (1) the personal guaranty was merged into the franchise agreement for "all of the obligations and liabilities" of the franchisee to franchisor; (2) the obligation to pay rent was specifically included in the franchise agreement; and (3) the franchisor paid the lessor an amount on a judgment against the franchisor and the franchisee for rent owed.

Appeal by third-party defendant Alrumaih from two separate orders entered 15 March 2000 by Judge Jesse B. Caldwell and 27 July 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. By order entered 19 January 2001 this Court allowed cases COA00-506, COA00-745, and COA00-1231 to be consolidated for purposes of hearing only. This Court now orders that COA00-745 and COA00-1231 be consolidated for decision in this opinion and that COA00-506 be decided in a separate opinion. Heard in the Court of Appeals on 5 June 2001.

Parker Poe Adams & Bernstein, L.L.P. by John W. Francisco for third-party defendant-appellant Shafique Alrumaih.

John T. Daniel for defendant-appellee Flamers Charburgers, Inc.

No brief filed for plaintiff-appellee Carolina Place Joint Venture.

BRYANT, Judge.

The pertinent factual and procedural background is as follows: On 7 March 1991, Carolina Place Joint Venture (Carolina Place) entered into a ten-year lease agreement with Flamers Charburgers, Inc. (Flamers) for retail space in the food court of the Carolina Place Mall. On 1 August 1991 the lease commenced. On 16 September 1994, Shafique Alrumaih (Alrumaih), president and CEO of F.A. International (FAI), executed a personal guarantee of all obligations of FAI under the Franchise Agreement. As an inducement for Flamers to enter into the Franchise Agreement with FAI, Alrumaih agreed to guarantee all the obligations and liabilities which FAI owed to Flamers under the agreement. On 20 September 1994, Flamers entered into a Franchise Agreement with FAI which included the 16 September 2000 personal guarantee by Alrumaih and the sublease.

On 12 December 1997, Carolina Place terminated Flamers' and FAI's right of possession and two months later filed an action in summary ejectment. On 10 June 1998, Carolina Place's motion for summary ejectment was granted and possession was awarded. However, defendants Flamers and FAI did not vacate the premises until 30 June 1998.

Carolina Place filed a complaint in January 1999 seeking to recover from defendants FAI and Flamers previous rent owed and rent for the remainder of the lease term. Four months later, Flamers answered by filing a cross-claim against FAI and a third-party complaint against Alrumaih. Alrumaih answered the third party complaint and denied his obligation to personally guarantee FAI's rental obligation to Carolina Place.

On 30 December 1999, Carolina Place filed a motion for summary judgment against Flamers and FAI for the unpaid rent under the lease and sublease. On 20 January 2000, the trial court granted summary judgment and issued an order against Flamers and FAI, jointly and severally, in the principal amount of $214,512.45.

On 16 February 2000, both Flamers and FAI filed a notice of appeal (COA 00-506) from the order granting summary judgment in favor of Carolina Place for rent and related charges. Flamers has abandoned its appeal and only FAI continues its appeal against Carolina Place. Flamers then filed a motion for summary judgment against Alrumaih based on his personal guarantee of FAI's obligation to indemnify Flamers. The trial court granted Flamers' motion for

summary judgment against Alrumaih and ordered that Alrumaih was liable for any amounts Flamers paid to Carolina Place to satisfy the 20 January 2000 judgment. On 13 April 2000, Alrumaih filed a notice of appeal (COA 00-745) of the 15 March 2000 court order.

On 12 June 2000, Flamers filed a motion for summary judgment against Alrumaih for $50,000, the amount Flamers had paid to the plaintiff and $7,500 for attorney fees. On 27 July 2000, the trial court granted Flamers' motion for summary judgment against Alrumaih pursuant to the personal guarantee and awarded Flamers a $50,000 judgment plus reasonable attorney's fees in the amount of $7,500. On 17 August 2000, Alrumaih filed notice of appeal (COA 00-1231) of that judgment.

The sole issue on appeal in both cases is whether the trial court erred in granting summary judgment in favor of Flamers on the issue of indemnity under the personal guarantee. Because Alrumaih personally guaranteed the franchise agreement and because the obligation to pay rent was included in the franchise agreement, we uphold the trial courts' rulings on summary judgment.

Alrumaih contends that the personal guarantee was ambiguous and thus the issue was not appropriate for summary judgment. He also contends that the franchise agreement, by its terms, does not incorporate the terms of the sublease agreement entered into between Flamers and FAI and thus the personal guarantee does not apply to the sublease. We are not persuaded by Alrumaih's arguments.

Summary judgment is proper under G.S. 1A-1, Rule 56(c) only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." An issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972); *see Northwestern Bank v. Gladwell*, 72 N.C. App. 489, 493, 325 S.E.2d 37, 39 (1985).

A guarantor's liability depends on the terms of the contract as construed by the general rules of contract construction. *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C.

App. 637, 641, 486 S.E.2d 229, 232 (1997). Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and summary judgment is appropriate. *Corbin v. Langdon*, 23 N.C. App. 21, 27, 208 S.E.2d 251, 255 (1974). In contrast, an ambiguity exists in a contract if the "language of the [contract] is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Taha v. Thompson*, 120 N.C. App. 697, 701, 463 S.E.2d 553, 556 (1995) (citations omitted). Moreover, all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken. *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969); *see generally Perry v. Southern Sur. Co.*, 190 N.C. 284, 129 S.E. 721 (1925); *Matter of Sutton Investments, Inc.*, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

In the present case, the guarantee which was signed as an inducement to get Flamers to enter into the Franchise Agreement with FAI, specifically provides that Alrumaih will personally guarantee "unconditionally to Franchisor (Flamers) the full, faithful and punctual performance, fulfillment and observance of *all of the obligations and liabilities of the Franchisee (FAI) to Franchisor*." (Emphasis added). In addition, we are convinced that at the time the documents were executed, the parties intended that they be construed together. All of the documents were merged into one document, the Franchise Agreement, as indicated by the consecutive page numbers in the Franchise Agreement and the Table of Contents. (The personal guarantee is on page 37 of the Franchise Agreement and the sublease is on pages 43-45.) Considering the foregoing facts, we find that the Franchise Agreement containing the personal guarantee and the sublease should "be construed together in determining what was undertaken," thus resolving any ambiguity that might arise if these documents were read alone. *Yates*, at 640-41, 170 S.E.2d at 482.

Moreover, we find that the franchise agreement *does* set forth FAI's obligation to pay rent on page 13, paragraph 8.2(b) of the franchise agreement:

> (b) Franchisor (Flamers) shall sublet the location to Franchisee (FAI) *pursuant to the form of sublease* set forth in Exhibit "C" hereto. The *basic terms of the lease on which Franchisor is obligated shall be those terms and conditions upon which Franchisee shall be obligated*, although Franchisor reserves the

right to charge Franchisee an administrative fee for Franchisor's services in connection with the sublease. (Emphases added.)

Finally, we find that the language "all of the obligations and liabilities" in Alrumaih's personal guarantee creates an obligation similar to the obligation in *Devereux Properties, Inc. v. BBM & W, Inc.*, 114 N.C. App. 621, 442 S.E.2d 555, *rev. denied*, 337 N.C. 690, 448 S.E.2d 519 (1994). In *Devereux*, the guarantee agreement covered "each and every obligation of Tenant under this Lease Contract." *Id.* at 625, 442 S.E.2d at 557. The court held the guarantors of the commercial lease liable for rent payments and attorneys' fees. *Id.* at 622, 442 S.E.2d at 555. The court reasoned that defendants were responsible for attorneys' fees because the lease required them to pay in the event of a default. *Id.* at 625, 442 S.E.2d at 557. Similarly, in the case at hand, Alrumaih guaranteed *all* of FAI's obligations to Flamers, which included the duty to pay rent.

Because the obligation to pay rent was specifically included in the franchise agreement, Alrumaih must indemnify Flamers' obligations under the lease. Accordingly, we conclude that the trial court's orders granting summary judgment in favor of Flamers are affirmed.

AFFIRMED.

Judges GREENE and TIMMONS-GOODSON concur.

ROBERT L. VINCENT v. CSX TRANSPORTATION, INC.

No. COA00-965

(Filed 21 August 2001)

Employer and Employee— railroad worker—delayed investigation of breathing difficulties

The trial court did not err in an asbestos action by a railroad worker by granting summary judgment for defendant-railroad based on the three-year FELA statute of limitations where plaintiff experienced breathing difficulties in 1984 which he believed to be related to dusty working conditions, never informed his physicians of his exposure, did not seek any other medical treatment or diagnosis until after consulting an attorney in 1998, and

filed this action in 1999. Plaintiff did not fulfill his affirmative duty to investigate suspected causes of his breathing difficulties.

Appeal by plaintiff from judgment entered 15 May 2000 by Judge W. Russell Duke, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 23 May 2001.

Bondurant & Appleton, P.C., by Randall E. Appleton, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Timothy Wood Wilson and Randall Ray Adams, for defendant-appellee.

WALKER, Judge.

From March 1970 until November 1986, Robert L. Vincent (plaintiff) worked for CSX Transportation, Inc. (defendant). Plaintiff's job required him to inspect, repair, and maintain the rails, crossties, and roadbeds upon which trains operate. His duties exposed him to varying levels of dust and he was hospitalized in 1984 for difficulty of breathing. Plaintiff's physicians advised him that cigarette smoking was contributing to his breathing difficulties. Plaintiff did not make inquiry of his physicians as to the causes of his breathing problems because he knew "back then" that the dust in his workplace was the cause. At that time, he chose not to file a claim against defendant for the breathing problems.

In 1998, plaintiff learned that some of his co-workers had been diagnosed with work-related asbestosis. He contacted an attorney who advised him to undergo a pulmonary evaluation. After this evaluation, plaintiff was diagnosed on 18 November 1998 with asbestosis which was attributed to his exposure to asbestos dust while working for defendant.

On 25 January 1999, plaintiff filed this negligence action against defendant, seeking damages pursuant to the Federal Employers' Liability Act (FELA) of 1908, 45 U.S.C. § 51 (1994) *et seq.*, for "occupational pneumoconiosis including but not limited to asbestosis." Plaintiff alleged he contracted this condition as a result of his employment with defendant. Defendant filed a motion for summary judgment which was granted on 15 May 2000. The trial court concluded there was no genuine issue of material fact since the three-year statute of limitations had expired before plaintiff filed this cause of action. From this order, plaintiff appeals.

In his sole assignment of error, plaintiff contends the trial court erred in finding his cause of action was barred by the statute of limitations. In support of his argument, plaintiff asserts he presented sufficient evidence to establish he neither knew, nor should have known, that he suffered from asbestosis due to dust exposure during his employment with defendant prior to 18 November 1998.

At the outset, we note the test for summary judgment is whether on the basis of the materials presented to the trial court "there exists any genuine issue of material fact." *Lowe v. Murchison*, 44 N.C. App. 488, 490, 261 S.E.2d 255, 256 (1979), *citing* N.C.R. Civ. P. 56(c). In other words, "[s]ummary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery." *Lowder v. Lowder*, 68 N.C. App. 505, 506, 315 S.E.2d 520, 521, *disc. review denied*, 311 N.C. 759, 321 S.E.2d 138 (1984) (citation omitted). A trial court must construe the record in a light most favorable to a party opposing a motion for summary judgment. *Peterson v. Winn Dixie*, 14 N.C. App. 29, 187 S.E.2d 487 (1972).

