NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Appointed Chief Judge effective 1 September 2002.
2. Resigned as Chief Judge 31 August 2002.

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RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CONSTITUTION OF THE UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JAMES RUSSELL SMITH, JR.

No. COA00-616

(Filed 4 September 2001)

1. Homicide— second-degree murder—shaken baby syndrome—motion to dismiss—defendant as perpetrator—sufficiency of evidence

The trial court did not err in a shaken baby syndrome case by failing to grant defendant stepfather's motion to dismiss the charge of second-degree murder for the death of his wife's two-year-old daughter on the basis that there was allegedly insufficient evidence of defendant being the perpetrator of the offense, because the evidence taken in the light most favorable to the State reveals that: (1) defendant had the child in his exclusive care during the time period the injuries were sustained that resulted in the child's death; (2) the wife did not check on the child when she returned home from work or during the night, but the child was alive and conscious when the wife left the child to go to work that afternoon; (3) defendant admitted to an investigator that defendant consumed alcohol that evening and that he might have popped the child in the mouth and that he could have slapped her across the face; (4) defendant told the investigator that he had shaken the child on prior occasions; and (5) while defendant presented some evidence to show his wife abused the child and that there existed a possibility that his wife caused the child's death, this evidence was merely an alternative theory as to the identity of the perpetrator of the offense.

2. Homicide— second-degree murder—shaken baby syndrome—motion to dismiss—malice—sufficiency of evidence

The trial court erred in a shaken baby syndrome case by failing to grant defendant stepfather's motion to dismiss the charge of second-degree murder for the death of his wife's two-year-old daughter based on the State's failure to present substantial evidence that defendant had the necessary malice and the case is remanded for sentencing and entry of judgment finding defendant guilty of involuntary manslaughter, because: (1) the State failed to present any direct evidence that defendant inflicted the lethal blow to the child's head with the degree of recklessness required to find malice; (2) the evidence failed to establish the cause of the child's head injury and whether the injury was the result of an intentional and willful act or the result of an accident; (3) the fact that defendant admitted to having physically disciplined the child that evening does not support a finding of malice; (4) the State failed to present evidence of previous acts of child abuse which might permit an inference of malice; and (5) defendant cooperated with police, appeared upset at the child's death, made the 911 call, and attempted to revive the child by administering CPR.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 15 December 1999 by Judge J. B. Allen, Jr. in Orange County Superior Court. Heard in the Court of Appeals 18 April 2001.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

HUNTER, Judge.

James Russell Smith, Jr. ("defendant") appeals the trial court's judgment convicting him of the second degree murder of his wife's two-year-old daughter, Amanda. We hold that the trial court erred in failing to grant defendant's motion to dismiss because the State failed to present substantial evidence that defendant had the necessary malice to sustain a second degree murder conviction. Therefore, we reverse and remand.

The evidence presented at trial tended to show that on 21 November 1998, defendant married Angelene Smith ("Angie"). At the time of the incident in question, the couple had one child born of their relationship, and three other children (including Amanda) from prior relationships living with them. Because defendant worked first shift (6:00 a.m. to 3:30 p.m.) and Angie worked second shift (4:00 p.m. to 12:00 midnight), it was customary for defendant to care for the children while Angie was at work, and for Angie to care for the children while defendant was at work.

On Monday, 7 December 1998, Amanda was ill, and Angie left her in the care of defendant. On Tuesday, 8 December, Amanda threw up, and "defendant bathed and cleaned up Amanda." Later, Angie noticed a bruise on Amanda's forehead and asked defendant how it came to be. Defendant told Angie that Amanda fell off the toilet in the bathroom and bumped her head. On Wednesday, 9 December, Amanda was still ill. Angie cared for her during the day and left her in defendant's care that evening. When Angie returned home after midnight that same night, she did not check on Amanda. After she and defendant went to bed, Angie got up during the early morning hours on 10 December and went to get her infant daughter, Angelica, bringing her back to bed with herself and defendant. Later, when the alarm clock rang at 5:30 a.m. for defendant to go to work, Angie woke defendant who then got up, got dressed, and after checking on Amanda, came back into the bedroom and told Angie that Amanda was dead. Both of defendant's sons were also in the home the night of the incident.

At trial, the State asked Angie if she had ever noticed any bruises on Amanda and, if so, whether she had inflicted them. In response, Angie testified that the day before she married defendant she noticed "purplish" bruises on both of Amanda's arms. She stated, "[i]t looked like somebody had grabbed her." Angie further testified that she noticed a yellow "bruise on [Amanda's] butt[ocks]" a few days after the wedding. Angie also stated that she noticed Amanda's "eyes were black and blue" on or about 3 December 1998. Angie stated that, although she asked defendant about the bruises on Amanda's arms and buttocks, she did not ask about Amanda's black eyes. She testified that she never inflicted any injuries on Amanda and that, aside from the bump on the forehead, these were the only bruises she had ever noticed on Amanda.

Angie further testified that the Department of Social Services ("DSS") had intervened in her relationship with Amanda in response to a report that she abused Amanda by violently grabbing Amanda's

arm. However, as to this report of abuse, Angie testified that "[t]here is no evidence showing that I had done that at all. [DSS] was just assuming that I had grabbed her by her arm. I did not do that." Angie did testify that prior to the time that defendant moved in with her she noticed "bruises on [Amanda's] legs." Angie told several people that she did not believe defendant hurt the child; however, Angie testified that at the time defendant told her of Amanda's death, he stated, "they['re] going to come and get [me]."

Kim Barkhurst, the DSS child abuse investigator, testified that she met Angie and defendant when she began investigating another DSS employee's (Deana Smith) complaint of abuse against Angie. Ms. Barkhurst stated that Ms. Smith had filed a report of abuse against Angie in which Ms. Smith stated "not only had she seen [Angie] jerk [Amanda]'s arm, but . . . also . . . that she had seen [Angie] pop [Amanda] in the face and on the leg" while the two were in Ms. Smith's office. Ms. Barkhurst further testified that Angie ignored Amanda during a visit to defendant and Angie's home, and defendant seemed resentful of Ms. Barkhurst's being there.

Lisa Mendez, one of Angie's supervisors at work, testified that Angie called work on the morning Amanda died, sounding like her "normal self," to say she would not be in to work that day. When Ms. Mendez asked why she was not coming to work, Angie said, "my baby's dead." However, Ms. Mendez further stated that Angie told her she had not checked on Amanda nor had she called 911. Ms. Mendez advised Angie to hang up the phone with her and to call 911. Ms. Mendez testified that she was disturbed by her conversation with Angie, and that she called the sheriff's department that same day "asking to speak to someone that was in charge of the case." Ms. Mendez "attempt[ed] to report the phone call that [she] received or the things that [she] observed to the authorities[.]" However, when she "did speak to someone, . . . they told [her] they had all the information that they needed, thanks for calling."

Molly Malden, another of Angie's co-workers, testified that when she met Angie approximately one to two weeks after Amanda died, Angie "was real bubbly and giddy, and . . . reminded [her] of a teenager." Ms. Malden further testified that she never saw Angie upset about Amanda's death even though she and Angie spent a great deal of time together. Ms. Malden testified that Angie would get upset only when a police officer or detective would come by her job and talk to her. Ms. Malden testified that, after such incidents, Angie would say "that she was going to go to jail, or she was going to be

arrested. . . . They were going to come and take her on her job and take her to jail." Ms. Malden further stated, "they thought that she was guilty of having something to do with the—with the death of the child." The one time Ms. Malden saw Angie dressed up, Angie said that "she was celebrating" and that "she had made some decisions, that she was going back to school, she had signed over custody to Social Services to have her [other] baby adopted, and that she was getting on with her life, that it was time for her to do that."

Christina Alexander (one of Angie's neighbors) testified that she met Angie in February 1997 and that they became friends, spending a great deal of time together with their children. It was her perception that Angie and Amanda had a good relationship at times. However, Ms. Alexander noted that sometimes Angie would mistreat Amanda by slamming her down on the couch, yanking her by the arms, or smacking her in the face. Also, she noted that Amanda would have bruises on her upper arms and legs. Finally, she testified that Angie would treat Amanda this way when she became angry and not for disciplinary reasons. Ms. Alexander had contacted DSS about Angie's treatment of Amanda.

Deana Smith was Angie's case worker at the Alamance County Social Services office. Ms. Smith made the initial call to Child Protective Services after a visit with Angie and Amanda at her office in August 1998 for a case review. During that meeting, Amanda began acting up and Ms. Smith observed Angie jerk Amanda by the arm, pop her on the mouth, and slap her on the leg. Ms. Smith testified that Angie seemed frustrated and angry with Amanda and that they did not have a normal mother-child relationship.

On cross-examination by the State, Ms. Smith admitted that Amanda would not obey Angie and acted in an uncontrollable manner. Furthermore, she agreed that the only way for Angie to keep Amanda under any semblance of control was for her to grab and hold onto Amanda. Finally, Ms. Smith testified that she did not notice any bruises on Amanda, despite the fact that Amanda was wearing an outfit that left her arms and legs bare, and that she would have noticed if there had been any bruises due to Amanda's close proximity in the office.

Dr. Thomas Clark, the forensic pathologist who performed the autopsy on Amanda, testified for the State that during his external examination of Amanda he found "bruises of varying ages distributed over the body from the top of the head to the legs, and even one on

the foot." "The shape and distribution of the bruises was [sic] often in a pattern suggestive of an adult hand." Regarding his internal exam of Amanda, Dr. Clark stated that the brain was bloody and that "there was blood present on both sides of the brain." He testified that any blood in this space is abnormal and that the brain was bruised. Also, Dr. Clark noted the presence of blood in the retinas of Amanda's eyes and that "[t]he presence of blood in the retina is almost always a result of injury." He testified that this indicated that Amanda suffered injury to the head.

Additionally, Dr. Clark explained that shaken baby syndrome "includ[es] the presence of subdural hemorrhage in the head, the presence of retinal hemorrhages in the eyes, and optionally, the presence of hemorrhage within the spinal cord," of which Amanda had all three. He testified that these injuries occur from the violent shaking of a child "so that the head snaps back and forth enough that blood vessels are ruptured, causing the bleeding within the eyes and . . . surrounding the brain." Furthermore, he stated that he found bruises on Amanda's head and all over her body indicating the occurrence of blunt force injury. He then concluded that blunt force injury played a significant role in Amanda's death and that shaking probably contributed.

On appeal from his conviction for second degree murder, defendant raises two assignments of error. First, defendant assigns error to the trial court's denial of his motion to dismiss. Specifically, defendant argues that there was insufficient evidence: (1) as to him being the perpetrator of Amanda's death; (2) as to him having the required malice for second degree murder; and (3) as to him having intentionally inflicted a fatal injury on Amanda. We disagree with defendant on the identity issue, but we agree with defendant on the malice issue. Because we find that the evidence as to defendant having the necessary malice was not substantial enough to withstand defendant's motion to dismiss, we need not address the sufficiency of the evidence as to whether the injury was inflicted intentionally.

The applicable standard for ruling on a defendant's motion to dismiss has been set forth in considerable detail by our Supreme Court:

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Whether 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 term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged. "In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." It is not the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss.

In ruling on a motion to dismiss:

"The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

State v. Vause, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (emphasis omitted) (citations omitted). This standard, requiring substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense, applies whether the evidence is direct, circumstantial, or both. *See State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 208 (1978).

[1] Defendant argues that there was insufficient evidence of defendant being the perpetrator of the offense because "[t]he physical evidence did not point to either Angie or the defendant as the culprit, although each had ample time alone with the child to commit the act." Additionally, defendant asserts that during the relevant time period in which Amanda received the fatal blunt force trauma to the head, both defendant and Angie had exclusive control of Amanda at some point and consequently that the evidence could not support a finding that he inflicted the fatal injury.

Taking the State's evidence as true and making all reasonable inferences in favor of the State, the evidence as to defendant being

the perpetrator of the murder was sufficient to withstand defendant's motion to dismiss. Defendant had Amanda in his exclusive care between approximately 4:00 p.m. until midnight on the night before she was discovered dead. Angie testified that she did not check on the child when she returned home from work or during the night. By all accounts, Amanda was alive and conscious when Angie left the child to go to work that afternoon. Defendant admitted to Investigator Thorpe that he consumed alcohol that evening, that he "might" have "popped" Amanda in the mouth, and that he "could have" slapped her across the face. Defendant also told Investigator Thorpe that he had shaken Amanda on prior occasions, but that he always stops when Amanda cries because he realizes he is hurting her.

As defendant correctly notes, if the evidence raises no more than a suspicion that the defendant committed the charged offense, then the evidence is not sufficient to carry the case to the jury. *See State v. Byrd*, 309 N.C. 132, 139-40, 305 S.E.2d 724, 730 (1983). While defendant presented some evidence to show that Angie abused Amanda and that there existed a possibility that Angie caused Amanda's death, this is merely an alternate theory as to the identity of the perpetrator of the offense. As noted above, it is not required for purposes of a motion to dismiss that the evidence exclude every reasonable hypothesis of innocence. *See Vause*, 328 N.C. at 237, 400 S.E.2d at 61. Thus, although there is some evidence that Angie could have been involved, such evidence does not remove from consideration the evidence tending to implicate defendant as the perpetrator. Since the evidence was sufficient to permit a reasonable inference that defendant was the perpetrator of the offense charged, the trial court did not err in denying defendant's motion to dismiss on this basis.

[2] Defendant also argues that the court erred by denying his motion to dismiss on the grounds that the evidence was insufficient to support a finding of malice. We agree with defendant that there was insufficient evidence of malice. Therefore, we reverse the trial court's ruling denying defendant's motion to dismiss, and we vacate the judgment for second degree murder. As discussed in further detail below, we further remand this case to the trial court for sentencing and entry of judgment finding defendant guilty of involuntary manslaughter. *See State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991).