FELA governs those actions brought by railroad workers who claim injuries as a result of their employer's negligence. *See* 45 U.S.C. § 56 (1994). The United States Supreme Court and the federal courts, who have interpreted FELA, apply the principles of common law negligence in these cases. *Urie v. Thompson*, 337 U.S. 163, 93 L. Ed. 1282 (1949). In *Urie*, the Supreme Court stated: "We recognize . . . that [FELA] is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Id.* at 182, 93 L. Ed. at 1299. This application of common law negligence by the federal courts supersedes state law and binds the state courts in their interpretation of FELA. *Cole v. R.R.*, 199 N.C. 389, 154 S.E. 682 (1930), *citing Toledo R.R. Co. v. Allen*, 276 U.S. 165, 72 L. Ed. 513 (1928).

FELA provides in part that "[n]o action shall be maintained under this [Act] unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. Further, the burden is on the claimant to allege and prove he commenced his cause of action within this statute of limitations as a condition precedent to recovery. *See Carpenter v. Erie R. Co.*, 132 F.2d 362, 362-63 (3d Cir. 1942); *Bealer v. Missouri Pacific R.R. Co.*, 951 F.2d 38, 39 (5th Cir. 1991).

The purpose of the statute of limitations ". . . is to require the reasonably diligent presentation of tort claims against the [alleged tort-

feasor]. *United States v. Kubrick*, 444 U.S. 111, 123, 62 L. Ed. 2d 259, 270 (1979). Thus, when a plaintiff is unaware of when the injury actually occurs, the "discovery rule" is applied. *See Tolston v. National R.R. Passenger Corp.*, 102 F.3d 863, 865 (7th Cir. 1996); *Albert v. Maine Cent. R. Co.*, 905 F.2d 541, 543 (1st Cir. 1990); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990); *Townley v. Norfolk & Western Ry. Co.*, 337 F.2d 498, 501 (4th Cir. 1989); *DuBose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1029-1030 (5th Cir.), *cert. denied*, 469 U.S. 854, 83 L. Ed. 2d 113 (1984); *Kichline v. Consolidated Rail. Corp.*, 800 F.2d 356, 358 (3rd Cir. 1986); *Young v. Clinchfield Railroad Company*, 288 F.2d 499 (4th Cir. 1961). Under this rule, borrowed from the reasoning of our United States Supreme Court in *Urie*, an action accrues when the plaintiff becomes, or should become aware of his injury. *Id.; Urie* at 170, 93 L. Ed. at 1282-93. Likewise, a claim under the Federal Torts Claim Act accrues when the employee knows, or should know, of both his disease and its cause. *Kubrick* at 123, 62 L. Ed. 2d at 270. This rule has been extended to FELA cases. *See Townley* at 501; *Kichline* at 356.

In *Kubrick*, the claimant brought an action under the Federal Tort Claims Act to recover for a hearing loss allegedly caused by negligent treatment received in a veterans' administration (VA) hospital. *Kubrick* at 115, 62 L. Ed. 2d at 265. Although his private physician had indicated to him in 1969 that his treatment administered by the VA hospital had likely caused his hearing loss, Kubrick did not file his action until 1972 after another physician had advised him that the VA hospital treatment had caused his injury. *Id.* at 114-15, 62 L. Ed. 2d at 264-65. The Supreme Court held that the statute of limitations began to run in 1969 when the plaintiff knew of his hearing loss and its cause, not in 1971 when another physician confirmed that his hearing loss resulted from his treatment at the VA hospital. *Id.* at 122-23, 62 L. Ed. 2d at 269-70. The Court further stated:

> We . . . cannot hold that Congress intended that 'accrual' of a claim must wait awareness by the plaintiff that his injury was negligently inflicted. A plaintiff . . ., armed with facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute[.]

Id. at 123, 62 L. Ed. 2d at 270.

The *Kubrick* Court emphasized a claimant's affirmative duty to investigate his injury with reasonable diligence. *Id.; see also Albert* at 544 (holding once the plaintiff, who had filed a FELA claim, concluded that he was injured and believed the injury was caused by his employment, "he had a duty to investigate the situation in order to confirm or deny his belief."); *Fries* at 1095 (holding an injured plaintiff filing a FELA claim has "an affirmative duty to investigate the potential cause of his injury").

In the instant case, plaintiff argues that his claim did not accrue until 1998 when he was formally diagnosed with asbestosis. Defendant counters that courts, consistent with the affirmative duty rule, have uniformly rejected the formal diagnosis rule that accrual does not begin until medical conditions are formally diagnosed. *See, e.g., Townley* at 498; *Crisman v. Odeco, Inc.*, 932 F.2d 413 (5th Cir. 1991).

In *Townley*, the plaintiff filed a claim under FELA for pneumoconiosis allegedly resulting from his work as defendant's yard brakeman. *Townley* at 499. Plaintiff claimed he was unaware of his injury until his condition was diagnosed; however, his testimony revealed he had corresponded with his employer about obtaining black lung benefits in 1980. *Id.* at 499-500. The federal Fourth Circuit Court of Appeals held that even if the defendant did not truly believe he had black lung in 1980, "it is obvious . . . that he possessed sufficient information that he knew, or should have known, that he had been injured by his work with the railroad." *Id.* at 501. The Court explicitly rejected plaintiff's contention that the formal diagnosis rule should always apply by stating that the statute begins to run when a person's condition is diagnosed, unless the plaintiff shows he should have known earlier of his injury. *Id.*

Here, plaintiff admitted in his deposition that his breathing difficulties caused him to seek medical treatment in November of 1984. He attributed his breathing difficulties to the dust in his work environment. Plaintiff's association between his breathing difficulties and his workplace is evident from his deposition testimony as follows:

> Q Sir, when you were in the hospital in November of 1984 because of your breathing difficulty and pain when you were breathing, shortness of breath, did you ask the doctors then what was causing your breathing difficulties?
>
> A . . . no.

Q You don't recall asking any of the doctors then why you were having the chest pain when you were breathing, shortness of breath and increasing shortness of breath when you exerted yourself back there in November of '84?

A I know what part of that was. It come [sic] from that dust.

Q You knew it back then?

A Yes, I knew it.

Q That part of your breathing difficulty was from dust that—the various dust conditions you [had] been around at the Railroad?

A Yes, I coughed dust up from when I worked that week to the day I go [sic] back to work. My wife can testify to that. Every time I coughed, dust come [sic] up in cold.

Q And you believe that [at] that time, in November of 1984, that being around various dusty conditions over the course of Railroad employment had harmed your breathing?

A Yes, I know it did.

When plaintiff experienced his breathing difficulties in 1984, he had been employed by defendant for fourteen years. Even though he had been exposed to dust during these years, plaintiff never informed physicians of his dust exposure or of his own belief that the dusty conditions caused or contributed to his breathing difficulties. He admitted in his deposition that he never asked his physicians in 1984 whether the dust in the workplace was the cause of, or contributed to, his breathing difficulties. Further, even though he did not work for defendant after 1986, plaintiff did not seek any other medical treatment or diagnosis until after he consulted an attorney in 1998. Thus, plaintiff did not fulfill his affirmative duty to investigate suspected causes of his breathing difficulties as required by *Kubrick*.

Therefore, under the cases cited herein, once plaintiff's breathing difficulties manifested themselves and plaintiff attributed these breathing difficulties to the dust in his workplace, he possessed sufficient information that he knew, or should have known, that he had been injured by his work with the railroad. Because he failed to file his action within the requisite time period, summary judgment in favor of defendant was proper. As no genuine issue of fact existed, the judgment of the trial court is

Affirmed.

Judges McCULLOUGH and THOMAS concur.

GREGORY A. SPEARS AND LESLIE G. SPEARS, PLAINTIFFS v. SAM W. MOORE, DEFENDANT

No. COA00-721

(Filed 21 August 2001)

Statute of Limitations–fraud— failure to pursue provisional perk test—due diligence—summary judgment improper

The trial court improperly granted summary judgment for defendant based on the statute of limitations where plaintiffs bought real property with defendant as the seller's broker; the contract required a satisfactory "perk" test; defendant provided plaintiffs with a recorded map containing a certification of provisional approval for subsurface sewer treatment subject to the issuance of permits by the Health Department; the closing occurred in January of 1989; plaintiffs never developed the property and entered into a contract to sell in March of 1998; a permit was denied by the Health Department and the contract was terminated; and plaintiffs brought an action on several claims, including fraud. Although defendant argues that plaintiffs had both the opportunity and the capacity to discover the alleged fraud, plaintiffs were not required to build upon their property and believed they were under no pressing impetus to have their property further evaluated by the Health Department. It cannot be stated that their failure to further investigate the purported certificate and its five-year limitation constitutes neglect as a matter of law.

Appeal by plaintiffs from order entered 20 March 2000 by Judge A. Leon Stanback, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 18 April 2001.

Dorrestein & Crane, L.L.P., by Ronald Dorrestein and Shelly D. Crane, for plaintiff appellants.

Holt, Longest, Wall & Blaetz, P.L.L.C., by Frank A. Longest, Jr., for defendant appellee.

TIMMONS-GOODSON, Judge.

Gregory and Leslie Spears (plaintiffs) appeal from an order granting summary judgment to Sam Moore (defendant) based on the bar of the statute of limitations.

On 9 August 1988, the parties negotiated and executed a contract in which plaintiffs agreed to purchase from Meadowood Development Corporation (Meadowood) certain real property located in Alamance County, North Carolina. As a real estate broker and Meadowood's representative, defendant prepared the contract, which among other things required that the Alamance County Health Department perform a "satisfactory 'perk' test" upon the property. According to plaintiffs, the parties understood that the land would pass a soil percolation test for a four-bedroom residence in order to satisfy the "perk test" condition. In November 1988, defendant allegedly informed plaintiffs that the land had received a satisfactory perk test. Defendant then provided plaintiffs with a recorded map of the property containing the following language:

> CERTIFICATION OF APPROVAL OF SEWER FACILITIES
>
> I HEREBY CERTIFY THAT ALL LOTS ARE PROVISSIONALLY [sic] APPROVED FOR SUBSURFACE SEWAGE TREATMENT AND DISPOSAL, EXCEPT AS NOTED ON THE PLAT, SUBJECT TO THE ISSUANCE OF IMPROVEMENT PERMITS BY THE HEALTH DEPARTMENT, AND, TO THE NORTH CAROLINA ADMINISTRATIVE CODE.
>
> /S/ Alvin Cagle 11-23-88
> HEALTH DIRECTOR OR DEPUTY

On 5 January 1989, the parties closed on the subject property. Plaintiffs never developed the property, and in March 1998 plaintiffs entered into a contract to sell the property to Kenneth and Julie Walker (the Walkers). This contract was contingent upon plaintiffs obtaining an improvement permit indicating the property's suitability for a ground absorption sewage system. When plaintiffs applied for an improvement permit, however, they were denied such by the Alamance County Health Department. Plaintiffs now assert that a perk test was never performed upon the subject property. Based on the denial of the improvement permit, the Walkers properly terminated the contract with plaintiffs.

On 20 April 1999, plaintiffs filed a complaint against defendant alleging breach of contract, breach of implied warranty, fraud and misrepresentation, negligent misrepresentation, unfair and deceptive trade practices, and requesting punitive damages. On 20 March 2000, the trial court granted defendant's motion for summary judgment, finding there was "no genuine issue as to any material fact" and that defendant was "entitled to a judgment as a matter of law as to all issues . . . based on the bar of the Statutes of Limitations." From this order, plaintiffs appeal.

Plaintiffs argue the trial court erred in granting summary judgment to defendant based on the bar of the statute of limitations. For the following reasons, we agree with plaintiffs and reverse the order of the trial court.

An order granting summary judgment to a party is appropriate when "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). Such an order "based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976).