Second degree murder is defined as "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert.*

denied, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Malice is an essential element of second degree murder, and "[w]hile an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some *intentional act sufficient to show malice*." *State v. Lang*, 309 N.C. 512, 524, 308 S.E.2d 317, 323 (1983) (emphasis added). Our Supreme Court has recognized three types of malice in homicide cases:

> [I]n our law of homicide there are at least three kinds of malice. One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citations omitted). The second kind of malice, which the State argues is the kind of malice present here, has been described as follows:

> This kind of malice . . . "comprehend[s] not only particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.' "

State v. Blue, 138 N.C. App. 404, 409, 531 S.E.2d 267, 272 (2000) (quoting *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978), quoting 21 A. & E. 133 (2d Edition 1902)), *aff'd in part and reversed in part on other grounds*, 353 N.C. 364, 543 S.E.2d 478 (2001). Moreover, this Court has addressed the distinction between the "recklessness of consequences" required for a showing of malice and "recklessness of consequences" within the context of manslaughter. In *Blue*, the Court noted that

> "the distinction between 'recklessness' indicative of murder and 'recklessness' associated with manslaughter 'is one of degree rather than kind.' " [*State v. Rich*, 351 N.C. 386, 393, 527 S.E.2d 299, 303 (2000)] (citation omitted). . . .

> Furthermore, the phrase "recklessness of consequences" continues to require a high degree of recklessness to prove malice . . . . Hence, in the case before us we describe malice . . . keeping in mind that the . . . phrase "recklessness of consequences" denotes the high degree of recklessness required for murder as opposed to the lesser degree required for manslaughter.

Blue, 138 N.C. App. at 410, 531 S.E.2d at 272.

The necessary malice for second degree murder may be inferred from the "willful blow by an adult on the head of an infant." *State v. Perdue*, 320 N.C. 51, 58, 357 S.E.2d 345, 350 (1987). "Willful" has been defined as an act being done " 'purposely and designedly in violation of [the] law.' " *State v. Whittle*, 118 N.C. App. 130, 135, 454 S.E.2d 688, 691 (1995) (quoting *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)).

Here, the evidence established that Amanda's death was the result of a blunt force injury to the head. However, the State failed to present any direct evidence that defendant inflicted the lethal blow to Amanda's head with the degree of recklessness required to find malice. Moreover, because the evidence failed to establish what caused the injury to Amanda's head, and whether the injury was the result of an intentional and willful act or the result of an accident, the evidence was insufficient to establish an inference of malice.

The forensic pathologist, Dr. Clark, testified that Amanda's death ultimately resulted from "a blow or blows to the head, or included the head striking an object." Although he testified that shaking may have contributed to the death, Dr. Clark admitted that he could not tell to a certainty that the child had been shaken "because it is possible that a significant enough blunt force injury can also produce retinal hemorrhages." Dr. Clark admitted that he did "not know exactly how the injuries occurred." Dr. Clark testified that it was difficult to pinpoint the time of death, and that "[i]t could have been hours" before Amanda died as a result of the blow, or it was possible that "the injuries could have been inflicted in as little as forty-five minutes before [the child] was found." Dr. Clark could not determine whether all of the bruises were sustained at the time of death; rather, some of the bruising appeared to have been sustained prior to the time of death. He testified that the bruises did not "contribute directly to the death as it resulted from [the] head injury." Dr. Clark did not find any other evidence of serious injury to the child.

Investigator Thorpe testified that defendant stated that he may have slapped Amanda in the face or popped her in the mouth. Defendant further stated that it was possible he had shaken Amanda, but that when he has done so before, Amanda cries, and he immediately stops. This Court has held that "a defendant's shaking a baby and the baby's death by shaken baby syndrome are not the sole determinants of whether the State has produced sufficient evidence of malice to convict the defendant of murder in a shaken baby syndrome case." *Blue*, 138 N.C. App. at 413, 531 S.E.2d at 274.

The State argues that there was substantial evidence of malice presented at trial, relying upon *State v. Hemphill*, 104 N.C. App. 431, 409 S.E.2d 744 (1991), and *State v. Qualls*, 130 N.C. App. 1, 502 S.E.2d 31 (1998), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). However, we believe these cases may be distinguished based upon the same reasoning set forth by this Court in *Blue, supra.* In *Blue*, we noted that in *Hemphill*, the pathologist found significant evidence of shaken baby syndrome, including vomiting, hemorrhaging in the lungs, and bruises on the front and back of the brain. The pathologist testified that death resulted from " 'violent or vigorous' " shaking. *Blue*, 138 N.C. App. at 411, 531 S.E.2d at 273 (quoting *Hemphill*, 104 N.C. App. at 432, 409 S.E.2d at 744). The defendant admitted that he had shaken the baby several times shortly before her death, despite the child's continuous vomiting. *Id.*

While the *Hemphill* Court determined that sufficient evidence of malice existed, we noted in *Blue* that the *Hemphill* Court "did not limit its examination to the sole issues of whether the defendant shook the baby and whether the baby died from shaken baby syndrome." *Id.* at 413, 531 S.E.2d at 274. Rather, the holding "was based on all of the State's evidence and not solely on the two factors that the 'defendant shook the baby' and 'the cause of death was "Shaken Baby Syndrome." ' " *Id.* at 412, 531 S.E.2d 273 (quoting *Hemphill*, 104 N.C. App. at 434, 409 S.E.2d at 745).

The *Blue* Court also distinguished *Qualls*, noting that, in *Qualls*, this Court found sufficient evidence of malice in the defendant's abuse of the victim, and the victim's resulting death from subdural hemorrhaging. *Id.* (citing *Qualls*, 130 N.C. App. at 11, 502 S.E.2d at 38). In that case, however, the evidence established that the defendant "previously inflicted a severe blow to . . . the victim's head." *Qualls*, 130 N.C. App. at 11, 502 S.E.2d at 37-38. In addition, the forensic pathologist testified that the contusions on the child's brain were

" 'consistent with more than one episode of intentionally-inflicted injury.' " *Id.* at 11, 502 S.E.2d at 38. The pathologist further testified that the injury to the child's head which lead to his death was " 'not an accidental injury.' " *Id.* at 4, 502 S.E.2d at 34. In citing *Qualls*, we reemphasized in *Blue* that "a defendant's shaking a baby and the baby's death by shaken baby syndrome are not the sole determinants of whether the State has produced sufficient evidence of malice to convict the defendant of murder in a shaken baby syndrome case." *Blue*, 138 N.C. App. at 413, 531 S.E.2d at 274.

In contrast, the State in this case has failed to present any evidence of malice other than the fact of Amanda's injury, that defendant was with the child from 4:00 p.m. until midnight, and that defendant "might" have "popped" Amanda on the mouth or slapped her. The fact that defendant admitted to having physically disciplined Amanda that evening does not support a finding of malice. *See Blue*, 138 N.C. App. at 414, 531 S.E.2d at 275 (no evidence of malice despite defendant's admission that he "became frustrated" with the child and shook the child). Moreover, unlike the pathologist's testimony in *Qualls*, which clearly established an expert opinion that the child's injuries were "intentionally-inflicted" and "not . . . accidental," Dr. Clark admitted that he did "not know exactly how the injuries occurred" or whether the blunt force trauma to the child's head was intentionally inflicted.

In fact, the evidence presented did not establish that the blunt force trauma which caused Amanda's death was administered by an adult hand. Although Dr. Clark opined that some of the bruises to Amanda's body were "suggestive of an adult hand," he testified that such bruises did not "contribute directly to the death as it resulted from [the] head injury." Dr. Clark stated that the blunt force trauma could have been caused either by an object striking the child's head, or by the child's head striking an object. Thus, there is no evidence in the record, beyond suspicion, that the fatal blunt force trauma to Amanda's head was administered by an adult hand. In the absence of such evidence, we do not believe that the evidence supported an inference of malice. *See Perdue*, 320 N.C. at 58, 357 S.E.2d at 350 (malice may be inferred from the "willful blow by an adult on the head of an infant").

In addition, although the evidence did tend to show that Amanda had been abused and Dr. Clark opined that she suffered from battered child syndrome, none of the evidence raises more than a suspicion

that defendant, rather than some other individual, inflicted the prior abuse. To the contrary, Angie testified that she trusted defendant with the children and that she never witnessed defendant mistreat the children. Indeed, evidence was presented tending to establish that Angie could have been responsible for some of the child's prior injuries. Thus, the State failed to present evidence of previous acts of child abuse which might permit an inference of malice. *See State v. Smith*, 61 N.C. App. 52, 57-58, 300 S.E.2d 403, 407 (1983). We also note that the facts show that defendant cooperated with police and investigators, he appeared upset at the child's death, he made the 911 call, and he attempted to revive Amanda by administering CPR.

In sum, although the evidence and circumstances surrounding Amanda's death most certainly raise a suspicion that defendant could have been responsible for the child's blunt force head trauma, the State failed to present substantial evidence of the malice required to support a conviction of second degree murder.

In his second assignment of error, defendant argues that the trial court committed plain error in its instruction to the jury on how to assess whether the evidence supported a conclusion that the injury which caused Amanda's death was intentionally inflicted, as required for second degree murder. Because we find that defendant's conviction for second degree murder must be vacated, we need not consider this matter on appeal.

In the present case, the trial court submitted possible verdicts finding defendant guilty of second degree murder, guilty of the lesser included offense of involuntary manslaughter, or not guilty. The jury convicted defendant of second degree murder, and the judgment for second degree murder which we hold must be vacated was entered upon that verdict. In finding defendant guilty of second degree murder, however, the jury necessarily had to find facts establishing the lesser included offense of involuntary manslaughter. *See State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985). For this reason, we remand this case for judgment as upon a verdict of guilty of involuntary manslaughter. *See Vance*, 328 N.C. at 623, 403 S.E.2d at 501-02.

We hold that the evidence on the issue of malice was not substantial enough to withstand defendant's motion to dismiss on the charge of second degree murder, and we vacate that judgment. We remand this case to the Superior Court, Orange County, for sentencing and entry of judgment finding defendant guilty of involuntary manslaughter.

Reversed and remanded.

Judge WALKER concurs.

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

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

I concur with the majority that there is sufficient evidence of defendant's identity as the perpetrator of the crime. I respectfully dissent from the majority's holding that there is insufficient evidence that defendant acted with malice. The majority correctly states the law regarding second degree murder and malice. The majority misapplies the law to the facts in this case.

The evidence was sufficient to prove that defendant acted with malice as that element has been defined and applied by this Court and our Supreme Court. I find no error in defendant's conviction of second degree murder.

I. Malice

The majority's opinion sets forth three types of malice to support a charge of second degree murder. With regard to the second type of malice, the majority distinguishes between a higher and lesser degree of "recklessness" to separate second degree murder from manslaughter. The majority never analyzes why defendant's actions the night of the murder were the lesser "recklessness" to reduce defendant's conviction to involuntary manslaughter.

Their opinion sets forth defendant's statements about what he did and possibly did to Amanda the night of her death. Defendant admitted to: (1) possibly shaking Amanda; and, (2) possibly slapping her face; and, (3) "popping " her mouth; and, (4) possibly hitting her in the head; and, (5) previously shaking Amanda; and, (6) consuming alcohol the night Amanda died.

The majority cites *State v. Blue* for the proposition that mere "shaking" of a baby will not sustain malice. 138 N.C. App. 404, 413, 531 S.E.2d 267, 274 (2000). The majority attempts to buttress that point by stating that the pathologist ("Dr. Clark") was unsure whether shaking alone or a blunt blow to the head caused Amanda's death. However, Dr. Clark testified that Amanda's death was "the result of blunt force injury to the head, including physical injury resulting in

bruises, and in all likelihood including shaking." Dr. Clark also testified that the injuries Amanda suffered "takes more force than a child is likely to sustain in the ordinary activities of daily living." The jury could have reasonably concluded that Amanda's injuries were not "accidental." The majority's implication that the injuries might have been an accident is inconsistent with the entirety of Dr. Clark's testimony. Taken as a whole, Dr. Clark's testimony concluded that these injuries were the result of violent shaking and one or more blunt force injuries to the head administered by an adult.

The majority also discusses mitigating actions by defendant after Amanda's death intending to show a lack of "malice," and that the State presented no evidence that defendant previously abused Amanda. Not only is this factually inaccurate, but their opinion mentions that "[d]efendant further stated that it was possible he had shaken Amanda, but that when *he has done so before*, Amanda cries, and he immediately stops." (emphasis supplied). The opinion concludes that this evidence raises no more than a "suspicion" that defendant inflicted prior abuse. I cannot agree that previous shaking of a twenty-one pound, two-year-old is not "abuse." Our focus should concentrate on whether defendant's actions were malicious the night Amanda died.

Finally, the majority mentions that none of the State's evidence suggested that the blow to the head was administered "willfully or with the degree of recklessness required to find malice." Intent to kill or harm is not an element of second degree murder. Only an intentional act sufficient to demonstrate malice is required. *State v. Lang*, 309 N.C. at 524, 308 S.E.2d at 323.

Here the evidence was sufficient to demonstrate defendant acted with malice. The majority relies on *State v. Blue* to control the result in this case. The facts in this case are distinguishable from *Blue*, and the facts here are more analogous to other infant death cases where malice was shown and convictions of second degree murder were upheld.