For a claim based on fraud or mistake, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (1999). "Discovery" is defined as actual discovery or the time when the fraud should have been discovered in the exercise of due diligence. *See Hyde v. Taylor*, 70 N.C. App. 523, 528, 320 S.E.2d 904, 908 (1984). A suit must then be initiated within three years of such discovery in order to comply with the statute of limitations. *See* N.C. Gen. Stat. § 1-52 (1999). Whether a plaintiff has exercised due diligence is ordinarily an issue of fact for the jury absent dispositive or conclusive evidence indicating neglect by the plaintiff as a matter of law. *See Huss* at 468, 230 S.E.2d at 163. In other words, when there is a dispute as to a material fact regarding when the plaintiff should have discovered the fraud, summary judgment is inappropriate, and it is for the jury to decide if the plaintiff should have discovered the fraud. Failure to exercise due diligence may be determined as a mat-

ter of law, however, where it is "clear that there was both capacity and opportunity to discover the mistake." *Id.*

In the case at bar, defendant argues that summary judgment was appropriate, as plaintiffs had both opportunity and capacity to discover the alleged fraud. Defendant notes the language on the recorded map regarding alleged sewage treatment approval for the property stated that such approval was merely provisional, and therefore, temporary in nature. Defendant contends the provisional approval for sewage treatment in fact expired after five years, at which time a new application should have been submitted by plaintiffs. Defendant argues plaintiffs had the opportunity and the capacity any time before the provisional approval expired, and within three years after the provisional approval expired, to discover that the property would not perk. The discovery would have led them to believe defendant had defrauded them. Therefore, according to defendant, plaintiffs had ample time to discover the facts upon which their present suit is based, and their failure to reasonably inquire after the nature of the provisional certificate amounts to a failure to exercise due diligence as a matter of law. We disagree.

As stated above, "[w]hether the plaintiff in the exercise of due diligence should have discovered the facts [regarding the existence of potential fraud] more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflicting." *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163. In *Huss*, this Court reversed the trial court's grant of summary judgment based on the statute of limitations. In that case, a divorced wife petitioned the court for a partition sale of realty allegedly owned by petitioner and her ex-husband as tenants in common. Respondent ex-husband denied petitioner's interest in the property, asserting that petitioner's name on the deed as a grantee, together with respondent's name, was a result of mutual mistake. Respondent alleged that he alone had purchased the property in 1962, and accordingly, that he had requested and received assurances from the grantors of the property that the property was recorded solely in his name. Relying on these assurances, respondent did not learn of the mistake until 1975, when a dispute arose over the divorce judgment. The trial court subsequently entered summary judgment against respondent based on the statute of limitations, and respondent appealed.

On review, this Court noted that the three-year statute of limitations begins to run from the time the mistake is actually discovered or should have been discovered in the exercise of due diligence.

Viewing the pleadings liberally in favor of respondent and giving him the benefit of all reasonable inferences of fact, this Court reversed the grant of summary judgment, stating

> [w]e need not speculate on what circumstances should have led respondent to discover the mistake more than three years previously, nor are we to judge the likelihood of respondents' [sic] success on his claim. We think it clear that the pleadings do not disclose sufficient facts to establish as a matter of law that respondent failed to exercise due diligence.
>
> . . . .
>
> . . . It may be difficult for respondent to offer evidence tending to show that, though the realty was conveyed to him and his wife as tenants by the entirety by deed made thirteen years prior to this suit, he nevertheless used due diligence but failed to discover for a period of about ten years that the deed was so made. But we do not find that the pleadings preclude respondent from offering such evidence.

Id. at 468-69, 230 S.E.2d at 163-64.

As in *Huss*, we are unable to agree with the trial court in the instant case that the pleadings and other evidence establish that plaintiffs failed to exercise due diligence as a matter of law in discovering alleged fraud by defendant. Plaintiffs believed, based on their contract and defendant's alleged representation, that their property had passed a soil percolation test. Plaintiffs chose not to build upon their property, nor were they required to do so. Rather, plaintiffs apparently retained the property for investment purposes. Thus, plaintiffs believed they were under no pressing impetus to have their property further evaluated by the Alamance County Health Department. We cannot say that plaintiffs' failure to further investigate the purported certificate and its five-year limitation constitutes neglect as a matter of law. As such, there remain genuine issues of material fact concerning plaintiffs' reasonableness in relying upon defendant's alleged assurances that the contractual obligation of a satisfactory perk test had been met. Whether plaintiffs can offer evidence tending to show they owned their property for ten years without discovering its poor percolation but nevertheless used due diligence may be difficult, but "[a] judgment on the pleadings is not appropriate merely because the claimant's case is weak and he is unlikely to prevail on the merits." *Id.* at 469, 230 S.E.2d at 163.

Because we conclude that genuine issues of material fact exist regarding plaintiffs' exercise of due diligence, we hold the trial court improperly granted summary judgment to defendant based on the bar of the statute of limitations. Accordingly, the order of the trial court is hereby reversed.

Reversed.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. TAMANCHI LAKEWONDO KRIDER

No. COA99-313-2

(Filed 21 August 2001)

Homicide— first-degree murder—felony murder rule—felonious child abuse

The trial court did not err by convicting defendant for the first-degree murder of her two-year-old child based on the felony murder rule using the underlying felony of felonious child abuse with the use of a deadly weapon, because there was substantial evidence that defendant, using her hands as a deadly weapon, intentionally shook and threw her child resulting in his serious physical injury which shows defendant purposely resolved to commit the underlying felony that formed the basis of the first-degree murder charge.

Appeal by defendant from judgment entered 20 May 1998 by Judge Howard E. Manning, Jr. in Rowan County Superior Court. Originally heard in the Court of Appeals on 27 January 2000 in an opinion filed 16 May 2000. Remanded to the Court of Appeals for reconsideration by order of the North Carolina Supreme Court on 1 February 2001. Reheard without oral argument, but with additional briefing.

Attorney General Michael F. Easley, by Assistant Attorney General Anne M. Middleton, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

HUNTER, Judge.

The Supreme Court ordered that we reconsider our decision in *State v. Krider*, 138 N.C. App. 37, 530 S.E.2d 569 (2000), *remanded*, 353 N.C. 391, 547 S.E.2d 32 (2001), in light of its holding in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000). After a careful reconsideration of the issues, we affirm Tamanchi Lakewondo Krider's ("defendant") conviction for first-degree murder based on the felony murder rule.

A full review of the facts and procedural history of this case can be found in our previous opinion, *Krider*, 138 N.C. App. 37, 530 S.E.2d 569. The facts relevant to our present review are: defendant admitted that she abused her two-year old son, DeMallon Krider ("DeMallon"), in the past—throwing him around and biting him. Additionally, defendant admitted that on 15 June 1997, she shook DeMallon and threw him down, using her hands, which caused his death. Thereafter, defendant was convicted of first-degree murder as a result of her causing DeMallon's death while committing felonious child abuse with the use of her hands as a deadly weapon. Originally, this Court, in a unanimous decision, upheld defendant's conviction. *See id.*

The sole issue for determination on remand is whether defendant was properly convicted of first-degree murder under the felony murder rule in light of *Jones*, 353 N.C. 159, 538 S.E.2d 917. In *Jones*, *supra*, our Supreme Court reversed Thomas Jones' ("Jones") conviction for first-degree murder under the felony murder rule, because Jones did not actually intend to commit the underlying felony (assault with a deadly weapon inflicting serious injury). Specifically, the Court found Jones' conviction to be based on his implied intent to commit the underlying felony based on his culpable or criminal negligence. *Id.* Accordingly, our Supreme Court held that "(1) culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge; and, (2) a defendant may not be subject to a potential death sentence absent a showing of actual intent to commit one or more of the underlying felonies delineated or described in our state's murder statute, N.C.G.S. § 14-17." *Id.* at 163, 538 S.E.2d at 922.

In the present case, the underlying felony for felony murder purposes was felonious child abuse committed with use of a deadly weapon, defendant's hands.

> In order to sustain a conviction for felonious child abuse, the State must prove that "the accused is 'a parent or any other person providing care to or supervision of a child less than 16 years of age' and that the accused intentionally inflicted a serious physical injury upon the child or intentionally committed an assault resulting in a serious physical injury to the child."

State v. Pierce, 346 N.C. 471, 492-93, 488 S.E.2d 576, 588 (1997) (quoting *State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 218-19 (1996)) (quoting N.C. Gen. Stat. § 14-318.4(a) (1993)). There is no question that defendant was the parent of DeMallon; she was providing care for him; DeMallon was less than sixteen years of age; defendant abused DeMallon in the past; defendant shook him and threw him down on this occasion; and as a result, DeMallon was seriously injured.

In felonious child abuse cases, the State is not required to prove that the defendant " 'specifically intend[ed] that the injury be serious.' " *Pierce*, 346 N.C. at 494, 488 S.E.2d at 589 (quoting *State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 476 (1986)). Moreover, felonious child abuse "does not require the State to prove any specific intent on the part of the accused." *Id.* To show intent in a child abuse case, past incidents of mistreatment are admissible. *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991).

However, "[f]elony murder on the basis of felonious child abuse requires the State to prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. "When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.* To be convicted for first-degree murder under the felony murder rule, an "accused must be purposely resolved to commit the underlying crime in order to be held accountable for unlawful killings that occur during the crime's commission." *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. In other words, "the actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required." *Id.*

Here, defendant confessed:

> ". . . I woke up around 12:00 P.M. and DeMallon was laying on the bed like something was wrong. I asked DeMallon what was wrong with him, and he did not answer me. I became upset and

> angry at DeMallon and grabbed him up and shaking him and yelling, asking DeMallon what was wrong. . . ." "DeMallon would not answer me, and I threw him, I thought, on the bed, but DeMallon hit the floor instead of the bed. After DeMallon hit the floor, I knew I had done something wrong. . . ." ". . . I had gotten angry at DeMallon before and threw DeMallon around. I have also gotten angry at DeMallon and would bite DeMallon on his cheeks and body . . . I would get so angry that DeMallon was scared of me. . . ."

Krider, 138 N.C. App. at 43-44, 530 S.E.2d at 573. Later, defendant admitted that after shaking DeMallon on 15 June 1997, she threw him directly to the floor, where he hit his head on the bed frame and subsequently died. Thus, there was substantial evidence in the instant case that defendant, using her hands as a deadly weapon, intentionally shook and threw DeMallon resulting in his serious physical injury. In light of the substantial evidence showing defendant was purposely resolved to commit the underlying felony (felonious child abuse) that formed the basis of the first-degree murder charge, we uphold defendant's conviction.

Our determination is consistent with the North Carolina Supreme Court's decision in *Jones*, 353 N.C. 159, 538 S.E.2d 917. Furthermore, we find this case analogous to our Supreme Court's decision in *Pierce*, 346 N.C. 471, 488 S.E.2d 576—cited in *Jones*, 353 N.C. at 168, 538 S.E.2d at 925—whereby the Court acknowledged that felonious child abuse committed with the use of a deadly weapon may serve as the underlying felony for felony murder purposes.

Thus, as the State proved beyond a reasonable doubt that defendant actually intended to commit the underlying offense (felonious child abuse) with the use of her hands as a deadly weapon, we affirm defendant's conviction for first-degree murder based on the felony murder rule.

Affirmed.

Judges GREENE and McGEE concur.