A. *State v. Qualls*

In *State v. Qualls*, 130 N.C. App. 1, 502 S.E.2d 31 (1998), defendant argued that the State's evidence that he may have shaken the baby was insufficient to support malice and his conviction for second degree murder. *Id.* at 10, 502 S.E.2d at 37. The factual similarities of *Qualls* and the present case are compelling. Defendant was home

alone with the *Qualls* victim. The defendant called 911 after victim choked and gaged. The victim was rushed to the hospital and died four days later.

The treating physician testified that:

> [T]here [are] a number of findings on [the victim's] exam . . . that are consistent with a shaking type injury, one of the most remarkable of those being that the hemorrhages, or bleeding, that was seen . . . in the back of . . . the eye or on the retina . . . That, along with the evidence of head trauma and the fractures that were seen on a brain scan and swelling of the brain, taken together, were evidence that . . . this baby had suffered a severe injury and possibly some shaking to cause that swelling . . .

Id. at 4, 502 S.E.2d at 33-34.

These injuries are virtually identical to those described in Dr. Clark's testimony in the present case. Two differences are that Amanda did not have a fractured skull, although she did have a blunt blow to the head in addition to injuries sustained from violent shaking. Another difference is that the baby in *Qualls* died four days after being brought into and cared for by the hospital. Amanda never made it to the hospital. She died alone, uncovered, wearing only a diaper.

The defendant in *Qualls* denied responsibility for the severe injuries to the victim. He stated that "he may have accidently kicked or tripped on the victim." *Id.* at 5, 502 S.E.2d at 34. The next day defendant said that "he may have also shaken the victim . . . trying to arouse him." *Id.* At another time "he denied that he either shook, kicked or tripped on the victim." *Id.* As here, defendant in *Qualls* had exclusive control and possession of the victim during the time period the injuries were sustained that resulted in death. This Court found no error in defendant's conviction for second degree murder.

B. *State v. Hemphill*

In *State v. Hemphill*, 104 N.C. App. 431, 409 S.E.2d 744 (1991) the facts are also similar to the present case.

The defendant in *Hemphill* contended that the "trial court erred in denying his motion to dismiss the charge of second degree murder. He argues that the evidence is insufficient to support a finding of the element of malice." *Id.* at 433, 409 S.E.2d at 745.

As in the present case, Hemphill was alone with the victim baby. During an interview, defendant initially denied that he had shaken the victim. At trial defendant testified that he "had shaken the child because she was choking, . . ." *Id.* This Court held that "the evidence in the present case is sufficient to support a finding by the jury that defendant acted with malice as defined in *Wilkerson,*" even though no direct evidence linked defendant's conduct to the violent shaking which produced the fatal injuries. *Id.* at 434, 409 S.E.2d at 745. Our Court stated:

> evidence that defendant shook the baby as well as the expert testimony that the cause of death was 'Shaken Baby Syndrome,' which typically results from an infant's head being held and shaken so violently that the brain is shaken inside the skull causing bruising and tearing of blood vessels on the surface of and inside the brain, is sufficient to show that defendant acted with 'recklessness of consequences, . . . though there may be no intention to injure a particular person.'
>
> *Id.*

In *Hemphill* there was no evidence that the baby was "hit about the head, or popped in the mouth." Medical evidence of violent shaking was sufficient to show that defendant acted with the requisite "recklessness of consequences" to sustain his conviction for second degree murder.

The majority's opinion misapplies our central holding in *Hemphill.* Evidence that a person shakes a baby plus expert testimony of head injuries that resulted from violent shaking "is sufficient to show recklessness of consequences" to show malice. In the present case, defendant admitted that "[he] might have [shaken Amanda] . . . [and] it could have been last night." These statements are not mere "suspicion" that defendant shook Amanda. A jury reasonably could have concluded that defendant shook Amanda. Dr. Clark testified that massive injuries to Amanda's head and brain were caused by violent shaking and a blunt force injury to the head.

C. *State v. Blue*

In *Blue* we emphasized that "a defendant's shaking a baby and the baby's death by shaken baby syndrome are not the sole determinants of whether the State has produced sufficient evidence of malice to convict the defendant of murder in a shaken baby syndrome case." *State v. Blue,* at 413, 531 S.E.2d at 274. This Court in *Blue* found that

the evidence was "sufficient only to raise a suspicion or conjecture of malice . . . " *Id.* at 414, 531 S.E.2d at 275. The Supreme Court remanded the case for sentencing under involuntary manslaughter. *State v. Blue*, 353 N.C. 364, 543 S.E.2d 478 (2001).

The majority relies on *Blue* to support its holding that the evidence does not rise to the level of "recklessness of consequences" to show malice. That reliance is misplaced.

The facts in *Blue* are distinguishable from the facts in this case, *Qualls*, and *Hemphill*. In *Blue* the baby was undeveloped, weak and only two months old. The defendant-father had placed the victim on his knee and began to bounce her to try and get her to stop crying. Defendant said that he probably was not supporting the back of the baby's head properly when he shook her. The pathologist in *Blue* testified that "many small blood vessels on the surface of the brain were torn and bleeding, *but that larger blood vessels were not torn.*" *Id.* at 406, 531 S.E.2d at 270 (emphasis supplied). "There were no other internal or external injuries to [the victim's] body . . . ." *Id.* at 407, 531 S.E.2d at 270. The pathologist also testified there were no external head injuries and that the skull was not fractured. "The evidence did not show she was shaken violently or vigorously and she did not suffer from the same signs of injury as the baby in *Hemphill* or in *Qualls*." *Id.* at 413, 531 S.E.2d at 274. No evidence was presented that the baby in *Blue* was either hit or struck. The injuries Amanda sustained are much more severe than those of the victim in *Blue*.

II. Evidence of Malice

State v. Blue emphasizes that we should "examine all of the State's evidence to determine whether it was sufficient to permit a rational jury to find the existence of malice beyond a reasonable doubt." *Id.* at 412, 531 S.E.2d at 273 (citation omitted).

A. Defendant's Statements

Defendant in the present case did not testify. Defendant did meet twice with investigator Ned Thorpe ("Thorpe"). These meetings produced lengthy recorded statements that were played for the jury for corroboration of the State's evidence.

Defendant-stepfather had the sole care, custody, and control of Amanda from the time her mother left for work at 3:55 p.m. on 9 December until after midnight when Amanda's mother returned home. Defendant admitted to arriving home from work at "about 3:30

p.m." Amanda was asleep on the couch with her mother. Defendant stated that Amanda was "alert," after she awoke. Amanda "got up off the couch, she walked over, [and] got her clothes on . . . ." Defendant stated that he took Amanda and his natural daughter to pick up his two sons at approximately 4:30 p.m. and brought them back for dinner. Around 8:30 p.m. he "got the shoes on the little ones, put their jackets on, we went out to the car so [he] could drop the boys back off." Defendant stated that he, Amanda, and her infant sister arrived back home around 9:20 p.m. Defendant stated that after returning home, Amanda "sat down, took her shoes off, like she normally does inside the back door, come [sic] in and sat down in the living room . . . she was watching TV . . . ." This evidence shows that Amanda was alive, conscious, alert, and ambulatory for more than five hours after Amanda was left in defendant's sole custody.

Defendant stated that he drinks alcohol, and that he had been drinking alcohol the night Amanda died. Detective Thorpe asked "[o]n last evening, December 9th, did you consume any alcohol?" Defendant responded "[y]es I did . . . Probably three beers and a mixed drink." Defendant also stated that he believed he was not drunk and "[t]o consider myself drunk . . . I've drank *over* a 12-pack, and still wasn't." Defendant stated that there was "four or five cases" of beer in the house on the night of Amanda's death.

Thorpe asked defendant, "Mr. Smith let me ask you point blank, this morning, last night, did at any time you strike [Amanda] Cook about the face or head?" Defendant responded that "if I did, I might have popped her in the mouth, she has a bad habit of saying no . . ." Defendant was also asked "Mr. Smith, on December 9th, at any time did you shake [Amanda]?" He responded "I might have, I'm not positive." Later, Thorpe again asked defendant "Mr. Smith . . ., you admitted hitting the child . . . on 12-9-98, when did you shake her last trying to make her stop crying or whatever?" Defendant responded "I can't recall." When asked again "[d]id you shake her last night" defendant stated "[i]t could have been last night, what I—if I realize that I've got her up shaking her, I sit her down and I walk off." When defendant discussed shaking Amanda with Thorpe, he also stated "I realize I go too far when I do that."

The uncontroverted facts in this case and defendant's own statements show that Amanda was conscious and ambulatory when she and defendant returned to the house at approximately 9:20 p.m. on 9 December. Defendant stated that he was "upset" with Amanda and had to "discipline" her that night before putting her to bed around

10:30 p.m. or 11:00 p.m. According to defendant's statements, this discipline included possible shaking, possibly hitting her about the head, and popping her in the mouth; all administered while defendant was under the influence of alcohol. Mrs. Smith testified that she arrived home from work after midnight and never checked on Amanda. Amanda was found dead by defendant when he checked on her at 5:45 a.m. on 10 December. Defendant stated that Amanda was warm but stiff at that time. Amanda's mother testified that after defendant told her that Amanda was dead, the defendant further stated that "they were going to come and get [me]."

After defendant made these statements, he called 911. Defendant stated the paramedics arrived about 15 minutes after the 911 call. Paramedic Pope did not attempt any lifesaving measures on Amanda. Pope testified that Amanda had been dead in "excess of a couple of hours, at least." He testified that Amanda's body was cool and rigor mortis had set in when he had arrived.

B. Dr. Clark's Testimony

Dr. Clark testified as an expert witness to the extent of Amanda's injuries and the cause of her death as follows: Two year old Amanda was "32 inches tall and weighed 21 pounds." "The external examination of this body showed extensive evidence of injury. There were bruises of varying ages distributed over the body from the top of the head to the legs, and even one on the foot." There were three groups of bruises which were "purple" in color, indicating that they were recent. Dr. Clark stated that "[t]he shape and distribution of the bruises was often in a pattern suggestive of an adult hand." All of the bruises "relate to the cause of death, in that they are the basis for my having called this battered child syndrome, but they don't contribute directly to the death as it resulted from head injury."

As to the head injuries, Dr. Clark testified that the

> brain was quite bloody . . . blood [was] present on both sides of the brain . . . [A]pproximately 25 grams [on one side and] 5 grams [on the other]. . . The brain itself had a bruise or a contusion on it . . . [Also there were bruises on the underside of the scalp, on the top and both sides.] [B]lood was present in the retinas of both eyes . . ., one of them somewhat more than the other . . . The spinal cord also . . . had blood surrounding its membranes, as did the brain.

Dr. Clark concluded, "I would expect that shaking played at least a part in this death. And by shaking, *I mean picking up the child, shaking the child violently,* so that the head snaps back and forth enough that blood vessels are ruptured, causing the bleeding within the eyes and the bleeding surrounding the brain." (emphasis supplied).

Also the "presence of bruises on top of the head and all over the rest of the body also shows that blunt force injury occurred." "As there were bruises present internally and externally, I concluded that blunt force injury was present and played a significant role in this death." "There was a small amount of hemorrhage or bleeding of the inner upper lip, ..."

With respect to the time and cause of death, Dr. Clark testified that "[t]he child could conceivably have lived for a day or more with these injuries. *But not in a conscious state.*" (emphasis supplied). "I think [Amanda] would have been conscious either no time or a very short period of time following these injuries. *Very short meaning measured in minutes.*" (emphasis supplied). The majority's opinion ignores this testimony.

During cross-examination Dr. Clark maintained that "I don't think this child could have behaved normally following these injuries, and the child could have lived in an unconscious state for a period of hours or more than a day. I think if it was a day, there would have been at least some early pneumonia." The autopsy evidence showed none. Dr. Clark concluded that Amanda died as a "result of blunt force injury to the head, including physical injury resulting in bruises, and in all likelihood including shaking."

Clearly, defendant's actions and conduct were as egregious as the defendant's actions in *Qualls* and *Hemphill*, and far worse than those of the defendant in *Blue*. None of the defendants in those cases were under the influence of alcohol when the acts resulting in death were inflicted.

C. *State v. Perdue*

The majority also correctly points out that our Supreme Court has held that malice may also be inferred from a "willful blow by an adult on the head of an infant." *State v. Perdue*, 320 N.C. 51, 58, 357 S.E.2d 345, 350 (citation omitted). Willfully is defined as "purposely" and "designedly." *State v. Whittle*, 118 N.C. App. 130, 135, 454 S.E.2d 688, 691 (1995).

Defendant admitted to being upset with Amanda and disciplined her sometime during the evening when she was in his exclusive custody. Defendant also admitted to being under the influence of alcohol. During the course of his interviews, defendant vacillated as to whether he hit and shook Amanda, the amount of force used, and adjusted his version of events.

Defendant said he had to strike Amanda because she had a bad habit of saying "no, no, no, no." According to defendant, the purpose of his discipline was to keep Amanda away from her baby sister who, according to defendant, Amanda was pestering. It was the defendant's "conscious object" or "purpose" to strike Amanda. The forensic evidence is overwhelming that the blow or blows to Amanda were from an adult, and, combined with the violent shaking, were significant enough to cause death. A jury could have reasonably concluded that defendant willfully and maliciously struck Amanda's head and violently shook her.

The majority's opinion concludes that "[t]he evidence presented did not establish that the blunt force trauma which caused Amanda's death was administered by an adult hand." This conclusion confuses Dr. Clark's testimony about Amanda's body injuries with her head injuries. Dr. Clark testified that the injuries and bruises to the body were indicative of an "adult hand." The fatal blow and violent shaking which caused Amanda's death were administered by an adult.

The majority's opinion also recites at length Mrs. Smith's bizarre behavior and actions toward Amanda. Without doubt, Mrs. Smith's actions were deplorable and totally inconsistent with those of a loving, natural mother. Mrs. Smith testified at trial and was subjected to a vigorous cross-examination by defense counsel. The jury had a full opportunity to observe her responses and demeanor. Despite Amanda's mother's inexcusable behavior and uncaring neglect, the jury concluded that defendant was guilty of second degree murder and not involuntary manslaughter. Although defendant did not testify in his own defense, his version of the events were heard and considered by the jury through his recorded statements to Detective Thorpe.

Defendant presumably did not testify due to his prior convictions for driving while impaired, misdemeanor child abuse, and indecent liberties with a child. The jury was unaware of defendant's prior record when it returned its verdict of second degree murder. The trial

court determined that there were seven prior record points and imposed a sentence for a minimum term of 220 months and for a maximum term of 273 months, due to these prior convictions. N.C. Gen. Stat. § 15A-1340.17(c) (1997). The trial court ordered this judgment be executed with credit for 371 days of prior confinement.

III. Summary

The evidence shows that Amanda was sick for several days before her death. The individual that Amanda counted on, and who had a legal duty to protect her and to keep her safe, treated her illness not by caring for her or taking her to the doctor, but with a "pop in the mouth," hitting her in the head, and shaking her. Defendant admitted to consuming at least three beers and a mixed drink on the night Amanda died, and to keeping four to five cases of beer in the home. Defendant also admitted to shaking and spanking Amanda on prior occasions. Dr. Clark testified that Amanda died as a result of violent shaking and a blow or blows to the head administered by an adult.

Viewing this evidence in totality after giving the State the benefit of all reasonable inferences, the jury could have concluded that defendant acted with malice. The facts more than satisfy the *Wilkerson* definition of malice as used in *Hemphill*, *Qualls* and *Blue*. *Wilkerson* requires "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind utterly regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person." *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978). The majority mistakenly holds that these facts raise only a suspicion of "recklessness of consequences," and do not show malice. The evidence was sufficient for the jury to conclude that defendant acted with malice to sustain the conviction for second degree murder. I find no error in the jury's verdict or the judgment. Therefore, I respectfully dissent.

HANES CONSTRUCTION COMPANY, A NORTH CAROLINA CORPORATION, PLAINTIFF v. HOTMIX & BITUMINOUS EQUIP. CO., INC., DEFENDANT

No. COA00-736

(Filed 4 September 2001)

Jurisdiction— personal—foreign corporation—long-arm statute—minimum contacts

The trial court erred in a breach of contract action by allowing defendant foreign corporation's motion to dismiss based on lack of personal jurisdiction where defendant had its principal place of business in Indiana and sold products in part through advertisements in a national magazine which had circulation in North Carolina, because: (1) defendant's promise to deliver goods to a third-party carrier is sufficient to establish personal jurisdiction over a foreign corporation under the long-arm statute of N.C.G.S. § 1-75.4(5)(c); and (2) defendant had sufficient minimum contacts to permit this state to exercise personal jurisdiction over it consistent with the due process clause when the parties negotiated a contract providing that plaintiff would bear the cost of shipment and risk of loss once defendant delivered the equipment to a third-party carrier, and the parties negotiated another agreement to sell a used asphalt plant in Lexington, North Carolina.

Judge CAMPBELL dissenting.

Appeal by plaintiff from judgment entered 4 April 2000 by Judge L. Todd Burke in Davidson County Superior Court. Heard in the Court of Appeals 16 May 2001.

Law offices of J. Calvin Cunningham, by R. Flint Crump, for plaintiff-appellant.

Brinkley Walser, P.L.L.C., by Stephen W. Coles, for defendant-appellee.

WYNN, Judge.

In this appeal, we agree with Hanes Construction Company (a North Carolina corporation) that under the facts of this matter, the contacts between Hotmix & Bituminous Equipment Company (an Indiana corporation) and the State of North Carolina were sufficient to give North Carolina courts *in personam* jurisdiction over it. *See*

Collector Cars of Nags Head, Inc. v. G.C.S. Electronics, 82 N.C. App. 579, 347 S.E.2d 74 (1986). Accordingly, we reverse the trial court's order finding no personal jurisdiction.

Hanes, a North Carolina corporation having its principal office and place of business in Lexington, North Carolina, filed this action in Davidson County, North Carolina, against Hotmix, an Indiana corporation with its principal place of business in Noblesville, Indiana. In its complaint, Hanes alleged that Hotmix breached an agreement between the parties by delaying the loading of equipment and failing to load all equipment on trucks sent to Indiana by Hanes.

Hanes is involved in the asphalt business and Hotmix sells among other things, equipment used to produce asphalt. Hotmix has advertised for the sale of construction equipment in a magazine, "The Asphalt Contractor." This magazine is published thirteen times a year and is mailed free of charge to all asphalt plant owners, contractors, and paving maintenance companies throughout the United States and Canada.

The president of Hanes, Mr. Simerson, consulted the magazine, "The Asphalt Contractor" and called the number listed on the advertisement. In response, the president of Hotmix, Mr. Haskin, quoted a price over the telephone for the equipment Mr. Simerson was interested in purchasing; and, Mr. Simerson went to Indiana to look at the equipment. In September 1998, Hanes entered into a contract for $120,000 with Hotmix to purchase numerous items of equipment used in the asphalt paving business. The agreement was signed by Hanes at its place of business in North Carolina and forwarded to Hotmix. The contract stated that Hanes was responsible for providing the necessary trucks required for shipping. When the third-party shipper arrived, he was advised by Hotmix that the trucks were not appropriate for shipping the contracted items. Therefore, Hotmix delayed and also refused to load certain items, including a hot oil heater, a special conveyer, and a compressor valued in excess of $50,000.

On 21 September 1998, Hanes and Hotmix signed a marketing agreement to sell a used asphalt plant in Lexington, North Carolina. Mr. Simerson, on behalf of Hanes, signed a contract in North Carolina for Hotmix to sell a used Little Ford Model 122-60 Asphalt Plant, located in Lexington, North Carolina.

On 8 January 1999, Hanes filed a complaint in Davidson County, North Carolina alleging breach of contract. Hotmix filed a motion to

dismiss under Rule 12 (b)(2) of the North Carolina Rules of Civil Procedure for lack of jurisdiction over the defendant. The trial court granted Hotmix's motion and Hanes appealed to this Court.

The sole issue presented by this appeal is whether the trial court properly granted Hotmix's motion to dismiss for lack of personal jurisdiction. The granting of a motion to dismiss for lack of jurisdiction is immediately appealable. *See* N.C. Gen. Stat. § 1-277(b) (1999); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999).

Our Courts have adopted a two-part test to determine whether a court may exercise *in personam* jurisdiction over a nonresident defendant. *See Mony Credit Corp. v. Ultra-Funding Corp.*, 100 N.C. App. 646, 648, 397 S.E.2d 757, 758 (1990). "First, the court must determine whether the North Carolina 'long-arm' statute, N.C. Gen. Stat. § 1-75.1 et seq., confers jurisdiction over defendant. Second, the court must determine whether the exercise of personal jurisdiction violates defendant's right to due process." *Id.* "The question for the [appellate] court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory, whether properly labeled or not." *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 300, 435 S.E.2d 537, 541 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

Hanes contends that the trial court erred in granting defendant's motion to dismiss for lack of jurisdiction over the person of the defendant where the defendant met both the statutory and constitutional requirements for personal jurisdiction. We agree.

The long-arm statute "is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 643, 314 S.E.2d 124, 126 (1984), *rev'd on other grounds*, 312 N.C. 749, 325 S.E.2d 223 (1985). The statute, provides a basis for personal jurisdiction when an action:

> Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to

> deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or . . . .

See N.C. Gen. Stat. § 1-75.4(5)(c) (1999). A promise to deliver goods to a third-party carrier rather than to the contracting party is sufficient to confer statutory jurisdiction under N.C. Gen. Stat. § 1-75.4(5)(c) when the parties to the contract contemplated shipment in North Carolina. *See Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 82 N.C. App. 579, 581, 347 S.E.2d 74, 76 (1986).

In the subject case, Hanes entered into a contract with Hotmix to purchase numerous items of equipment used in the asphalt paving business. The agreement was signed by Hanes in North Carolina and forwarded to Hotmix. The breach of contract claim involves asphalt paving equipment, which was promised to be delivered to a third-party carrier in Indiana by Hotmix. Thus, we must agree with Hanes' contention that the promise in the subject case to deliver goods to a carrier is sufficient to establish personal jurisdiction over a foreign corporation under the long-arm statute.

Since we have determined that personal jurisdiction is authorized by the long-arm statute, we must now address whether the exercise of personal jurisdiction over Hotmix comports with due process requirements under the United States Constitution. *See Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989). The constitutional standard to be applied in determining whether a state may assert personal jurisdiction over a nonresident defendant is found in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945).

To exercise personal jurisdiction over a foreign corporation, the out-of-state defendant must have "certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and justice." *Id.*, 326 U.S. at 316, 90 L. Ed. 2d at 102. The application of the minimum contact rule varies with the nature and quality of defendant's activities, but it is essential in each case that the defendant purposefully avails itself of the privilege of conducting activities within the forum state thus invoking the benefits and protection of its laws. *See Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283 (1958). This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980).

"It is well settled that a defendant need not physically enter North Carolina in order for personal jurisdiction to arise." *Better Bus. Forms, Inc. v. Davis*, 120 N.C. App. 498, 501, 462 S.E.2d 832, 834 (1995). "Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of in personam jurisdiction if it has a substantial connection with this State." *Tom Togs, Inc. v. Ben Elias Indust. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986). "Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Id.* at 365, 348 S.E.2d at 785. Where the action arises out of defendant's contacts with the forum state, the issue is one of "specific" jurisdiction. To establish specific jurisdiction, the court analyzes the relation among the defendant, cause of action, and forum state. *CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 394, 383 S.E.2d 214, 216 (1989). "In determining whether a single contract may serve as a sufficient basis for the exercise of in personam jurisdiction, it is essential that there be some act by which defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Id.*

Factors used to determine the existence of minimum contacts include: "(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state; and (5) the convenience to the parties." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999). In *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, our Court applied the five factors to determine whether the minimum contacts standard had been met. In *Collector Cars*, the North Carolina plaintiff saw an advertisement for portable telephones in an national magazine that had a circulation in North Carolina. *See also Shaw Food Serv. Co., Inc. v. Morehouse College*, 108 N.C. App. 95, 99, 422 S.E.2d 454, 457 (1992) (holding that "[s]olicitation of business by the foreign defendant in the forum state is a factor to consider when determining whether a particular defendant has established the minimum contact with the forum state to satisfy due process."). *In Collector Cars*, the plaintiff signed the sales contract in North Carolina, which had been mailed unexecuted to it by the defendant from California. *See also Liberty Fin. Co. v. North Augusta Computer Store, Inc.*, 100 N.C. App. 279, 285, 395 S.E.2d 709, 712 (1990) (holding that the contract "was made in the State of North Carolina and therefore the contract has a 'substantial connection'

with North Carolina."). The contract provided that plaintiff would bear the cost of shipment and risk of loss, once the defendant delivered it to the third party carrier for shipment to North Carolina. The plaintiff executed the contract in North Carolina and mailed it with a check to the defendant in California. The defendant later mailed a confirmation of the contract to the plaintiff in North Carolina. The buyer sued when the seller cashed the check but allegedly did not deliver on time. Our Court held in *Collector Cars* that "these acts manifest a willingness by G.C.S. to conduct business in North Carolina. In personam jurisdiction is present when there is 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Collector Cars*, 82 N.C. App. at 582, 347 S.E.2d at 76 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958)).

Similarly, in the case at bar, Hotmix had its principal place of business in a state other than North Carolina, and sold products in part through advertisements in a national magazine which had circulation in North Carolina; Hanes' president saw the advertisement, called Hotmix from North Carolina and negotiated a price. Shortly thereafter, Hotmix sent an unsigned contract to Hanes. The president of Hanes signed the contract in North Carolina. The contract provided that Hanes would bear the cost of shipment and risk of loss once Hotmix delivered the equipment to a third-party carrier. Moreover, we point out that Hotmix had even more contact with the state of North Carolina than the defendant did in *Collector Cars*. In the case at bar, the parties made another agreement to sell a used asphalt plant in Lexington, North Carolina. The president of Hanes signed a contract in North Carolina to sell a used Little Ford Model 122-60 Asphalt Plant, which was located in Lexington, North Carolina. This agreement was a marketing agreement that contemplated Hotmix's representatives demonstrating the equipment at Hanes' plant in Lexington. Hotmix did not sell the Ford Asphalt Plant nor did any of its agents or employees come to North Carolina. The facts in *Collector Cars* are analogous to the present case; therefore, we must hold that Hotmix purposely availed itself of the benefits of the laws of this state in enjoying the privilege of transacting business in this state.

Thus, as in *Collector Cars*, we conclude that Hotmix had sufficient minimum contacts to permit this state to exercise personal jurisdiction over it consistent with the due process clause.

Accordingly, the decision of the trial court allowing defendant Hotmix's motion to dismiss must be reversed.

Reversed and remanded.

Judge BIGGS concurs.

Judge CAMPBELL dissents in a separate opinion.

CAMPBELL, Judge, dissenting.

I respectfully dissent from the holding of the majority that personal jurisdiction over Hotmix is authorized under the North Carolina long-arm statute, N.C. Gen. Stat. § 1-75.4, and that it does not violate federal due process.