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Motion to sever—redacted statements from codefendants—The trial court did not err in denying a motion to sever in a prosecution for kidnapping, rape, and other offenses because of the admission of redacted statements of both defendants where the court sanitized the statements with assistance from the State and attorneys for both defendants and the deletions did not materially change the nature of either statement. **State v. Galloway, 555.**

Plea arrangement rejected—terms not modified—The requirements of N.C.G.S. § 15A-1023(b) were not violated in a prosecution arising from the sexual abuse of a child where defendant argued that the State proceeded upon the original indictment after a plea arrangement was rejected without modifying the terms of the arrangement. However, this statute merely requires the court to afford the parties an opportunity to modify the terms of a rejected plea agreement if both parties so desire; here, there is no indication that the State wished to modify the terms of the arrangement or that the court denied the State the opportunity to do so. **State v. Bailey, 13.**

Prosecutor's argument—inferences—The trial court did not abuse its discretion in a prosecution for kidnapping, rape, and other offenses by denying defendants' motion for a mistrial based upon the State's closing argument where defendants pointed to inaccurate inferences that a defense theory was fabricated for trial and that defendants failed to present evidence that they were not present or did not assist in the commission of the crimes. **State v. Galloway, 555.**

Prosecutor's argument—redacted statements—The trial court did not abuse its discretion by denying defendants' motion for a mistrial in a prosecution for kidnapping, rape, and other offenses where defendants contended that the State in its closing argument improperly referred to portions of defendants' statements concerning prostitution that had been redacted to comply with *Bruton v. United States*, 391 U.S. 123. **State v. Galloway, 555.**

DECLARATORY JUDGMENTS

Actual controversy—ownership of underground gas tanks—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's declaratory judgment action regarding whether defendant oil company is the owner of certain underground gas tanks located on plaintiffs' property in order to determine who has responsibility for the collection and removal of any discharge or release from the underground storage tanks because the complaint does not set forth an actual controversy between plaintiffs and defendant. **Carpenter v. Brewer Hendley Oil Co., 493.**

Insurance claim for theft—no judgment against insured—petitioner not a third party to contract—The owner of a stolen customized motorcycle was not a third party to an insurance contract under N.C.G.S. § 1-254 where petitioner loaned the motorcycle to a furniture store for use as a display, it was stolen from the furniture store, petitioner's claim under the store's policy was denied, and petitioner filed this declaratory judgment action alleging that the loss was covered by the policy, and the furniture store was voluntarily dismissed from the action. The liability of the insured does not attach and plaintiff cannot establish a right to recover without a judgment against the furniture store. **Whittaker v. Furniture Factory Outlet Shops, 169.**

DECLARATORY JUDGMENTS—Continued

Miscalculation of parole eligibility—mootness—An action seeking declaratory or injunction relief by a prison inmate whose parole eligibility date was miscalculated was moot where plaintiff had become eligible for parole even under the miscalculation and a declaratory judgment would in no way affect his parole eligibility status. **Vest v. Easley, 70.**

DISCOVERY

Motion to quash subpoenas duces tecum—in camera inspection—The trial court erred in a first-degree rape and indecent liberties case by granting the motion to quash subpoenas duces tecum issued by defendant teacher to the attorneys for the board of education and to an individual of the board of education seeking records compiled during the board's investigation of the charges against defendant. **State v. Johnson, 51.**

Sanctions—failure to appear at depositions–default judgment—The trial court did not abuse its discretion by entering a default judgment as to one of plaintiff's five causes of action as a sanction for failure to appear at depositions where defendant contended that its attorneys had failed to keep it informed. **Henderson v. Wachovia Bank of N.C., 621.**

DIVORCE

Alimony—relative earnings and earning capacities—accustomed standard of living—established pattern of savings—The trial court erred by denying plaintiff wife's claim for alimony under N.C.G.S. § 50-16.3A(c) based on the fact that she was able to meet all of her monthly bills without the aid of alimony. **Vadala v. Vadala, 478.**

Equitable distribution—dismissal of declaratory judgment action—jurisdiction—The superior court did not err by dismissing plaintiffs' declaratory judgment action without prejudice concerning the ownership of arguably marital property subject to equitable distribution when defendant wife had already filed a separate action against defendant husband seeking equitable distribution of marital property in district court. **Hudson Int'l, Inc. v. Hudson, 631.**

Equitable distribution—military retirement pension—notice—waiver—The trial court did not err by granting summary judgment in favor of plaintiff husband on defendant wife's counterclaim for an equitable distribution of plaintiff's military retirement pension even though defendant contends she had no notice of the hearing because defendant waived procedural notice by participating in the hearing without objection. **Anderson v. Anderson, 453.**

Equitable distribution—separation agreement—military retirement pension—failure to hold evidentiary hearing—The trial court did not err by dismissing defendant wife's counterclaim for an equitable distribution of plaintiff's military retirement pension without an evidentiary hearing where the parties' separation agreement bars defendant's claim as a matter of law. **Anderson v. Anderson, 453.**

DOMESTIC VIOLENCE

Protective order—sufficiency of findings—The trial court erred by entering a domestic violence protective order against defendant based upon findings

DOMESTIC VIOLENCE—Continued

which show that defendant's twelve-year-old daughter felt uncomfortable because of defendant's conduct in touching her buttocks and chest area but did not fear bodily injury. **Smith v. Smith, 434.**

DRUGS

Cocaine—constructive possession—defendant not in dwelling—The trial court erred by not dismissing a charge of possession of crack cocaine with intent to sell or deliver where the evidence might have raised a strong suspicion of constructive possession, but defendant was not in the apartment when the crack was found and the evidence did not lead to the conclusion that he had exclusive use of the apartment, maintained the apartment as a residence, or had any apparent interest in the apartment or the crack cocaine. **State v. Hamilton, 152.**

Conspiracy to sell—sufficiency of evidence—The trial court did not err by refusing to dismiss charges of conspiracy to sell and deliver cocaine where both defendant and an accomplice exercised some control over the hotel room where defendant was arrested, defendant had negotiated a drug deal with a detective two days earlier, there was heavy foot traffic to the room, plastic bags and a razor blade found in the room tested positive for cocaine, and the accomplice opened the door to detectives, then ran to the bathroom and flushed the toilet. There was at least a jury question as to the existence of a conspiracy. **State v. Harris, 570.**

Destruction of evidence after initial plea agreement—no prejudice—A cocaine defendant did not establish prejudice from the destruction of the drug evidence after a plea agreement which was later set aside. The record indicates that defendant was only seeking to confirm by independent analysis the weight and composition of the substance found in plastic bags in the cellar where he was found and the State introduced a lab report without objection. **State v. Williams, 472.**

Maintaining a dwelling to sell controlled substances—sufficiency of evidence—The trial court erred by not dismissing a charge of maintaining a dwelling to keep or sell controlled substances where the facts could not be distinguished from *State v. Bowens*, 140 N.C. App 217, in which testimony that defendant was present in the dwelling on several occasions and that he lived at the address in question was not sufficient to support the conclusion that he kept or maintained the dwelling. **State v. Hamilton, 152.**

Possession of cocaine with intent to sell and deliver—sale of cocaine—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the charges of possession of cocaine with intent to sell and deliver and the sale of cocaine where the evidence showed that defendant exchanged cocaine for clothing and a video game. **State v. Carr, 335.**

Sale of controlled substance—any transfer in exchange for consideration—The trial court did not commit plain error by instructing the jury that exchanging cocaine for clothing or video games would constitute a sale of a controlled substance under N.C.G.S. § 90-95(a)(1). **State v. Carr, 335.**

ELECTIONS

Standing— public service announcements by candidate—statement of claim—A taxpayer had standing under N.C.G.S. § 163-278.28(a) to bring claims

ELECTIONS—Continued

relating to election laws arising from public service announcements by a sitting attorney general who was running for governor where the plaintiff alleged that he was a registered voter of Wake County. **Fuller v. Easley, 391.**

Standing—taxpayer suit—violation of election laws—A plaintiff did not have taxpayer standing to bring an action alleging violation of election laws in the Attorney General's use of lawsuit proceeds for public service advertisements the year before he ran for governor where plaintiff failed to allege that the Treasurer or any state entity refused to file suit to recover the proceeds, that he requested a state entity to do so, or that such a demand would have been in vain. **Fuller v. Easley, 391.**

Use of public funds for public service campaign by candidate—no actual controversy—The trial court properly granted defendants' Rule 12(b)(6) motion to dismiss plaintiff's claim for declaratory relief arising from an attorney general's use of lawsuit proceeds to fund public service announcements while he was running for governor. There was no actual controversy because the plain and clear language of N.C.G.S. § 163-278.16A prohibits advertisements only in years when the candidate's name appears on an election ballot and Council of State candidates were not on the ballot when these ads ran in 1999. Furthermore, plaintiff alleged that the lawsuit proceeds were state funds, which the Attorney General is not required to report to the State Board of Elections. **Fuller v. Easley, 391.**

EMOTIONAL DISTRESS

Fee construction contract—exclusion of evidence—The trial court did not err in an action arising out of a fee construction contract to build a house by excluding evidence of plaintiff wife's emotional distress as a component of damages for both breach of contract and for negligence. **Lassiter v. Cecil, 679.**

EMPLOYER AND EMPLOYEE

Railroad worker—delayed investigation of breathing difficulties—The trial court did not err in an asbestosis action by a railroad worker by granting summary judgment for defendant-railroad based on the three-year FELA statute of limitations where plaintiff experienced breathing difficulties in 1984 which he believed to be related to dusty working conditions, never informed his physicians of his exposure, did not seek any other medical treatment or diagnosis until after consulting an attorney in 1998, and filed this action in 1999. Plaintiff did not fulfill his affirmative duty to investigate suspected causes of his breathing difficulties. **Vincent v. CSX Transp., Inc., 700.**

Wrongful discharge—collective bargaining contract—The trial court did not err by granting summary judgment for defendants on a wrongful discharge claim by a railroad employee subject to a collective bargaining agreement which provided that he could not be removed or disciplined except for just and sufficient cause after a preliminary hearing. The proper claim for this plaintiff was breach of contract. **Trexler v. Norfolk S. Ry. Co., 466.**

Wrongful discharge—employee-at-will—violation of public policy—specific conduct and specific policy not alleged—The trial court did not err by dismissing a wrongful discharge complaint pursuant to N.C.G.S. § 1A-1, Rule

EMPLOYER AND EMPLOYEE—Continued

12(b)(6), where plaintiff alleged that he had been employed as in-house counsel by a corporation providing food service to government and private corporations, that he had discovered and sought to end violations of a compliance program that affected federal, state and local government contracts, and that he was discharged for doing what his job required as a monitor of the compliance program. Exceptions to the employment-at-will-doctrine have been recognized in North Carolina, including a prohibition against termination for a purpose in contravention of public policy, but the plaintiff here failed to allege specific conduct violating a public policy specifically expressed in North Carolina's statutes or constitution. **Considine v. Compass Grp. USA, 314.**

Wrongful discharge—retaliation—conjecture—The trial court did not err by granting summary judgment for defendants on wrongful discharge and conspiracy claims by a UNC police officer who issued an underage drinking citation to the daughter of a University trustee. Plaintiff presented nothing more than conjecture to support his allegations of retaliation and there was no evidence of any agreement to unlawfully discharge plaintiff. **Swain v. Elfland, 383.**

ESTOPPEL

Governmental agency—disability retirement—The trial court erred by finding that respondent Board of Trustees Local Governmental Employees Retirement System was estopped from denying petitioner disability retirement benefits when petitioner continued to work although in a part-time capacity based on her disability. **Wallace v. Board of Tr., 264.**

EVIDENCE

Blood sample—DNA testing—motion to suppress—search warrant—The trial court did not err in a case where defendant pled guilty to two counts of second-degree rape by denying defendant's motion to suppress evidence of a blood sample and the DNA testing performed on the blood resulting from a 23 November 1998 search warrant. **State v. Pearson, 506.**