The majority first concludes that personal jurisdiction is proper under the long-arm statute. The long-arm statute provides for personal jurisdiction when an action:

> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
>
> . . . .
>
> e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

N.C. Gen. Stat. § 1-75.4(5) (1999). This Court has held that when the parties to a contract contemplate shipment to North Carolina, a promise by an out-of-state party to deliver goods to North Carolina through a carrier is sufficient to permit statutory personal jurisdiction under N.C.G.S. § 1-75.4(5)(e). *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 82 N.C. App. 579, 347 S.E.2d 74 (1986). Based on *Collector Cars*, the majority holds that Hotmix's "promise . . . to deliver goods to a carrier is sufficient to establish personal jurisdiction over a foreign corporation under the long arm statute."

The record in the instant case indicates that the contract entered into by the parties contemplated delivery in Indiana "on buyer timely supplied trucks." A subsequent paragraph adds that the agreement is

"PRODUCT PRICE F.O.B. POINT OF ORIGIN . . . ."[1] (emphasis in original) and reiterates that "[t]rucks are buyers responsibility." Not only did the contract contemplate delivery in Indiana on trucks supplied by Hanes, all the evidence is that delivery did in fact occur this way, rather than through a "carrier." In its complaint, Hanes acknowledges that it "made arrangements to pick up all of the equipment, and made plans to take all items purchased to Lexington, North Carolina," and that the equipment was to be loaded on "trucks sent to Indiana by Plaintiff." Furthermore, in his affidavit, Bob Haskin, the president of Hotmix, says that "Mr. Simerson [Hanes' president] and his agents proceeded to load the trucks with the equipment." Simerson's affidavit does not deny this description of the events. Thus the present case is not, as the majority concludes, one of delivery to North Carolina through a common carrier, as in *Collector Cars.* Rather it is one of delivery in Indiana to Hanes or Hanes' agents. The location and recipient of delivery are critical distinctions. On the facts of the instant case, I do not believe statutory personal jurisdiction can be supported under N.C.G.S. § 1-75.4(5)(e) or *Collector Cars.*

Regardless of whether personal jurisdiction is permissible under the long-arm statute,[2] jurisdiction in this case would be barred under federal due process. To satisfy the requirements of the due process clause, an out-of-state defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). Our Supreme Court has held that "a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary

1. Sale F.O.B. point of origin is further indication of Hotmix's attempt to contractually provide for "delivery" of the goods in Indiana. *See* N.C. Gen. Stat. § 25-2-319, N.C. Comment (1999).

2. Some cases have held that North Carolina's long-arm statute is properly construed as extending to the farthest reaches permissible under the due process clause. *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 631 (1977); *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 616-17, 532 S.E.2d 215, 218, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000); *Jordan v. Bridges*, 978 F. Supp. 659 (E.D.N.C. 1997). Under this interpretation, the two-part inquiry collapses into the single question of whether jurisdiction is proper under the due process clause. *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 218. On the other hand, some cases, including the majority opinion here, continue to hold that the analysis is two-part: first a statutory inquiry and then a constitutional inquiry. *See, e.g., Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 95, 414 S.E.2d 30, 35 (1992); *Saxon v. Smith*, 125 N.C. App. 163, 168, 479 S.E.2d 788, 791 (1997).

minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for *in personam* jurisdiction if it has a substantial connection with this State." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986) (emphasis in original).

To determine whether Hotmix has sufficient contacts with North Carolina, the majority compares the quantity and quality of the contacts in the instant case with those in *Collector Cars*, and, finding them analogous, holds that personal jurisdiction over Hotmix is consistent with the due process clause. I disagree. *Collector Cars* is distinguishable from the instant case. It is true that in both cases an out-of-state defendant sought business through advertisements in a national magazine with circulation in North Carolina, received an order from a North Carolina company, and mailed to North Carolina an unsigned contract which was then signed within North Carolina. However, in *Collector Cars* payment was mailed from North Carolina to California and the defendant promised to ship the goods from California through a carrier. In the instant case, Hanes hand delivered the final payment to Hotmix in Indiana. More importantly, the contract called for delivery to trucks supplied by Hanes in Indiana, and when the delivery took place, Hanes' employees were present to take possession of the goods and load them on trucks supplied by Hanes. Hotmix's contacts with North Carolina are significantly less substantial than those of the defendant in *Collector Cars*, and, therefore, *Collector Cars* cannot be considered controlling.

The majority also notes that the parties had a previous contract and suggests that this previous contract is an additional contact for establishing *in personam* jurisdiction. The instant case is one of "specific jurisdiction" in that the suit arises from Hotmix's contacts with North Carolina. *See Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989). Past contractual activities can be considered to establish the minimum contacts necessary for jurisdiction, even in cases of specific jurisdiction. *See ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 386 S.E.2d 766 (1990). However, the "prior agreement" of the parties in this case is actually a marketing agreement executed the same day as the contract at issue. There is no evidence of prior business activity in North Carolina by Hotmix. Hotmix never entered North Carolina to negotiate or perform the marketing agreement. Indeed, there is no evidence to suggest that there was any performance at all under the marketing agreement. Thus this "prior agreement" of the parties does not lend support to

the argument that Hotmix has sufficient minimum contacts with North Carolina to be subject to its jurisdiction.

In *Stallings v. Hahn*, 99 N.C. App. 213, 392 S.E.2d 632 (1990), this Court held that personal jurisdiction could not be exercised under the due process clause where (1) defendant placed an advertisement in a national magazine which circulated in North Carolina, (2) defendant returned a telephone call of the plaintiff to North Carolina, (3) plaintiff mailed a $200.00 cashier's check to defendant in Pennsylvania, and (4) delivery of the goods was expected to take place in Pennsylvania. The facts of the present case are so similar to *Stallings* that I find it to be controlling. For that reason, I conclude that personal jurisdiction is not permissible under the due process clause.

Finally, I would point out that I believe the majority is correct that "[t]he standard of review of an order determining jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements LTD v. Midwesterling*, 133 N.C. App. 139, 141, 515 S.E.2d 46, 48 (1999). Using this standard of review, I would affirm the trial court's order of dismissal.

CAROL SCARVEY, PLAINTIFF-APPELLANT, AND CHARLOTTE T. AND CHARLES E. CURRY, INTERVENOR-APPELLANTS V. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE, DEFENDANT-APPELLEE AND THIRD-PARTY PLAINTIFF V. FAIRFIELD COMMUNITIES, INC., THIRD-PARTY DEFENDANT

No. COA00-806

(Filed 4 September 2001)

1. Appeal and Error— notice of appeal—timeliness—Rule 59 motion

Defendant's motion in the Court of Appeals to dismiss an appeal as untimely was denied where the notice of appeal was given within 30 days of the trial court's denial of a "Motion to Alter or Amend Judgment." Although defendant asserts that appellants improperly argued errors of law, so that this was not a N.C.G.S. § 1A-1, Rule 59(e) motion and did not qualify for added time under N.C. R. App. P. 3(c)(3), an argument that the trial court committed errors of law is expressly permitted under Rule 59.

2. Appeal and Error— review of collateral estoppel conclusion—prior orders not before Court of Appeals—not affected

The Court of Appeals granted a motion to dismiss assignments of error relating to a 15 September 1995 denial of motions to intervene and for class certification where the notice of appeal was from a later order and made no reference to the 15 September 1995 order. Appellants asserted the later trial court "adopted and incorporated" the 15 September orders when it held the subsequent claims to be collaterally estopped and that appeal of the subsequent order was essentially the same as appeal of the 15 September 1995 orders, but the 15 September orders were not before the Court of Appeals and would not be affected by review of the trial court's holding of collateral estoppel.

3. Collateral Estoppel and Res Judicata— class action certification—new evidence

The trial court did not err by holding that plaintiff was collaterally estopped from seeking class certification by a prior denial of certification where appellants asserted that there was additional evidence, but there was no legal or factual change in the common issues underlying both cases. The proper method for raising newly discovered evidence is through N.C.G.S. § 1A-1, Rule 60.

4. Statute of Limitations— tolling—claims raised in class action—interlocutory appeal from denial of certification

Plaintiff Scarvey's cause of action was not barred by the statute of limitations where another party filed a class action complaint covering the same claim, class certification was denied, and there was an interlocutory appeal. The statutes of limitations on claims raised in a class action complaint are tolled as to all putative members of the class from the filing of the complaint until a denial of class action certification by the trial court. If an interlocutory appeal is taken from the denial of certification, tolling continues during the pendency of the appeal. Tolling ends at the trial court's denial of certification if an interlocutory appeal is not taken, regardless of whether the denial of certification is subsequently appealed at the conclusion of the action.

Appeal by plaintiff and intervenors from orders dated 23 February 2000 and 12 April 2000 by Judge Ben F. Tennille in Superior

Court, Mecklenburg County. Heard in the Court of Appeals 21 May 2001.

Moore & Brown, by Beverly C. Moore, Jr. and B. Ervin Brown II, for plaintiff-appellant and intervenor-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mack Sperling, for defendant-appellee.

McGEE, Judge.

This case concerns efforts by plaintiff Carol Scarvey (Scarvey) and intervenors Charlotte T. and Charles E. Curry (the Currys) (collectively, appellants) to recover money allegedly owed them by First Federal Savings and Loan Association of Charlotte (defendant) following appellants' purchases of unimproved lots through installment sales contracts and appellants' subsequent defaults on their payments to defendant. Third-party defendant Fairfield Communities, Inc. is not a party to this appeal.

The Currys filed a class action complaint against defendant on 10 December 1993, alleging breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices. In an order dated 6 July 1994, the Currys' claims for breach of contract and breach of fiduciary duty were dismissed as barred by the relevant statutes of limitations. Scarvey moved to intervene on 10 March 1995 and included a complaint in intervention alleging the same claims the Currys had alleged. Judge Robert P. Johnston denied both Scarvey's motion to intervene and the Currys' motion for class certification on 15 September 1995. Scarvey and the Currys appealed the orders to our Court, but their appeal was dismissed for failure to properly perfect the appeal. *See Curry v. First Federal Savings and Loan Assn.*, 125 N.C. App. 108, 479 S.E.2d 286, *disc. review denied*, 346 N.C. 278, 487 S.E.2d 544 (1997).

Scarvey then filed the class action complaint in the present case on 7 January 1998, alleging the same claims against defendant that the Currys had previously alleged. The Currys took a voluntary dismissal of their remaining individual claim of unfair and deceptive trade practices against defendant on 16 April 1998, and filed a motion to intervene and complaint in intervention in the present case on 14 December 1998. In an order dated 23 February 2000, the trial court dismissed Scarvey's claims against defendant as barred by the relevant statutes of limitations and by the doctrine of collateral estoppel, and the trial court dismissed the Currys' motion to intervene as moot.

Following a "Motion to Alter or Amend Judgment" filed by appellants, the trial court amended its 23 February 2000 order to include the Currys as proposed intervenors, but the trial court otherwise denied the motion in an order dated 12 April 2000. Appellants filed a notice of appeal on 3 May 2000 of the 23 February 2000 and 12 April 2000 orders.

I.

We first address defendant's two motions to dismiss the present appeal.

A.

[1] In its first motion to dismiss, defendant asserts that appellants' notice of appeal was untimely. Under N.C.R. App. P. 3(c), an appeal must be taken within thirty days of the entry of the order or judgment appealed from, which appellants did not do. However, N.C.R. App. P. 3(c)(3) allows for such an appeal to be taken within thirty days of the entry of an order upon a N.C. Gen. Stat. § 1A-1, Rule 59(e) motion to alter or amend a judgment. Defendant asserts that appellants' "Motion to Alter or Amend Judgment" does not qualify as a Rule 59 motion, and therefore the added time to appeal provided under N.C.R. App. P. 3(c)(3) was not available. *See, e.g., Smith v. Johnson*, 125 N.C. App. 603, 607, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997) ("Because the motion is not a Rule 59 motion, the time to file an appeal from the . . . order was not tolled. Therefore, defendants' . . . notice of appeal from the order was not timely and must be dismissed.").

In particular, defendant asserts that appellants improperly argued errors of law in their motion. However, while it may be true that a Rule 59 motion "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made" before the trial court, *id.* at 606, 481 S.E.2d at 417 (citation omitted), N.C.G.S. § 1A-1, Rule 59(a)(8) (1999) specifically permits such a motion to raise an error of law by the trial court. "The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8)[.]" *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988). Defendant does not assert in its motion to dismiss that appellants made new arguments before the trial court, but only that appellants argued the trial court committed errors of law. Because such argument is expressly permitted under Rule 59, we find

no reason that the tolling provision of N.C.R. App. P. 3(c) should not apply to appellants' notice of appeal.

We hold that appellants' "Motion to Alter or Amend Judgment" was a valid Rule 59 motion and that appellants were entitled to file their notice of appeal within thirty days of the denial of that motion under N.C.R. App. P. 3(c)(3). Because appellants filed their notice of appeal within that time, we deny defendant's first motion to dismiss the present appeal.

B.

[2] In its second motion to dismiss, defendant seeks the dismissal of appellants' assignments of error on appeal assigning error to Judge Johnston's 15 September 1995 denials of the Currys' motion for class certification and Scarvey's motion to intervene. Because appellants' 3 May 2000 notice of appeal makes no reference in any manner to Judge Johnston's September 1995 orders, we hold that Judge Johnston's September 1995 orders are not properly before us on appeal. *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Proper notice of appeal requires that a party 'shall designate the judgment or order from which appeal is taken . . . [.]' 'Without proper notice of appeal, this Court acquires no jurisdiction.' "). We therefore need not address whether appellants might have been entitled to a second appeal of Judge Johnston's orders had the 3 May 2000 notice of appeal referred to them.