Cross-examination—explanation of answer denied—reference to insurance claims adjustor—The trial court abused its discretion in an automobile negligence action by not permitting plaintiff to explain her answer where she had been asked whether she had hired an attorney before visiting her doctor, and she would have testified that she hired the attorney after an encounter with defendant's claims adjuster because the explanation was offered for a purpose other than to prove the existence of liability insurance and did not violate N.C.G.S. § 8C-1, Rule 411. The prejudicial effect of the testimony was not outweighed by the probative value because the extent of plaintiff's injuries was a major issue and defendant's apparent trial strategy was to characterize plaintiff as blatantly seeking profit. **Williams v. McCoy, 111.**

Cross-examination of detective—limitation—The trial court did not abuse its discretion in a first-degree rape and indecent liberties case by limiting the scope of defendant's cross-examination of a detective. **State v. Johnson, 51.**

Defendant's oral and written statements given to police—pretrial motion to suppress—Although a defendant in a first-degree murder case assigns error to the trial court's denial of his pretrial motion to suppress evidence of the oral

EVIDENCE—Continued

and written statements defendant gave to police shortly after his estranged wife's death, the ruling will not be addressed because the Court of Appeals granted defendant a new trial and rulings on motions in limine are preliminary and subject to change during the trial. **State v. Locklear, 447.**

Excited utterance—25 minutes after assault—clear motive for fabrication—The trial court did not err in an assault prosecution in which defendant argued self-defense by excluding statements defendant made to his sister 25 minutes after the altercation where defendant contended that the statements fell within the excited utterance exception to the hearsay rule, but the circumstances, coupled with defendant's clear motive for fabrication, indicate a lapse of time sufficient to allow manufacture of a statement and show that defendant's statements to his sister lacked sufficient spontaneity. **State v. Safrit, 541.**

Hearsay—out-of-court statements of witness refusing to testify—witness unavailable—order to testify required—There was no plain error in a prosecution for the first-degree sexual offense of a child and the attempted first-degree rape of a child where the victim refused to testify, the court ruled that she was unavailable, but never ordered her to testify, and a number of witnesses were allowed to testify regarding her out-of-court statements. **State v. Linton, 639.**

Hearsay—prior statements—impeachment—The trial court did not err in a prosecution for the robbery of a Bojangles by admitting alleged hearsay statements from codefendants where the codefendants' pretrial statements implicated defendant, their testimony at trial exonerated defendant, and the court instructed the jury that the statements were to be considered as impeaching rather than as substantive evidence. **State v. Featherson, 134.**

Hearsay—unavailable declarant—statement against interest—trustworthiness—The trial court did not abuse its discretion in an armed robbery case by excluding the testimony of three witnesses regarding statements allegedly made to them by an unavailable deceased witness regarding the identity of the perpetrator of an attempted armed robbery and murder on the basis that the statements were hearsay that did not fall within the statement against interest exception provided by N.C.G.S. § 8C-1, Rule 804(b)(3). **State v. Wardrett, 409.**

Medical malpractice—expert testimony—standard of care—The trial court did not err in a medical malpractice action by excluding testimony from plaintiff's expert and by granting a directed verdict for defendants where the alleged malpractice occurred in Wilmington and plaintiffs failed to establish that their expert was familiar with the standard of care practiced in Wilmington or similar communities. The previous opinion in the same case at 142 N.C. App. 561 is superseded. **Henry v. Southeastern OB-GYN Assocs., P.A., 208.**

Medical records—discharge notation—psychiatric history—not admissible—The trial court did not err in a prosecution for kidnapping, rape, and other offenses by excluding the victim's medical discharge summary and other medical records. **State v. Galloway, 555.**

Nontestimonial identification order—hair and saliva samples—motion to suppress—probable cause—The trial court did not err in a case where defendant pled guilty to two counts of second-degree rape by denying defendant's motion to suppress evidence of hair and saliva samples obtained from a nontes-

EVIDENCE—Continued

timonial identification order (NIO) even though defendant contends the NIO was allegedly not appropriately obtained and there was allegedly no probable cause. **State v. Pearson, 506.**

Nontestimonial identification order—hair and saliva samples—motion to suppress—statutory violations—The trial court did not err in a case where defendant pled guilty to two counts of second-degree rape by denying defendant's motion to suppress evidence of hair and saliva samples obtained from a nontestimonial identification order (NIO) even though defendant contends there were statutory violations after the NIO was obtained. **State v. Pearson, 506.**

Photostatic reproduction—hotel registration card—authenticity—chain of custody—The trial court did not err in a first-degree murder, attempted murder, and robbery with a dangerous weapon case by admitting a photostatic reproduction of a hotel registration card. **State v. Ferguson, 302.**

Prior crimes or acts—sexual acts—common intent, scheme and design, and opportunity—The trial court did not abuse its discretion in a first-degree statutory rape and taking indecent liberties case by admitting the testimony of two of the victims concerning defendant's prior sexual acts. **State v. Beckham, 119.**

Prior crimes or acts—sexual acts—remoteness—intent and absence of accident—The trial court did not abuse its discretion in a first-degree statutory rape and taking indecent liberties case by admitting the testimony of two of the State's witnesses concerning defendant's prior sexual acts with minor females some twelve and fourteen years prior to these incidents. **State v. Beckham, 119.**

Prior crimes or acts—victim's testimony of sexual acts committed by defendant—common plan or scheme—The trial court did not err in a first-degree rape and indecent liberties case by admitting the testimony of a prior victim as to sexual acts committed against her by defendant. **State v. Johnson, 51.**

Property owner's opinion of value—not familiar with nearby land values—There was competent evidence to support the trial court's finding of the value of a tract of land in a contested partition sale where a co-owner testified to its value. There is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property. **Goodson v. Goodson, 356.**

Recorded exculpatory statement–testimony about subsequent statement–door not opened—The State did not "open the door" to the admission of defendant's recorded exculpatory statement to a deputy in a prosecution for felonious assault and armed robbery when it elicited testimony from the deputy that he and defendant had a conversation at the conclusion of defendant's recorded interview during which defendant mentioned having a head injury and asked the deputy to look at it because defendant's remarks to the deputy about his head injury constituted a separate verbal transaction from defendant's prior recorded statement, and the State did not attempt to offer into evidence any portion of defendant's recorded statement or any testimony concerning its contents. **State v. Safrit, 541.**

Relevancy—automobile accident—date attorney retained—The trial court did not err in an automobile negligence action by allowing defendant to ask plain-

EVIDENCE—Continued

tiff on cross-examination when she had retained an attorney. *Thompson v. James*, 80 N.C. App. 535, indicates that inquiry concerning when a plaintiff hired an attorney is admissible to impeach a litigious plaintiff and is relevant to rebut the existence and extent of plaintiff's injuries. Although there was no evidence that this plaintiff was litigious, the extent of her injuries was a major issue at trial. **Williams v. McCoy, 111.**

SBI Lab Report—cocaine—motion in limine—notice—The trial court did not err in a possession of cocaine with intent to sell and deliver and sale of cocaine case by denying defendant's motion in limine and allowing the State to introduce an SBI Lab Report regarding the chemical contents of the substance received from defendant into evidence without further authentication under N.C.G.S. § 90-95(g). **State v. Carr, 335.**

Subsequent crime or act—defendant's use of handgun—The trial court did not err in a prosecution for first-degree murder, attempted murder, and robbery with a dangerous weapon which occurred in June 1995 by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) from a witness about an incident in Asheville in July 1995 where defendant had a handgun and threatened to kill someone if she did not tell him where he could locate his marijuana. **State v. Ferguson, 302.**

Telephone transcript—not entered into evidence—verbatim reading—The trial court did not abuse its discretion in an action on a note by sustaining an objection to defendant's verbatim reading of a telephone transcript that had not been entered into evidence, but the court allowed defendant to ask plaintiff questions about the telephone conversations and indicated that defendant would be allowed to enter the transcripts into evidence after a recess for plaintiff to review the transcripts. **Crist v. Crist, 418.**

GUARANTY

Commercial lease—holdover tenancy—lease amendment and extension—signing in capacity as corporate officer—The trial court did not err in an action seeking damages in connection with a lease of commercial property by affirming summary judgment in favor defendant Betty Alberty, but it did err by affirming summary judgment in favor of Nathan Alberty, where defendants' guaranty did not extend to a new lease extension executed more than two years after the original lease expired, but a genuine issue of fact existed as to whether defendant Nathan Alberty is estopped to deny the continuance of his personal guaranty based on his signing the lease extension as a corporate officer of the lessee. **Sherwin-Williams Co. v. ASBN, Inc., 176.**

Personal guaranty—franchise agreement—The trial court did not err by granting summary judgment in favor of a franchisor on the issue of indemnity under a personal guaranty by the franchisee's president for unpaid rent under the lease and sublease and for reasonable attorney fees. **Carolina Place Joint Venture v. Flamers Charburgers, Inc., 696.**

HOMICIDE

Attempted second-degree murder—conviction set aside—A conviction for attempted second-degree murder was set aside pursuant to *State v. Coble*, 351

HOMICIDE—Continued

N.C. 448, which held that no such crime exists in North Carolina. **State v. Galloway, 555.**

First-degree murder—felony murder rule—felonious child abuse—The trial court did not err by convicting defendant for the first-degree murder of her two-year-old child based on the felony murder rule using the underlying felony of felonious child abuse with the use of a deadly weapon. **State v. Krider, 711.**

First-degree murder—indictment—constitutionality—Although defendant contends the trial court erred by denying his motion to dismiss the indictment for first-degree murder based on a failure to disclose the theory and precise elements, defendant concedes that this precise issue has been considered and rejected by our Supreme Court. **State v. Ferguson, 302.**

First-degree murder—short-form indictment—constitutionality—The use of a short-form indictment in a first-degree murder case was not erroneous even though it failed to cite the elements of premeditation and deliberation and lying in wait. **State v. Locklear, 447.**

Jury instruction—self-defense—The trial court did not err in a second-degree murder case by refusing to instruct the jury on self-defense based on defendant's alleged fear for his own safety and the safety of his wife. **State v. Jackson, 86.**

Second-degree murder—voluntary manslaughter—motion for nonsuit—The trial court did not err by denying defendant's motion for nonsuit as to the charges of second-degree murder and the lesser included offense of voluntary manslaughter where defendant intentionally struck decedent with his automobile. **State v. Jackson, 86.**

HUSBAND AND WIFE

Sale of shopping center–breach of contract—agency of husband for wife—The trial court erred by granting a directed verdict in favor of defendant wife as to plaintiff's breach of contract claim arising out of the sale of a shopping center because defendant received a benefit from the contract and her husband acted as her agent in negotiating the contract. **Lake Mary Ltd. Part. v. Johnston, 525.**

IMMUNITY

***Emergency management workers*—private contractor**—The trial court properly denied summary judgment for defendants in a negligence action involving a dump truck assisting in hurricane clean-up efforts where defendants contended that they were entitled to governmental immunity under N.C.G.S. § 166A-14 as emergency management workers, but there was a genuine issue of fact as to the relationship between the defendants and the State of North Carolina, any political subdivision thereof, and the Army Corps of Engineers. There were also genuine issues of fact as to the claim of immunity under N.C.G.S. § 166A-15 in that defendants did not present evidence to suggest that they were sheltering, protecting, safeguarding, or aiding persons, as that statute requires. **Ray v. Lewis Hauling & Excavating, Inc., 94.**

IMMUNITY—Continued

Parole Commission and Corrections officials—miscalculation of parole eligibility—Summary judgment should have been granted on plaintiff's negligence claims arising from the miscalculation of his parole eligibility date where the remaining defendants were entitled to public official immunity. Plaintiff did not allege a waiver; did not show evidence that defendants' conduct was malicious, corrupt or outside the scope of their official authority; and failed to show injury. **Vest v. Easley, 70.**