Appellants assert that, in holding Scarvey's claims to be collaterally estopped by Judge Johnston's September 1995 denial of class certification, the trial court "adopted and incorporated" the prior class denial. Appellants reason that, insofar as the trial court denied class certification on the same grounds as did Judge Johnston, the trial court's denial is appealable, which appellants suggest "would be essentially the same as a direct appeal from Judge Johnston's class denial." However, while it is true that the trial court's holding of collateral estoppel is reviewable on appeal, that review will not affect either of Judge Johnston's September 1995 orders.

Appellants alternately contend that the Currys' voluntary dismissal of their remaining individual claim against defendant acted to nullify Judge Johnston's denials of class certification and intervention under *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 385 S.E.2d 545 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). That argument, however, only supports defendant's contention that

Judge Johnston's orders are not properly before us on appeal. Because it does not aid appellants, we decline to address the argument.

We conclude that Judge Johnston's September 1995 orders are not before us on appeal, and we therefore grant defendant's second motion to dismiss appellants' first and third assignments of error, insofar as those assignments of error assign error to Judge Johnston's September 1995 orders.

II.

We next address appellants' remaining assignments of error. As an initial matter, we note that appellants' brief has violated N.C.R. App. P. 10(c)(1) and 28(b)(5), in that appellants' assignments of error do not include references to specific pages in the record and appellants' arguments in their brief do not include specific references to particular assignments of error. Appellants' violations are highlighted by the fact that Judge Johnston's September 1995 orders, the apparent basis of appellants' first and third assignments of error, are not in the record on appeal at all, except insofar as they are reproduced in appendices to various motions filed before the trial court and included in the record on appeal.

The result is an appeal which is very difficult to follow and which includes numerous matters not properly before this Court. However, we decline to dismiss appellants' appeal in its entirety, and instead address the merits of those assignments of error that appear to be properly before us. *See* N.C.R. App. P. 2.

A.

[3] In their second assignment of error, appellants challenge the trial court's determination that Scarvey was collaterally estopped from seeking class certification in the present case by Judge Johnston's September 1995 denial of class certification. Under the doctrine of collateral estoppel, also known as issue preclusion,

> parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. "[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally."

King v. Grindstaff, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 599, 92 L. Ed. 898, 907 (1948)). *See also*, *State v. Summers*, 351 N.C. 620, 528 S.E.2d 17 (2000).

On appeal, appellants do not challenge the trial court's finding that they were in privity. Instead, appellants argue that there is no identity of issues between the Currys' claims against defendant and Scarvey's claims. Although appellants acknowledge that they raised the same claims, they assert that "changed circumstances" have rendered the issues different. *See, e.g.*, *Sunnen*, 333 U.S. at 599, 92 L. Ed. at 907. Specifically, appellants assert a change in facts.

In his 15 September 1995 order denying class certification to the Currys, Judge Johnston found that the Currys had testified through deposition that the value of their lot at the time of default was $15,000. Judge Johnston then denied class certification, concluding that individual issues predominated over common issues and further suggesting that the Currys were not adequate class representatives. Judge Johnston noted that the Currys' remaining non-time-barred claim of unfair and deceptive trade practices "also seems endangered by [the Currys'] testimony that their lot's fair market value was $15,000 at the time of default. . . . Assuming [the Currys'] own assessment is accurate, then [the Currys] may well not be entitled to any refund." In its 23 February 2000 order, the trial court in the present case held that Scarvey was estopped from seeking class certification by Judge Johnston's conclusion that individual issues predominated over common issues.

Appellants assert on appeal that the fair market value of the Currys' lot at the time of default was actually $38,000, a value they allege would have entitled the Currys to a refund. The $38,000 value comes from an appraisal of the lot obtained by appellants. It is unclear when the appraisal was performed, or whether it was presented to Judge Johnston before his 15 September 1995 order. However, appellants did inform Judge Johnston in a motion dated 8 September 1995 that the Currys' property had sold in February 1995 for $32,000, which suggested that the fair market value of the property at the time of the 1990 default lay somewhere between the $45,000 purchase price and the $32,000 sale price. Appellants contend that such evidence that the value of the Currys' lot was greater than $15,000 at the time of default constitutes "changed circumstances" preventing collateral estoppel.

We disagree. There has been no legal or factual change in the common issues underlying both the Currys' case and the present case in the time between Judge Johnston's September 1995 order and the trial court's February 2000 order. Appellants do not assert a change in facts but instead assert additional evidence about the original facts. The proper method for raising newly discovered evidence is through a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. Moreover, the existence of appellants' 8 September 1995 motion suggests that Judge Johnston was aware of appellants' contentions of contrary evidence as to the value of the Currys' lot by the time the 15 September 1995 order was filed. If Judge Johnston was aware of such evidence, that evidence could not constitute "changed circumstances" in the period following the order.

We conclude that appellants have failed to demonstrate a difference in issues between the Currys' claims before Judge Johnston and Scarvey's claims before the trial court in the present case. Because that was the sole argument raised by appellants against the trial court's holding of collateral estoppel, we find no error in the trial court's conclusion that Scarvey is collaterally estopped from seeking class certification of her claims before the trial court in the present case.

B.

[4] In appellants' third and fifth assignments of error, appellants assign error to the trial court's holding that Scarvey's claims were barred by the applicable statutes of limitations. We dismiss appellants' third assignment of error as not properly before us, insofar as it asserts that Scarvey's claims would have been timely had Judge Johnston allowed Scarvey's 10 March 1995 motion to intervene in the Currys' action. *See* Part I, Subpart B, *supra*.

The trial court held that Scarvey's cause of action arose on 30 January 1992. Therefore, unless tolled, the three and four year statutes of limitations on Scarvey's claims would all have run before Scarvey filed her 7 January 1998 complaint in the present case. Appellants assert, and the trial court agreed, that the statutes of limitations on Scarvey's claims should have been tolled by the filing of the Currys' class action complaint. However, appellants disagree with the trial court's conclusion that the tolling ceased when Judge Johnston denied the Currys' motion for class certification.

This Court has never considered whether the statute of limitations on a particular claim is tolled by the filing of a class action com-

plaint covering that claim. However, the issue has been addressed by federal courts under the federal class action statute and, while federal class action cases are not binding on this Court, we have held in the past that the reasoning in such cases can be instructive. *See Pitts v. American Sec. Ins. Co.*, 144 N.C. App. 1, 550 S.E.2d 179 (2001); *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 16, 454 S.E.2d 278, 286, *disc. review denied*, 340 N.C. 260, 456 S.E.2d 830 & 831 (1995). This is so even though North Carolina's class action statute, N.C. Gen. Stat. § 1A-1, Rule 23, is closely patterned after Rule 23 of the Federal Rules of Civil Procedure as it existed prior to 1966, making our Rule 23 quite different from the present federal Rule 23. *See English v. Realty Corp.*, 41 N.C. App. 1, 6, 254 S.E.2d 223, 229, *disc. review denied*, 297 N.C. 609, 257 S.E.2d 217 (1979). Our Courts have recognized that "[o]ur Rule 23 should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions[,]" *id.* at 9, 254 S.E.2d at 230, and we have accordingly expanded the rule beyond its letter as dictated by concerns for fairness. *See id.* at 8, 254 S.E.2d at 230; *Nobles v. First Carolina Communications*, 108 N.C. App. 127, 133-34, 423 S.E.2d 312, 316 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993).

The U.S. Supreme Court held in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L. Ed. 2d 713 (1974), that the goals of judicial economy to be served by the representative nature of a class action lawsuit would be endangered if all potential members of a class felt required to intervene in the action lest the statutes of limitations on their own claims expire and class certification subsequently be denied. The Court therefore held that the statutes of limitations on all claims alleged in a class action should be tolled for all putative class members from the time the action was filed until such time as class certification should be denied, so that would-be class members could move to intervene in the action following the denial. *See id.* at 553, 38 L. Ed. 2d at 726. The Court subsequently clarified that the tolling of the statutes of limitations applied regardless of whether would-be class members moved to intervene following the denial or filed their own individual lawsuits. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354, 76 L. Ed. 2d 628, 636 (1983). *See also, Newberg on Class Actions* §§ 5.05, 6.03, 16.11, 16.19, 24.99 (3d ed. 1992).

However, the U.S. Supreme Court never clearly indicated whether the tolling of the statutes of limitations should end with the trial court's denial of class certification or continue until all appeals of

that denial have been exhausted. The Federal Court of Appeals for the Eleventh Circuit considered that issue in *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998), *cert. denied*, 525 U.S. 1019, 142 L. Ed. 2d 453 (1998), and concluded that, under the federal Rule 23, tolling should cease with the trial court's denial of certification. The Court based its decision in part on the fact that federal appellate courts rarely grant interlocutory appeals on the issue of class certification, and concluded that continued tolling until a case reached its full conclusion and an appeal of the denial of class certification was properly taken would be unfairly burdensome upon defendants. *See also*, *Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173, 134 L. Ed. 2d 213 (1996).

The *Armstrong* Court suggested, however, that it might allow for continued tolling of a statute of limitations during the pendency of an appeal under a proposed amendment to the federal Rule 23. *Armstrong*, 138 F.3d at 1389, n.35. The amendment, enacted as Fed. R. Civ. P. 23(f) in 1998, permits a federal court of appeals to review a denial of class certification at its discretion, if such a review is requested within ten days of the entry of the denial. The federal court for the Eastern District of New York accordingly deemed the reasoning in *Armstrong* to have been superseded by the adoption of Rule 23(f) in *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 2000 U.S. Dist. LEXIS 13910, 2000 WL 1424931 (E.D.N.Y. 2000), and held that the relevant statutes of limitations should be tolled during an appeal under the federal Rule 23(f).

North Carolina's Rule 23 does not expressly provide for immediate appeal of an order denying class certification, but our Courts have held that such an interlocutory appeal nonetheless affects a substantial right and is immediately appealable. *See Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000). We conclude that the reasoning in *National Asbestos* is better suited to North Carolina's class action statute than the reasoning in *Armstrong* and *Nelson*. *Cf. Nelson*, 60 F.3d at 1013 (recognizing that Pennsylvania state courts have permitted tolling through appeal but distinguishing on the basis that, unlike the federal courts, Pennsylvania courts consider the denial of class certification to be immediately appealable.).

We therefore hold that the statutes of limitations on claims raised in a class action complaint are tolled as to all putative members of the

class from the filing of the complaint until a denial of class action certification by the trial court, as per *American Pipe* and *Crown, Cork.* We further hold that, if an interlocutory appeal is taken from the denial of certification, tolling continues during the pendency of the appeal, as suggested in *National Asbestos.* On the other hand, if an interlocutory appeal is not taken, we hold that tolling ends at the trial court's denial of certification, regardless of whether the denial of certification is subsequently appealed at the conclusion of the action, for the reasons stated in *Armstrong* and *Nelson.* We feel that this rule is appropriate because, while "to permit tolling the statute of limitations until final resolution on appeal of all claims would disable the essential purpose of the statute and encourage plaintiffs to sleep on their rights[,]" *Nelson* at 1013, an immediate interlocutory appeal of a denial of certification indicates that the plaintiffs are actively pursuing their rights. To allow the statutes of limitations to run during the period of such an appeal would create the same undesirable incentives toward precautionary filing that the U.S. Supreme Court sought to eliminate in *American Pipe.*

In the present case, appellants filed a timely interlocutory appeal of Judge Johnston's denial of class certification, and Scarvey filed her complaint seven months after our Supreme Court denied discretionary review to this Court's dismissal of the appeal on technical grounds. We hold that the statutes of limitations on Scarvey's claims were tolled until our Supreme Court's denial of discretionary review. Defendant does not deny that Scarvey had at least seven months remaining on her statutes of limitations. We therefore hold that Scarvey's 7 January 1998 complaint was timely filed. We note that, having affirmed the trial court's holding of collateral estoppel on the issue of class certification, *see* Part II, Subpart A, *supra*, we have not had to address whether the tolling of statutes of limitations by a class action lawsuit would allow the subsequent filing of a second class action lawsuit.

C.

Finally, in their fourth assignment of error, appellants assign error to the trial court's denial of the Currys' motion to intervene as moot. Because we have held that the trial court erred in dismissing Scarvey's individual claims as untimely, we remand the Currys' motion to intervene for further consideration.

We therefore affirm in part and reverse in part the trial court's 23 February 2000 order of dismissal, and remand to the trial court to

reinstate Scarvey's individual claims of breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices, as well as to address the Currys' motion to intervene in Scarvey's action.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge SMITH concur.

STATE OF NORTH CAROLINA v. ANTORIO MAURICE SMARR

No. COA00-722

(Filed 4 September 2001)

1. **Criminal Law— questions by court—clarifying sequence of events**

The trial court did not err in a prosecution for second-degree murder, attempted armed robbery, and other crimes by questioning witnesses where defendant contended that the questions aided the State but none of the court's questions suggested an opinion on the facts or commented on the weight of the evidence or the credibility of the witness. All of the information gathered by the court had previously been elicited on direct examination, the order of events had been confused on cross-examination, and the court's questions attempted to ascertain the correct sequence of events.

2. **Criminal Law— questions by court—credibility of witness**

Although defendant contended that questions asked by the trial court in a prosecution for second-degree murder, attempted armed robbery, and other crimes destroyed the credibility of a defense witness, the questions attempted to clarify the sequence of events, did not comment on the weight of the evidence or the credibility of the witness, and had little bearing on defendant's guilt or innocence.

3. **Criminal Law— questions by court—aid to State**

The trial court did not err in a prosecution for second-degree murder, attempted armed robbery, and other crimes by asking a witness questions which defendant contends aided the State. The trial court at no time commented on the strength of the witness's

testimony, his credibility, or whether the State had proved the crimes charged, and the court also asked questions which appeared to help defendant's case. The court was only trying to clarify matters of importance to the jury and the questions were within his power under N.C.G.S. § 8C-1, Rule 614(b).

4. Sentencing— aggravating factor—involvement of a person younger than sixteen

The trial court did not err when sentencing defendant for second-degree murder, attempted armed robbery, and other crimes by finding as an aggravating factor that defendant had involved a person under the age of sixteen (McNeil) in the crime where defendant contended that there was insufficient evidence that defendant encouraged or used McNeil in the commission of the crimes and that the aggravating factor was not intended to apply where both participants were children. The court was within its discretion in concluding that McNeil's version of events was more credible and could conclude from the evidence that defendant drew McNeil into the crimes even though defendant did not occupy a position of leadership in the group. N.C.G.S. § 15A-1340.16(d)(13) only requires that the person defendant involves in the crime be under sixteen years old without any reference to a deviation between defendant's age and the age of the person he involves.

5. Criminal Law— duress—opportunity to escape

The trial court did not err in a prosecution for second-degree murder, attempted armed robbery, and other crimes by not giving an instruction on duress. Duress is not applicable to murder; furthermore, even under defendant's version of the facts, defendant had the opportunity to avoid committing the crimes without undue exposure to risk of death or serious bodily harm. Defendant's fear that he would be hurt later if the other participants thought that he told the police about their plan is not the kind of immediate threat of harm that would negate his opportunity to escape.

6. Appeal and Error— suppression of statement—new theory asserted on appeal—not considered

The argument of a defendant in a second-degree murder and armed robbery prosecution that his statement at the police station was inadmissible was not addressed where defendant asserted on appeal a theory for suppression which was not

asserted at trial and where there was no evidence in the record from which the Court of Appeals could conclude that the statement was taken in violation of defendant's rights.

Appeal by defendant from judgments entered 4 February 2000 by Judge F. Don Bridges in Gaston County Superior Court. Heard in the Court of Appeals 16 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

CAMPBELL, Judge.

Defendant was convicted by a jury of second degree murder, three counts of attempted robbery with a dangerous weapon, aiding and abetting an assault with a deadly weapon inflicting serious injury, and conspiracy to commit a felony. Defendant was sentenced to a total of 390 to 514 months in prison.

The evidence presented by the State tends to show that Nicholas and Crystal Hammond, along with their cousin Joshua Long ("Long"), were walking along Garrison Boulevard around 4:00 a.m. on 14 July 1998. They saw a Dodge Caravan drive by them two times as they were walking along the road. The van then pulled to a stop in a nearby park. Mr. Hammond observed three black males walking toward him from the direction of the van. Mr. Hammond heard one of them say "what's up" and then heard a gunshot. He turned to see one of the men shoot Long with a handgun. Another man stepped out from a bush, pointed at Mrs. Hammond and said "there the bitch goes." The third individual fired a shot in her direction. Mr. Hammond was also shot by the same assailant who shot Long. Although Mr. and Mrs. Hammond performed CPR on Long, he died at the hospital from loss of blood. Mr. Hammond underwent emergency surgery to remove his spleen, and later had a second surgery to remove a bullet lodged in his back.

Mrs. Hammond described a similar series of events in her testimony, adding that before Mr. Hammond was shot, she heard one of the assailants say "give it up."

Detective Jimmy Arndt testified that he was one of the primary investigators of the case. He arrived at the crime scene around 5:10 a.m., and later interviewed Mr. and Mrs. Hammond at the hospital. At about 6:05 a.m. on 15 July 1998, he went to the home of defendant with another detective and two uniformed officers. Defendant's mother indicated that defendant was in bed asleep. The officers entered defendant's bedroom and yelled at him to get up and keep his hands where they could see them. They told defendant they needed to talk to him. A loaded revolver was recovered from under defendant's bed. Defendant was transported to the police station where he was read his juvenile Miranda rights (defendant was sixteen years old at the time) and signed a form indicating that he understood his rights and was willing to make a statement.

Later that day defendant directed Detective Arndt to Montrell McNeil's ("McNeil") home, where the detective recovered a .38 caliber handgun, which defendant identified as the weapon McNeil had used during the incident on 14 July 1998.

On cross examination, Detective Arndt testified that during his interview with Mrs. Hammond, she never mentioned a third assailant, nor anyone shouting something from behind a bush. At trial Mrs. Hammond had testified that a third assailant shouted "there goes the bitch."

Defendant took the stand on his own behalf. According to his testimony, he arrived home around 1:00 or 2:00 a.m. on 14 July 1998, and saw McNeil riding his bike nearby. Defendant agreed to go riding with him, but first went inside to retrieve his bike and his gun, which he had recently purchased for protection. Defendant and McNeil had been riding around for a few hours when Chris Lipscomb ("Lipscomb"), an acquaintance of defendant, pulled up alongside them in a van. The three talked for a while and Lipscomb offered them a ride home, but indicated that he needed some gas money. After getting in the van, defendant reached into his pocket and removed his gun in order to get to his wallet. Lipscomb saw the gun and grabbed it. As they were driving to the gas station, Lipscomb announced that he wanted to rob someone. McNeil said he would help, and showed his own gun, but defendant said no. Defendant testified that he felt scared. When the three reached the gas station, Lipscomb handed defendant's gun to McNeil so he could go inside to pay while defendant pumped the gas.

After they got back in the van, they drove by the Hammonds and Long a few times, then pulled over and parked. While parking Lipscomb handed the gun back to defendant. After the van was stopped, Lipscomb demanded the gun back and defendant complied. Lipscomb told defendant to get out of the van. After he was out of the van, the three began to follow the Hammonds and Long on foot. Defendant stopped to tie his shoes, and when he looked up, Lipscomb and McNeil were no longer in sight. He proceeded further down the road and witnessed Lipscomb shoot Long and Mr. Hammond. He also saw McNeil fire his weapon. McNeil and Lipscomb began running towards defendant, and the three got into the van and drove off. Defendant returned home around noon that day.

In rebuttal, the State presented the testimony of Montrell McNeil. McNeil testified that he and defendant had been riding around early on 14 July 1998 looking for someone to rob. After they ran into Lipscomb, they told him they were looking for someone to rob and he agreed to give them a ride. The three spotted the Hammonds and Long and followed them. Lipscomb and defendant argued over who would use defendant's gun, but defendant eventually agreed to allow Lipscomb to use it. McNeil fired his own weapon once, while Lipscomb fired defendant's weapon three times.

[1] Defendant's first argument on appeal is that the trial court committed reversible error when it questioned witnesses in a manner which he contends helped prove the State's case and indicated a bias against defendant. We disagree.

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (1999). In discussing an earlier version of the statute, our Supreme Court noted that " '[t]he judge occupies an exalted station, and jurors entertain a profound respect for his opinion. As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an adverse opinion on the facts.' " *State v. Carter*, 268 N.C. 648, 653, 151 S.E.2d 602, 606 (1966) (citation omitted in original) (quoting *State v. Canipe*, 240 N.C. 60, 64, 81 S.E.2d 173, 177 (1954)). Thus, " '[t]he law imposes on the trial judge the duty of absolute impartiality.' " *State v. Fleming*, 350 N.C. 109, 125-26, 512 S.E.2d 720, 732 (1999) (quoting *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959)).

Nevertheless, the trial court is permitted to "interrogate witnesses, whether called by itself or by a party." N.C. Gen. Stat. § 8C-1, Rule 614(b) (1999). Furthermore, in order to insure justice for the parties, the trial court may ask clarifying questions of a witness to alleviate confusion. *State v. Quick*, 329 N.C. 1, 21-22, 405 S.E.2d 179, 192 (1991). Such questions are only prejudicial error if "by their tenor, frequency, or persistence, the trial judge expresses an opinion." *State v. Rinck*, 303 N.C. 551, 562, 280 S.E.2d 912, 921 (1981).

Defendant complains of three instances in which the trial court questioned witnesses in a manner he considers prejudicial. On cross examination, the prosecutor asked defendant when the topic of robbing someone first came up. Defendant responded that it had come up "[w]hen we was leaving out of Bojangle's." The trial court then intervened:

THE COURT: When you were leaving Bojangle's?

A. When we left out of Bojangle's and we were starting to go down the hill. That's when we planned—Mr. Lipscomb said he wanted to rob somebody.

THE COURT: What did he say then?

A. He had said that y'all want to rob somebody and I told him no. I said are you crazy. I said I ain't robbing nobody.

THE COURT: Now was that before or after you stopped to get gas?

A. That was before we went to go get gas.

THE COURT: So before he stopped to get gas he was talking about robbing somebody?

A. Yes, sir.

THE COURT: When was it you took your gun out of your pocket when you reached for your wallet?

A. When we was in the Bojangle's parking lot.

THE COURT: You pulled your wallet out in Bojangle's parking lot?

A. Yes, sir.

THE COURT: Why did you do that?

A. To get the money. I was getting the money out that I was going to give [Lipscomb] for the gas.

THE COURT: That was all while you were in the Bojangle's parking lot?

A. Yes, sir.

THE COURT: [To the prosecutor] Go ahead.

Defendant argues that these questions by the trial court aided the State by emphasizing that defendant had not taken advantage of opportunities to leave McNeil and Lipscomb before the robbery and by suggesting that defendant's claim that he did not willingly remain with McNeil and Lipscomb was "pure nonsense." We disagree. The trial court's questions indicate an attempt to ascertain the correct sequence of events. All of the information gathered by the trial court had previously been elicited on direct examination, but on cross examination, the order of the events was confused. None of the questions by the trial court suggest an opinion on the facts, nor do they comment on the weight of the evidence or the credibility of the witness. We hold that the trial court acted properly by clarifying confusing testimony, with no resulting prejudice to defendant.

[2] Defendant also objects to questions the trial court asked of defendant's sister, Shawntay, which he contends impeached her credibility. The trial court questioned Shawntay as follows:

THE COURT: When was it that you saw Chris Lipscomb drive by and stop?

A. I'm not for sure. I mean I didn't know that all this stuff had went on, but I think it was like that next day.

THE COURT: What time the next day?

A. Probably like that evening, about 3:30, 4:00. Probably about 3:30, somewhere around in there.

THE COURT: Where was your brother then?

A. My brother was gone.

THE COURT: Where was he gone?

A. I believe he went with his friend Tracy.

It appears from the transcript that defendant presented Shawntay's testimony to show that Lipscomb was trying to threaten defendant by suspiciously driving by defendant's home. If the jury

believed this version of events, Shawntay's testimony would lend credibility to defendant's belief that he would be harmed if he told the police about Lipscomb and McNeil's participation in the robbery and murder.

Defendant contends that these questions by the trial court "destroyed" Shawntay's credibility because they forced her to assign a specific time to the events, i.e., the specific time that Lipscomb drove by defendant's house. Defendant contends that the testimony elicited by the trial court makes it appear as though Lipscomb drove by defendant's house after he had already been arrested (defendant was arrested at 6:00 a.m. on 15 July 1998), which would mean that defendant could not have been intimidated or threatened by Lipscomb's behavior. Thus, according to defendant, it made it appear to the jury that Shawntay was "obviously lying."

We conclude, however, that these questions were meant to clarify the sequence of events Shawntay was describing. On direct examination, Shawntay had been unclear as to what day Lipscomb had driven by. The questions of the trial court were an attempt to clarify this information. Again, the trial court made no comment as to the weight of the evidence or the credibility of the witness. Furthermore, these questions and their answers had little bearing on defendant's guilt or innocence. We hold that these questions were proper for purposes of clarification and did not prejudice defendant.

[3] Finally, defendant objects to questions the trial court directed toward McNeil during the State's rebuttal evidence, arguing that these questions helped the State prove part of its case. The trial court had the following exchange with McNeil:

> THE COURT: Excuse me for a second. You mentioned talking about committing an armed robbery.
>
> A. Yes, sir.
>
> THE COURT: This was something that came up in a conversation?
>
> A. (Indicating yes)
>
> THE COURT: How did that topic come up in conversation?
>
> A. I can't remember.
>
> THE COURT: Who was present when you had that conversation?
>
> A. Torry.

THE COURT: You and Mr. Smarr?

A. Yes, sir.

THE COURT: Where were you?

A. We were standing in front of his house.

THE COURT: As you best recall, what did you say and what did he say?

A. He was like if we commit an armed robbery do you think you can get away and I was like, no, because the bike is messed up.

THE COURT: Now was that conversation before or after he went in the house to get his gun?

A. It was before.

THE COURT: All right. I'm sorry. [To the prosecutor] Go ahead.

Defendant contends that these questions refuted defendant's testimony that he never intended to commit armed robbery and that before the trial court asked these questions the prosecutor had shown no interest in developing McNeil's testimony as to a prior intent to commit armed robbery, but after the trial court's questioning, he began to focus on this issue.

"A judge may ask questions . . . that elicit testimony which proves an element of the State's case so long as he does not comment on the strength of the evidence or the credibility of the witness." *State v. Lowe*, 60 N.C. App. 549, 552, 299 S.E.2d 466, 468 (1983) (citing *State v. Stanfield*, 19 N.C. App. 622, 626, 199 S.E.2d 741, 744 (1973)). A judge may not, however, "by his questions to a witness intimate an opinion as to whether any fact essential to the State's case has been proved." *Id.* (citing *State v. Hudson*, 295 N.C. 427, 435, 245 S.E.2d 686, 691 (1978)). In the line of questioning above, the trial court may have asked questions, the answers to which provided useful testimony for the State. However, the trial court at no time commented on the strength of McNeil's testimony, his credibility, nor whether the State had proved the crimes charged against defendant. The record also indicates that the trial court asked McNeil questions that appeared to *help* defendant's case. At one point the trial court asked McNeil if he had heard anyone say "there goes the bitch" (as Mrs. Hammond testified that defendant had said). McNeil replied that he had not.