INDICTMENT AND INFORMATION

Subsequent information—different offense—There was no error in a prosecution arising from the sexual abuse of a child where defendant was originally indicted for two counts of statutory rape or sexual offense against a person 13 to 15 years old; an information on one count alleging the offense of indecent liberties was included in the record and may have been filed (but may have been submitted to the trial court as a part of plea bargain which was rejected); and defendant contends that the court erred by proceeding to trial on the two original indictments after the information was filed. **State v. Bailey, 13.**

INJUNCTION

Soil extraction—dissolution of preliminary injunction—denial of permanent injunction—The trial court did not err by dissolving a preliminary injunction and by denying intervenors' request for a permanent injunction to prevent defendant landowner's soil extraction on land that defendant planned to operate a horse farm for her family's enjoyment because defendant's activities are exempt from the city/county zoning ordinance. **County of Durham v. Roberts, 665.**

INSURANCE

Automobile—excess liability coverage—The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant driver and finding that all four business auto insurance policies afforded coverage to plaintiffs. **Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co., 278.**

Automobile—supplemental payments—prejudgment interest over policy limits—The trial court did not err in an action arising out of an automobile accident by declaring that all four business auto insurance policies provided supplemental payments for prejudgment interest over the policy limits. **Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co., 278.**

Theft—owner of loaned property—no enforceable contract right—no subject matter jurisdiction—The owner of a stolen customized motorcycle did not have an enforceable contract right against an insurance company and the court did not have subject matter jurisdiction where petitioner loaned the motorcycle to a furniture store for use as a display, it was stolen from the furniture store, petitioner filed a claim under the store's policy, and respondent denied the claim. Petitioner is not an interested person under N.C.G.S. § 1-254. **Whittaker v. Furniture Factory Outlet Shops, 169.**

JUDGMENTS

Consent judgment—motion to set aside—unauthorized action by attorney—The trial court did not abuse its discretion by denying defendants' Rule 60(b)(4) motion to stay and vacate a memorandum of consent order signed by a trial judge where defendants contended that their attorney had agreed to the settlement without their consent. A party seeking to set aside a consent judgment has the burden of overcoming the presumption that counsel had the authority to enter the judgment on behalf of the client; an affidavit from this attorney stating that he lacked that authority was properly excluded as not duly served and defendants did not overcome their burden of proof. **Royal v. Hartle, 181.**

Date of entry—filing with clerk—The trial court incorrectly found that a judgment of forfeiture of a bail bond was entered on 8 April rather than on 20 April, which affects the interest owed, where the order was signed on 8 April but filed on 20 April. An order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. **State v. Coronel, 237.**

Performance bond—amount—evidence sufficient—The trial court did not abuse its discretion by requiring the owners of a subdivision to post a $600,000 performance bond as a part of an order requiring specific performance of a consent judgment to complete subdivision amenities where the amount of the bond was supported by the evidence. **Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp., 290.**

Rule 60 relief—default judgment—party not informed of deposition dates by attorney—The trial court did not abuse its discretion by denying defendant's motion for relief from a default judgment following its failure to appear for depositions where defendant contended that its attorneys had neglected to keep it informed and that this neglect rose to the level of fraud. Attorney negligence is not excusable neglect warranting relief under Rule 60(b), the fraud for which Rule 60(b)(3) provides relief is the misconduct of an adverse party rather than the fraud of a party's attorney, and Rule 60(b)(6) does not apply because defendant's attorneys did not bribe or improperly influence the court and their conduct did not constitute a fraud upon the court or upon defendant. **Henderson v. Wachovia Bank of N.C., 621.**

JUDICIAL SALES

Amended notice not received—sufficiency of evidence—There was sufficient evidence in a contested partition sale by commissioners to support the court's finding that petitioners did not receive an amended notice of sale reflecting a reduced price where the petitioners testified that they did not receive the notice and one commissioner testified that he had sent the notice to them. **Goodson v. Goodson, 356.**

Flawed commissioners' sale—innocent purchasers—deed not set aside—The trial court did not err by refusing to set aside a commissioners' deed where the current landowners purchased the tract with no notice of any dispute. An innocent purchaser takes title free of equities of which he had no actual or constructive notice. Furthermore, the presents owners were not joined as necessary parties. **Goodson v. Goodson, 356.**

Partition sale—negligence of commissioners—liability of commissioners—The trial court did not err in a contested partition sale arising from the

JUDICIAL SALES—Continued

alleged failure of the commissioners to deliver an amended notice of sale to petitioners by not ruling on the extent of the commissioners' liability and awarding damages. The findings regarding the commissioners' negligence supported the decision to deny commissioners' fees, but the extent of the commissioners' relative liability was not litigated. **Goodson v. Goodson, 356.**

JURISDICTION

Subject matter—raised by appellate court—The Court of Appeals dismissed for lack of subject matter jurisdiction a declaratory judgment action alleging that a furniture store's insurance policy covered a customized motorcycle used as display and stolen from the store. A challenge to subject matter jurisdiction may be made at any time and the issue may be raised by the appellate court on its own motion even when not raised by the parties. **Whittaker v. Furniture Factory Outlet Shops, 169.**

JURY

Alternate manner and procedure of selection—employees of sheriff's department—The trial court did not err in a medical malpractice action by the manner and procedure of selecting and summoning jurors even though jury selection is handled in Richmond County by employees of the sheriff's department. **Sweatt v. Wong, 33.**

Selection—reopening examination—number of peremptory challenges—The trial court erred in a first-degree murder case by denying defendant the full number of peremptory challenges during jury selection as required by N.C.G.S. § 15A-1217 when it reopened examination of a juror previously accepted by the parties and ruled that defendant had no peremptory challenges remaining with which to excuse this juror because defendant was not required to exhaust his supply of peremptory challenges left over from regulary jury selection until he had used both of the challenges allotted to him for alternate jurors. **State v. Locklear, 447.**

JUVENILES

Child care provider—disqualification for criminal record—judicial review—APA inapplicable—The district court erred by partially transferring jurisdiction to the Office of Administrative Hearings to review the disqualification of petitioner as a child care provider under N.C.G.S. § 110-90.2(a)(2) on the basis of a criminal record because the district court is the proper forum for a challenge of the decision disqualifying petitioner. **Long v. N.C. Dep't of Human Res., 186.**

Delinquency—condition of probation—restitution—The trial court erred by ordering a juvenile to pay restitution to the North Carolina Victim's Compensation Fund as a condition of his probation based on his alleged delinquency for the charge of crime against nature where the court failed to consider the juvenile's best interest and whether the juvenile, not his family, had the ability to pay restitution. **In re Heil, 24.**

JUVENILES—Continued

Delinquency—crime against nature—motion to dismiss—The trial court did not err by failing to dismiss a juvenile delinquency petition at the close of all evidence regarding the charge of crime against nature under N.C.G.S. § 14-177 where there was some evidence that penetration had occurred. **In re Heil, 24.**

KIDNAPPING

Second-degree—restraint and removal—integral part of robbery—The trial court erred by denying a motion to dismiss a second-degree kidnapping charge in an action arising from an armed robbery prosecution where the restraint and removal of the victim were an inherent and integral part of the robbery. **State v. Featherson, 134.**

LANDLORD AND TENANT

Implied warranty of habitability—breach—calculation of damages—There was competent evidence in a nonjury trial to support the trial court's findings and conclusions that plaintiff breached the implied warranty of habitability; however, defendant's damages were improperly calculated. **Cardwell v. Henry, 194.**

MOTOR VEHICLES

Driving while impaired—Intoxilyzer test results—appreciably impaired prong—The trial court erred in a driving while impaired case by admitting the Intoxilyzer test results where there was no showing that the arresting officer who administered the test possessed a current permit issued by the Department of Health and Human Services. **State v. Roach, 159.**

Negligence—left turn at stoplight—The trial court erred in an automobile accident case by granting summary judgment for plaintiff on the issue of liability where a reasonable juror could have found that plaintiff-Love was contributorily negligent in proceeding into an intersection without keeping a proper lookout, and that defendant-Clarence Singleton proceeded with due care in making his left turn in that the sun was in his eyes, the stoplight was yellow, and plaintiffs' van was at least 20 feet from the intersection. Even if Love had the benefit of a green light, which is in dispute, she had an obligation to maintain a proper lookout and should not have relied blindly on the green light. **Love v. Singleton, 488.**

NEGLIGENCE

Fee construction contract—judgment notwithstanding the verdict—The trial court did not err in an action arising out of a fee construction contract to build a house by granting judgment notwithstanding the verdict on the issue of defendant corporate officer's negligence because there was no corporate tort for which the corporate officer could be held liable. **Lassiter v. Cecil, 679.**

NEGOTIABLE INSTRUMENTS

Promissory note—consideration—The trial court did not err in an action on a promissory note given in a divorce settlement by not granting defendant's motions for directed verdict or judgment notwithstanding the verdict where

NEGOTIABLE INSTRUMENTS—Continued

defendant alleged that the evidence at trial failed to establish consideration for the promissory note, but evidence that the note was under seal raised a presumption of consideration; there was evidence that plaintiff detrimentally relied on defendant's promise; and there was evidence of the benefit the parties' son would receive from a house purchased after the note was given. **Crist v. Crist, 418.**

NOTICE

Consent judgment recorded in register of deeds—purchaser's notice of restrictions—The trial court did not err by adding respondent-Bluebird Corporation to an action to require specific performance of a consent judgment involving the completion of subdivision amenities where the shareholders in Bluebird were the sole shareholder and corporate secretary of Harborgate, the corporation which purchased the subdivision from the original developer and then transferred it to Bluebird, the consent judgment was recorded in the office of the Register of Deeds, and Bluebird is charged with constructive notice of the restrictions contained therein. **Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp., 290.**

OPEN MEETINGS

Government body—attorney-client exception—closed session minutes—The trial court erred by concluding that defendant Henderson County Board of Commissioners violated the Open Meetings Law and that their closed meeting was not within the attorney-client privilege under N.C.G.S. § 143-318.11. **Multimedia Pub'g of N.C., Inc. v. Henderson Cty., 290.**

PARTIES

Real party in interest—third-party claim under theft insurance—no judgment against policyholder—Petitioner did not have standing to bring this action directly against respondent where he loaned a customized motorcycle to a furniture store as a display, the motorcycle was stolen, petitioner's claim under the furniture store's insurance policy was denied, and petitioner then filed this declaratory judgment action alleging that the loss was covered by the policy, and the furniture store was voluntarily dismissed from the action. Although N.C.G.S. § 1A-1, Rule 17(a) provides that every claim shall be prosecuted or defended in the name of the real party in interest, petitioner is required to have a legal right to enforce the claim in question and, without a judgment against the furniture store, petitioner does not have an enforceable contractual right under the insurance policy. **Whittaker v. Furniture Factory Outlet Shops, 169.**

PARTITION

Judicial sale—negligence by commissioners—relevancy to denial of fees—The trial court's findings when denying a motion to set aside a partition sale regarding negligence by the commissioners in failing to send to petitioners an amended notice of sale was relevant to support the court's decision to deny commissioners' fees. **Goodson v. Goodson, 356.**

PENALTIES, FINES AND FORFEITURES

Taxpayer action—qui tam—A taxpayer did not have standing under a qui tam theory to bring an action arising from an attorney general's public service announcements the year before he ran for governor. Qui tam actions are brought under a statute that allows a private person to sue for a penalty, part of which the government or a specified public institution will receive. There is no statute allowing this plaintiff to sue for a penalty based upon alleged constitutional or election law violations as specified in the complaint. **Fuller v. Easley, 391.**

PENSIONS AND RETIREMENT

Disability benefits—continued service—The trial court erred by reversing respondent Board of Trustees Local Governmental Employees Retirement System's final agency decision concluding that petitioner was not entitled to disability retirement benefits for the months of March 1997 and October 1997 through May 1999 when petitioner continued to work although in a part-time capacity based on her disability. **Wallace v. Board of Tr., 264.**

PROBATION AND PAROLE

Anticipatory violation bond—The trial courts were urged to exercise caution in setting anticipatory probation violation appearance bonds. **State v. Hilbert, 440.**

PROCESS AND SERVICE

Service on corporate agent—defendant clearly identified—The trial court erred by dismissing a retaliatory discharge action for lack of jurisdiction where the summons was directed to Betty Koontz and sent via certified mail to Ms. Koontz as registered agent. Plaintiff complied with the statutory requirements for service upon the registered agent and the officer of a corporation because Ms. Koontz was the president and registered agent of defendant-corporation. The service upon defendant was sufficient even though the summons did not indicate the capacity in which Ms. Koontz was being served because the summons clearly named Watauga Building Supply, Inc. as defendant. **Bentley v. Watauga Bldg. Supply, Inc., 460.**

Summons—president and registered agent—capacity not identified on summons—A summons was not fatally defective where it did not identify the person served (Ms. Koontz) as the registered agent or president of defendant-corporation. The return of service shows that copies of the summons and complaint were delivered to Ms. Koontz and there is no evidence to contradict the affidavit of service identifying Ms. Koontz as the president and registered agent of defendant. While it is the better practice to identify the capacity in which the person receiving service is acting, such failure is not fatal. **Bentley v. Watauga Bldg. Supply, Inc., 460.**

PUBLIC OFFICERS AND EMPLOYEES

Whistleblower claim—failure to exhaust administrative remedies—The trial court did not err by dismissing a UNC police officer's whistleblower claim for failure to exhaust administrative remedies where there was no question that he had unsuccessfully exercised his right to seek relief from the State Personnel

PUBLIC OFFICERS AND EMPLOYEES—Continued

Commission under N.C.G.S. § 126-34.1(a)(7) and did not seek judicial review. **Swain v. Elfland, 383.**

PUBLIC RECORDS

Government body—closed session minutes—The trial court did not err by concluding that defendant Henderson County Board of Commissioners violated the Public Records Act when it reconvened the public session of its meeting and explained that the county attorney had in the closed session suggested amendments to the draft of the moratorium previously presented because the Board had a duty to disclose the minutes of the closed session to the public. **Multimedia Pub'g of N.C., Inc. v. Henderson Cty., 365.**

RAPE

First-degree-instructions—disjunctive—The trial court did not err by instructing the jury that one of the elements of first-degree rape was that the defendant employed or displayed a dangerous or deadly weapon or that defendant inflicted serious injury or that defendant aided and abetted one or more persons. **State v. Galloway, 555.**

First-degree—motion to dismiss—alleged variance between evidence and bill of particulars—window of time—The trial court did not err in a first-degree rape case by denying defendant's motion to dismiss based on an alleged variance between the evidence at trial and the State's responses to defendant's request for a bill of particulars regarding the window of time in which the alleged crime took place. **State v. Johnson, 51.**

Short-form indictments—constitutionality—Although defendant contends the short-form indictments charging him with first-degree rape and first-degree sexual offense were deficient based on a failure to allege the elements that distinguished the crimes as first-degree, our Supreme Court has already upheld the constitutionality of these indictments. **State v. Graham, 483.**

ROBBERY

Armed—erroneous jury instruction—no prejudicial error—Although the trial court erred in an armed robbery case by its jury instructions stating the evidence of the armed robbery was admitted for a limited purpose when it was admitted as substantive evidence, defendant has failed to show prejudicial error. **State v. Wardrett, 409.**

Armed—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery where defendant was identified by three witnesses as the perpetrator. **State v. Wardrett, 409.**

Armed-sufficiency of evidence—statements by codefendants—The trial court did not err in an armed robbery and conspiracy prosecution by denying defendant's motions to dismiss where statements by codefendants (held to be properly admitted) were sufficient standing alone to support defendant's convictions. **State v. Featherson, 134.**

SEARCH AND SEIZURE

Cocaine defendant found in cellar—search of cellar—The trial court did not err by denying a defendant's motion to suppress cocaine seized from a cellar where an officer responded to a domestic call from a woman who reported that she had previously sworn out a warrant for defendant's arrest for assaulting her and that defendant was in the cellar of the house they shared; officers approached the cellar and called for defendant to come out; he came up the steps with his hands up within a few seconds; officers arrested him for assault on a female, placed him in the custody of another officer, and searched the cellar; and they found broken crack pipes, marijuana, $3,641 in a bank bag in a hole in the duct work, and a plastic bag containing rocks of cocaine that was partially covered by dirt. **State v. Williams, 472.**

Items seized during arrest in hotel room—ruse to open door—search of pager memory—The trial court did not err in a cocaine prosecution by denying defendant's motion to suppress evidence seized during his arrest where officers called defendant's hotel room and told him that maintenance would be coming to fix a smoke detector, then knocked on the door and answered "maintenance" when asked who was there. Officers may have used a ruse to get the room door open, but the identity of the officers was immediately obvious and they did not step into the room until additional exigent circumstances arose. Defendant's pager, the numbers therein, and currency were found on defendant's person after he was arrested; the detective was entitled to search the pager's memory without a warrant because he had probable cause to believe that the pager contained information that would assist in the investigation of the crime. **State v. Harris, 570.**

SENTENCING

Assault—aggravating range—serious injury—The trial court did not err in an assault case by sentencing defendant under the aggravating range of sentences where the victim's injuries went beyond the "serious injury" necessary to convict. **State v. Wampler, 127.**

Burglary—aggravating factor—presence of young victim—The trial court erred by aggravating a first-degree burglary sentence based on the alleged presence of a very young victim where there was no evidence that defendant targeted the victims' home because of the presence of young children, that he knew the age of the occupants before breaking into the residence, that he entered the children's rooms, or that they were aware that he was in the house. **State v. Hilbert, 440.**

Burglary—mitigating circumstance—completion of drug treatment program—The trial court erred when sentencing defendant for first-degree burglary by not finding the statutory mitigating factor that defendant had completed a drug treatment program where the court was informed that defendant had entered himself in a program while awaiting trial, a certificate verifying successful completion of the program was handed to the trial court, no objection was made by the State, and no evidence to the contrary was presented. **State v. Hilbert, 440.**

Habitual felon—prior habitual felon prosecution—same felonies—collateral estoppel—The trial court erred by denying defendant's motion to dismiss a

SENTENCING—Continued

violent habitual felon indictment where another jury in a previous prosecution had found defendant not guilty of being a violent habitual felon based on the same two alleged prior violent felony convictions. The issue to be determined in this case was raised and litigated in the prior action, it was material and relevant to the disposition of the prior action, it was necessary and essential to the jury's not guilty verdict in that action, and the State was collaterally estopped. **State v. Safrit, 541.**

SETOFF AND RECOUPMENT

Sale of shopping center—counterclaims—single net judgment—abuse of discretion standard—The trial court did not err by failing to grant plaintiff's request to treat defendants' counterclaims arising out of the sale of a shopping center as setoffs to the claims of plaintiff and by not entering a single net judgment. **Lake Mary Ltd. Part. v. Johnston, 525.**

SEXUAL OFFENSES

Indecent liberties—motion to dismiss—alleged variance between evidence and bill of particulars—window of time—The trial court did not err in an indecent liberties case by denying defendant's motion to dismiss based on an alleged variance between the evidence at trial and the State's responses to defendant's request for a bill of particulars regarding the window of time in which the alleged crime took place. **State v. Johnson, 51.**

Short-form indictments—constitutionality—Although defendant contends the short-form indictments charging him with first-degree rape and first-degree sexual offense were deficient based on a failure to allege the elements that distinguished the crimes as first-degree, our Supreme Court has already upheld the constitutionality of these indictments. **State v. Graham, 483.**

SPECIFIC PERFORMANCE

Subdivision amenities—The trial court did not abuse its discretion by requiring that respondents Harborgate and Bluebird specifically perform the obligations of a consent judgment where Harborgate and Bluebird were successive owners of a subdivision, both corporations had common owners, the consent judgment involved the completion of subdivision amenities, and Harborgate contended that specific performance was impossible. Harborgate voluntarily agreed to be a party to the consent judgment and to specifically perform its obligations, and Bluebird accepted that obligation by accepting the transfer of the subdivision. Moreover, Harborgate and Bluebird failed to establish that specific performance was impossible. **Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp., 290.**

STATUTE OF LIMITATIONS

Fraud—failure to pursue provisional perk test—due diligence—summary judgment improper—The trial court improperly granted summary judgment for defendant based on the statute of limitations where plaintiffs bought real property with defendant as the seller's broker; the contract required a satisfactory "perk" test; defendant provided plaintiffs with a recorded map containing a cer-

STATUTE OF LIMITATIONS—Continued

tification of provisional approval for subsurface sewer treatment subject to the issuance of permits by the Health Department; the closing occurred in January of 1989; plaintiffs never developed the property and entered into a contract to sell in March of 1998; a permit was denied by the Health Department and the contract was terminated; and plaintiffs brought an action on several claims, including fraud. **Spears v. Moore, 706.**

Wrongful discharge—filing state action after voluntary dismissal of federal action—The trial court did not err in a wrongful discharge action by granting summary judgment in favor of defendant employer based on the expiration of the three-year statute of limitations under N.C.G.S. § 1-52(5) even though plaintiff filed the instant state action within one year of the voluntary dismissal without prejudice of his non-diversity federal complaint under Federal Rule 41. **Renegar v. R.J. Reynolds Tobacco Co., 78.**

TAXATION

Real property appraisal—country club fees included—A decision by the Property Tax Commission was affirmed where the property owners objected to the inclusion in their tax appraisal of their country club initiation fee where they were required by their restrictive covenants to join the country club and to pay the difference between the initiation fee of the previous owner and the current fee. Although the homeowners contend membership in the country club is a form of intangible personal property, a challenge to tax valuation requires a taxpayer to demonstrate that an erroneous standard was employed by the assessor and that the use of this standard caused the valuation to be substantially in excess of its true value. The taxpayers in this case failed to produce any evidence that their properties were appraised at an amount substantially exceeding true value. **In re Appeal of Bermuda Run Prop. Owners, 672.**

TORT CLAIMS ACT

Reversal of deputy commissioner by Commission—credibility of witness—The Industrial Commission did not err by reversing a deputy commissioner's decision in a Tort Claims action arising from the shooting of a motorist by a Highway Patrol Trooper where a deputy commissioner had found that the Trooper's testimony was not credible and that his use of deadly force was negligent, and the Commission found that the Trooper's testimony was credible, that the Trooper had believed that he was in danger of being shot, and that his use of deadly force was deliberate and not negligent. The Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner. **Fennell v. N.C. Dep't of Crime Control & Pub. Safety, 584.**

Shooting by Highway Patrol Trooper—intentional rather than negligent—The Industrial Commission did not err in a Tort Claims action by reversing a deputy commissioner's finding of negligence arising from a shooting by a Highway Patrol Trooper where competent evidence supports the Commission's findings that the Trooper believed that he was in danger of being shot and that he intended deadly force. The Tort Claims Act does not permit recovery for intentional injuries. **Fennell v. N.C. Dep't of Crime Control & Pub. Safety, 584.**

TRIALS

Alleged failure to exercise discretion—consideration of motion and attachments—The trial court did not abuse its discretion by denying without a hearing defendant's motion for reconsideration of a default judgment entered for failure to appear at depositions where defendant claimed that its attorneys did not keep it abreast of salient dates and issues. Although defendant contends that the court failed to exercise its discretion and that the court had to believe the evidence before it because there was no conflicting evidence, the court's order indicated careful consideration of the motion and its attachments and the court did evaluate evidence from both sides. **Henderson v. Wachovia Bank of N.C., 621.**

Bail bond remittance—action without jury—finding supported by evidence—Competent evidence supported the finding of a trial court, sitting without a jury to consider remittance of a bail bond forfeiture, that the sureties made no efforts to locate the defendant prior to a specific date. Although the sureties contend that there was evidence to support a contrary finding, the credibility of the evidence is weighed by the trial court rather than the appellate court. **State v. Coronel, 237.**

Verdict form—question to court—The trial court did not err in an action on a note by refusing to accept the jury's initial verdict where the jury had a question about the verdict form; a figure may have been written on the form, but there was no indication that the jury had submitted a verdict; the judge reread the instructions to the jury; and the jury completed their deliberation. **Crist v. Crist, 418.**

UNFAIR TRADE PRACTICES

Sale of shopping center—agency of husband for wife—The trial court erred by granting a directed verdict in favor of defendant wife as to plaintiff's unfair and deceptive practices claim arising out of the sale of a shopping center because defendant's husband acted as her agent when he took tenant rent checks belonging to plaintiff. **Lake Mary Ltd. Part. v. Johnston, 525.**

Sale of shopping center—taking of tenant rent checks—inequitable assertion of power and position—The trial court did not err by granting plaintiff's motion for a directed verdict on an unfair and deceptive practices claim under N.C.G.S. § 75-1.1 arising out of the sale of a shopping center when defendant husband intentionally deposited rental checks belonging to plaintiff after plaintiff purchased all of defendants' right, title, and interest in all leases on the pertinent property. **Lake Mary Ltd. Part. v. Johnston, 525.**

UTILITIES

Competing electric companies—two buildings—premises—separate metering—The trial court did not err by granting partial summary judgment in favor of plaintiff city ordering defendant electric company to cease supplying electric service to the new building of the Havelock Animal Hospital when plaintiff originally supplied the electric service to the old building, and by granting plaintiff a permanent injunction barring defendant from providing electric service to the hospital. **City of New Bern v. Carteret-Craven Elec. Membership Corp., 140.**

VENDOR AND PURCHASER

Purchase of realty—breach of contract—earnest money—The trial court did not err by finding defendant was in breach of contract to purchase certain realty from plaintiff and by allowing plaintiff to retain $6,500 in earnest money when defendant declared the contract null and void just a week after the failed closing where defendant failed to give plaintiff the thirty days provided in the contract to cure a title defect. **Dishner Developers, Inc. v. Brown, 375.**

Sale of real property–breach of contract—motion for directed verdict—The trial court did not err by denying plaintiff purchaser's motion for a directed verdict on defendant sellers' breach of contract claims arising out of the sale of a shopping center. **Lake Mary Ltd. Part. v. Johnston, 525.**

Sale of shopping center—closing date—entitlement to rental payments—The trial court did not err by ruling as a matter of law that the closing of the sale of a shopping center took place on 31 October 1997 and defendants were not entitled to any rental payments after that date. **Lake Mary Ltd. Part. v. Johnston, 525.**

Sale of shopping center–tax reimbursements—method of calculation—The trial court did not err by ruling as a matter of law that plaintiff's calculation of tax reimbursements arising out of the sale of a shopping center was reasonable and plaintiff was not obligated to follow the method previously used by defendants. **Lake Mary Ltd. Part. v. Johnston, 525.**

VENUE

Change—lack of jurisdiction—no prejudice—Although the trial court of Durham County erred by denying the Board of Trustees Local Governmental Employees Retirement System's (Board) motion to dismiss based on lack of jurisdiction to order a change of venue to Wake County Superior Court, the error did not prejudice the Board because the Board argued that petitioner should have filed her petition for judicial review in Wake County or in her county of residence. **Wallace v. Board of Tr., 264.**

WITNESSES

Credibility—cross-examination—The trial court did not err in a prosecution for kidnapping, rape, and other offenses by not allowing defendants to fully attack the credibility of the victim. During cross-examination, the victim admitted that she was addicted to crack cocaine and had smoked crack on the day of these crimes; she denied an alleged suicide attempt; she admitted visiting psychiatrists, being involuntarily admitted to a "detox" center and leaving it against medical recommendation; evidence was admitted that she used several aliases and had been convicted of writing bad checks, driving with a revoked license, and prostitution; and she admitted that this was a difficult time in her life, with financial problems, depression, and her husband's recent imprisonment. **State v. Galloway, 555.**

Expert—medical malpractice—general surgeon—An emergency room physician who was board certified in laparoscopic procedures was qualified to testify as an expert witness under N.C.G.S. § 8C-1, Rule 702 against defendant general surgeons as to the applicable standard of care for a laparoscopic cholecystectomy. **Sweatt v. Wong, 33.**

WORKERS' COMPENSATION

Attorney fees—unilateral stoppage of payments—The Industrial Commission was required to address the issue of whether attorney fees were due in a workers' compensation action where defendant did not present evidence to rebut the presumption of disability or to explain why it stopped benefits. **Bostick v. Kinston-Neuse Corp., 102.**

Average weekly wage—calculation—The Industrial Commission did not err in a workers' compensation case by its calculation of plaintiff subcontractor's lost wages using the amount he would have earned in 1995 divided by fifty-two weeks in order to get his average weekly wage based on what plaintiff was paid before his injury and what another employee was paid for completing the job after plaintiff was injured. **Davis v. Taylor-Wilkes Helicopter Serv., Inc., 1.**

Average weekly wage-computation—outside employment—The Industrial Commission did not err in a workers' compensation action by not including plaintiff's National Guard salary when computing his average weekly wage. A claimant's average weekly wage is computed using only the wages received in the employment in which he was injured. **Bostick v. Kinston-Neuse Corp., 102.**

Benefits—failure to file written notice within thirty days—The Industrial Commission did not err in a workers' compensation case by finding that defendant company was not prejudiced by plaintiff subcontractor's failure to file written notice within thirty days of his accident as required by N.C.G.S. § 97-22. **Davis v. Taylor-Wilkes Helicopter Serv., Inc., 1.**

Cause of injury—conflicting medical testimony—The trial court erred in a workers' compensation action by finding that plaintiff's left tennis elbow was not caused or aggravated by his compensable right tennis elbow. **Bostick v. Kinston-Neuse Corp., 102.**

Disability—credit for payments—restoration of vacation and sick leave balances—Although the Industrial Commission properly concluded in a workers' compensation case that plaintiff's vacation and sick leave payments taken during her period of disability were "due and payable" when made based on the fact that they have been earned by the employee and are not solely under the control of the employer, the Commission erred by concluding that defendant employer is entitled to a credit against compensation payments for those payments and plaintiff employee is entitled to restoration of vacation and sick leave. **Christopher v. Cherry Hospital, 427.**

Disability—Form 21 presumption—not rebutted by unsuitable jobs—A workers' compensation defendant did not rebut the Form 21 presumption of disability where plaintiff returned to work with defendant and then worked for his brother's ambulance company, but defendant presented no evidence that a suitable job existed for plaintiff and that he was capable of getting such a job. **Bostick v. Kinston-Neuse Corp., 102.**

Subcontractor—independent contractor—attempted waiver of benefits—The Industrial Commission did not err by concluding that defendant company was liable for plaintiff subcontractor's compensable injuries sustained in 1995 while he was working for defendant even though the parties agreed plaintiff was an independent contractor rather than an employee and plaintiff signed a waiver

WORKERS' COMPENSATION—Continued

of any workers' compensation rights in 1992. **Davis v. Taylor-Wilkes Helicopter Serv., Inc., 1.**

Temporary total disability—maximum medical improvement—The full Industrial Commission did not err by awarding plaintiff employee ongoing temporary total disability even though plaintiff reached maximum medical improvement and had been released to return to work with restrictions. **Russos v. Wheaton Indus., 164.**

Unexplained injury—arising out of employment—The Industrial Commission erred by awarding workers' compensation payments to plaintiff employee for an unexplained injury to plaintiff's ear sustained while working for defendant employer as a lumber grader. **Janney v. J.W. Jones Lumber Co., 402.**

Unilateral stoppage of payments—penalty—The 10% penalty for an unpaid installment of a workers' compensation award was due where defendants never sought permission from the Commission to terminate compensation under a Form 21 Agreement. **Bostick v. Kinston-Neuse Corp., 102.**

ZONING

City/county ordinance—soil extraction—bona fide farm purpose—livestock—The trial court did not err by finding that defendant landowner's soil extraction on land that defendant planned to operate a horse farm for her family's enjoyment constituted a bona fide farm purpose within the meaning of N.C.G.S. § 153A-340 and was therefore exempt from a city/county zoning ordinance. **County of Durham v. Roberts, 665.**

Conditional use permit—quasi-judicial proceeding not required—The trial court erred by invalidating a conditional use zoning permit allowing a commercial use in a previously residential district where the court held that conditional use zoning requires the issuance of a permit through a quasi-judicial proceeding under N.C.G.S. § 160A-381 and *Chrismon v. Guilford County*, 322 N.C. 611. Chrismon does not require a two-step legislative/quasi-judicial proceeding and the City did not engage in illegal contract zoning by virtue of the absence of such a proceeding. N.C.G.S. § 160A-381 states that a city may provide for the issuance of conditional use permits, but clearly does not mandate such a procedure. **Massey v. City of Charlotte, 345.**

Ordinance amendment—rezoning property subject to option to purchase—consideration of permissible uses of property—A zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase was not void based on the board of commissioner's alleged failure to consider all permissible uses of the property within the new zoning classifications. **Kerik v. Davidson Cty., 222.**

Ordinance amendment—rezoning property subject to option to purchase—contract zoning—The trial court erred by declaring that defendant board of commissioner's zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase was void based on alleged illegal contract zoning. **Kerik v. Davidson Cty., 222.**

Ordinance amendment—rezoning property subject to option to purchase—invalid provision of ordinance separable—Although the board of

ZONING—Continued

commissioners exceeded its powers by imposing the restriction of a 100 foot buffer along the western boundary of certain property that was not imposed on similarly zoned property in any other location in the county, this error does not affect the validity of the remaining zoning ordinance amendment that rezoned the property. **Kerik v. Davidson Cty., 222.**

Ordinance amendment—rezoning property subject to option to purchase—motion to dismiss—The trial court did not err by denying defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 41(b) an action considering a zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase. **Kerik v. Davidson Cty., 222.**

Ordinance amendment—rezoning property subject to option to purchase—standard of review—whole record—The trial court erred by failing to apply the whole record test in its review of defendant board of commissioners' zoning ordinance amendment that rezoned certain property owned or subject to an option to purchase. **Kerik v. Davidson Cty., 222.**

Ordinance—outdoor advertising billboards—city's duties under protest petition statute—The trial court did not err by failing to conclude as a mater of law that defendant city failed to carry out its duties under the protest petition statute of N.C.G.S. § 160A-386 used by plaintiffs and others to protest proposed zoning ordinances concerning outdoor advertising billboards. **Morris Communications Corp. v. City of Asheville, 597.**

Ordinance—outdoor advertising billboards—class of lots affected—The trial court erred by concluding that the class of lots affected by zoning ordinance number 2427 concerning outdoor advertising billboards are those lots upon which off-premises signs affected by the seven-year amortization provisions of the ordinance were located at the time of its passage. **Morris Communications Corp. v. City of Asheville, 597.**

Ordinance—outdoor advertising billboards—protest petition provisions—text amendments—The trial court did not err by concluding that the passage of zoning ordinance number 2427 concerning outdoor advertising billboards was subject to the protest petition provisions of N.C.G.S. §§ 160A-385 and 160A-386 even though defendant contends the protest petition procedure applies to only zoning map amendments and not to amendments to the text of a zoning ordinance. **Morris Communications Corp. v. City of Asheville, 597.**

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