These questions suggest that the trial court was only trying to clarify matters of importance to the jury. The questions were within his power under Evidence Rule 614(b). Furthermore, none of the trial court's questions explicitly or implicitly stated an opinion as to the facts or the witnesses' credibility. Defendant's assignment of error on this point is overruled.

[4] Defendant's second argument is that the trial court improperly applied a statutory aggravating factor in determining his sentence when it found that defendant involved a person under the age of 16 in the crime. *See* N.C. Gen. Stat. § 15A-1340.16(d)(13) (1999). Defendant contends that this factor should not apply for two reasons: (1) the evidence presented was insufficient to support a finding that defendant "encouraged or used" McNeil (who was fifteen at the time of the crime) in the commission of the crimes, and (2) that the legislature did not intend the factor to apply where both participants are children. We disagree.

The State has the burden of proving aggravating factors, and must prove them by a preponderance of the evidence. *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988). In making sentencing determinations, the trial court must consider all the aggravating or mitigating factors supported by the evidence, but the trial court has "wide latitude" to weigh the credibility of the evidence in determining the existence of aggravating factors. *Id.* at 524, 364 S.E.2d at 413.

Here, the trial court had to consider the differing stories presented by defendant and McNeil. The trial court was within its discretion, however, to conclude that McNeil's version of events was more credible, and that defendant did in fact involve McNeil in the crime. Although the trial court rejected the State's assertion that defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants in the offense (a statutory aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(1)), it could conclude from the evidence presented that while defendant did not occupy a position of leadership in the group, he did draw McNeil into participating in the crime.

Defendant's second contention on this point is that the legislature did not intend this aggravating factor to apply when both participants in the crime were children. It is undisputed in the evidence that defendant was sixteen at the time of the offense and McNeil was fifteen. We note that the legislature has clearly instructed that persons

aged sixteen or older are to be tried as adults. "Any juvenile . . . who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult." N.C. Gen. Stat. § 7B-1604(a) (1999). Furthermore, N.C. Gen. Stat. § 15A-1340.16(d)(13) only requires that the person the defendant involves in the crime be under sixteen years old, without any reference to a deviation between the defendant's age and the age of the person he involves. On the other hand, other statutes do make clear such an age deviation. *See, e.g.*, N.C. Gen. Stat. § 14-27.7A (1999) (classification of statutory rape as a Class B1 felony or a Class C felony depends on the age difference between the defendant and the victim). This Court is unable to infer any legislative intent to impose a requirement of any specific age difference between the defendant and the person under age sixteen he involves in the crime where no such intent is indicated by the statute itself. Therefore, we conclude that the trial court did not err in finding as an aggravating factor that defendant involved a person under the age of sixteen in the commission of the offense.

[5] Defendant next argues that the trial court committed reversible error by not instructing the jury on duress.[1] We disagree.

Generally, the trial court must give an instruction on any substantial feature of a case, regardless of whether either party has specifically requested an instruction. *State v. Henderson*, 64 N.C. App. 536, 539, 307 S.E.2d 846, 848 (1983). Any defense raised by the evidence is a substantial feature of the case, and as such an instruction is required. *Id.*

It should first be noted that a defense of duress is not applicable to murder. *State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000). Defendant acknowledges this rule, but contends that duress is a defense to the other charges against him, and that the trial court's failure to give the duress instruction as to these charges was error.

"In order to successfully invoke the duress defense, a defendant would have to show that his 'actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.' " *Id.* at 61-62, 520 S.E.2d at 553 (quoting *State v. Strickland*, 307 N.C. 274, 299, 298 S.E.2d 645, 661 (1983), *overruled on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775

1. North Carolina case law uses the terms duress and coercion interchangeably.

(1986)). Furthermore, a defense of duress "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 231 (1975). A defendant must present evidence on each element of the defense for the trial court to instruct the jury on that defense. *Henderson*, 64 N.C. App. at 540, 307 S.E.2d at 849.

Even under defendant's version of the facts, it is clear that defendant *did* have an opportunity to avoid committing the crimes without undue exposure to risk of death or serious bodily harm. When defendant, Lipscomb, and McNeil reached the gas station, defendant was alone outside pumping the gas. This gave him the opportunity to run away or call for help, but he chose to get back in the van. In addition, when McNeil and Lipscomb left the van to attack the Hammonds and Long, defendant got out with them but stopped to tie his shoes. At this point, McNeil and Lipscomb had gotten so far away they were out of defendant's eyesight, thus giving defendant another opportunity to run away and avoid being part of the armed robbery. Defendant's fear that McNeil and Lipscomb might later hurt him if they thought he told the police about their plan is not the kind of immediate threat of harm that would negate his opportunity to escape. Because defendant did have an opportunity to leave the scene without undue exposure to risk of death or serious bodily injury, we conclude that the trial court was correct in declining to give an instruction on duress.

[6] Defendant's final argument is that the trial court erred by admitting the written statement defendant made at the police station after his arrest. Defendant asserts that this statement was inadmissible as "fruit of the poisonous tree" from defendant's previous statements made at his home before he received his Miranda warnings.

We first note that defendant never made a formal motion to suppress the statement he made to police. Rather, he objected to its introduction during Detective Arndt's testimony. Defendant's trial counsel argued two theories in support of his objection. First, he argued that defendant's waiver was not knowing and voluntary. Second, he argued that the transcript of the statement should be barred by the best evidence rule, and that an actual audio recording of the statement should be the only admissible form of defendant's statement, if any. At no time did defendant's trial counsel argue that a failure to inform defendant of his Miranda rights at his home made his

later statement at the police station inadmissible as "fruit of the poisonous tree."

Defendant's change in tactics is important, because a defendant may not assert on appeal a new theory for suppression which was not asserted at trial. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988). As our Supreme Court has stated, "[d]efendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *Id.* at 322, 372 S.E.2d at 519 (citing *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836 (1934)). For this reason, we conclude that defendant's final argument is not properly before us and therefore we do not address it. Furthermore, there is no evidence preserved in the record from which this Court could conclude that a statement was taken in violation of defendant's rights.

We conclude that defendant had a fair trial, free from prejudicial error.

No error.

Judges WYNN and BIGGS concur.

ETHEL LEE ALLEN TAYLOR, PLAINTIFF v. ANNIE MAE ELLERBY, DEFENDANT

No. COA00-975

(Filed 4 September 2001)

1. Trials— automobile accident—verdict not contrary to evidence

The trial court did not abuse its discretion in an automobile accident case by denying plaintiff's Rule 59 motion for a new trial where plaintiff contended that the verdict was contrary to the evidence, but the jury finding was that plaintiff was not injured "as a result of the negligence of plaintiff" rather than "no injury." The evidence of causation was conflicting and plaintiff's testimony inconsistent; it cannot be concluded that the court's decision to defer to the jury's findings was a manifest abuse of discretion or probably amounted to a substantial miscarriage of justice.

2. Trials— motion for new trial—nine-month delay in ruling

The trial court did not abuse its discretion in an automobile accident case by taking nine months to rule on plaintiff's Rule 59 motion for a new trial where there was no indication that the court did not have a vivid recollection of the trial. The court had before it a letter from defendant reviewing the evidence and reminding the court that it had not ruled on the motion, as well as a detailed review of the evidence in plaintiff's original motion.

3. Damages and Remedies— peculiar susceptibility instruction—pre-existing mental condition—distinction between injuries and damages

The trial court did not err in an automobile accident case by giving the Pattern Jury Instruction on peculiar susceptibility due to a pre-existing physical condition but not an instruction on peculiar susceptibility due to a pre-existing mental condition. Although plaintiff contended that she suffered from mild mental retardation and was only capable of physical labor, so that her injuries left her unable to earn a living, there is a distinction between aggravation of an injury by a pre-existing mental condition and an increase in damages due to a pre-existing mental condition. Plaintiff never contended that her pre-existing condition aggravated the injuries she suffered to her neck, back, and knee, only that the pre-existing mental condition increased the special damages to which she was entitled.

Appeal by plaintiff from judgment entered 30 December 1998 by Judge William H. Helms in Anson County Superior Court. Heard in the Court of Appeals 7 June 2001.

Poisson, Poisson, Bower & Clodfelter, by Fred D. Poisson, Jr., for plaintiff-appellant.

The Robinson Law Firm, PLLC, by William C. Robinson, for defendant-appellee.

HUNTER, Judge.

Ethel Lee Allen Taylor ("plaintiff") appeals from a judgment entered following a jury trial in which plaintiff alleged she had suffered injuries in an automobile collision caused by the negligence of Annie Mae Ellerby ("defendant"). We find no error.

Plaintiff sets forth three assignments of error, accompanied by three corresponding arguments. First, plaintiff argues that the verdict returned by the jury was against the greater weight of the evidence presented at trial and should be set aside. After the judgment in favor of defendant was entered, plaintiff filed a "Motion for a New Trial" on 21 December 1998, requesting a new trial pursuant to N.C.R. Civ. P. 59 ("Rule 59"). This motion was eventually denied by order entered 9 September 1999 (approximately nine months later). Plaintiff requests that this Court reverse the trial court's order denying her motion for a new trial. It is well-established that a

> trial court's decision to exercise its discretion to grant or deny a Rule 59(a)(7) motion for a new trial for insufficiency of the evidence must be based on the greater weight of the evidence as observed firsthand only by the trial court. The test for appellate review of a trial court's granting of a motion for a new trial due to insufficiency of the evidence continues to be simply whether the record affirmatively demonstrates an abuse of discretion by the trial court in doing so. . . .

In re Buck, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999) (emphasis omitted). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice," *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982), and a "manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. Here, plaintiff bears the "heavy burden" of proving that the trial court abused its discretion by denying plaintiff's motion for a new trial.

[1] Plaintiff specifically argues that in failing to find that plaintiff suffered any injury, the jury returned a verdict that was contrary to all the evidence. We first note that, in fact, the jury did not return a verdict finding "no injury." Rather, the jury found that plaintiff was not injured "as a result of the negligence of the defendant." Thus, even if the evidence overwhelmingly established that plaintiff suffered from some injury, the jury's verdict would not necessarily be contrary to that evidence, since the jury could have concluded that plaintiff suffered injuries that were not caused by defendant's negligence. The issue, then, is whether the trial court's refusal to set aside the jury's verdict amounts to a substantial miscarriage of justice. We believe it does not.

At trial, plaintiff argued that she suffered from neck, back, and knee injuries as a result of the collision. While defendant admitted that she caused the accident by negligently pulling out in front of plaintiff, she specifically denied the existence of proximate cause of plaintiff's injuries and the existence of damages. The evidence presented at trial tended to show that Dr. Victoria Rommel first saw plaintiff as a patient on 12 January 1995, at which time she found that plaintiff was having some lower back pain with some tenderness to the sacroiliac joint. Dr. Rommel also noted that plaintiff, who weighed 246 pounds at the time, had gained 66 pounds over the course of two years. Dr. Rommel prescribed Zoloft for plaintiff because of her back pain, her premenstrual pain, her weight gain, and because she showed symptoms of depression.

On 16 February 1995, plaintiff and defendant had a "T-bone" collision on Highway 74 in Wadesboro, North Carolina, after defendant suddenly pulled out in front of plaintiff. Two police officers, Officers Pratt and Little, arrived on the scene after the collision to investigate. Officer Pratt testified at trial that plaintiff had a noticeable limp after the collision, and that she had told him that she hurt her leg. However, plaintiff refused Officer Pratt's offer to call an ambulance, and Officer Pratt failed to list any injuries sustained by plaintiff on the accident report filled out on the day of the collision.

On the day of the collision, plaintiff went to Anson County Hospital. The records from Anson County Hospital indicate that plaintiff complained primarily of sharp back pain radiating into the hip, beginning one hour after the car collision. Plaintiff did not report any knee pain or neck pain at the hospital, and there is no indication that a knee exam was performed. The doctors at the hospital performed a lumbar sacral spine film (an x-ray), and that test did not show any "disease." Plaintiff was diagnosed at the hospital as suffering from a lumbosacral sprain.

Plaintiff then visited Dr. Rommel on 21 February 1995, five days after the collision. During this visit, plaintiff complained of head, neck, shoulder and back pain and soreness. Plaintiff did not indicate that she suffered from any knee pain. Dr. Rommel found that plaintiff had a very limited range of motion in her neck, and that she was tender along the right side of her back and in her hips and legs. Dr. Rommel treated plaintiff for muscle or skeletal injuries by prescribing Flexeril, Percocet and Darvocet. Dr. Rommel also prescribed physical therapy. Dr. Rommel did not indicate any injury to plaintiff's knee.

Dr. Rommel saw plaintiff again on 24 February 1995, during which visit Dr. Rommel diagnosed plaintiff as suffering from a "hyperextension" to her neck. Dr. Rommel did not diagnosis plaintiff as having any knee injury during this visit. Dr. Rommel saw plaintiff again on 3 March 1995. Plaintiff complained at that time of headaches and neck pain. There is no indication that plaintiff complained of knee pain at this time. Dr. Rommel concluded that plaintiff had not shown significant improvement by 3 March 1995 and that her muscular-skeletal injury was severe enough to require the help of a specialist. Dr. Rommel referred plaintiff to Carolina Bone and Joint for hyperextension of the neck.

Plaintiff was then treated by Dr. King at Carolina Bone and Joint on 7 March 1995. When plaintiff first visited the clinic, she was asked to report all the problems she had, and she indicated only pain in her neck and back, and not in her knee. Dr. King's notes of the initial visit did not indicate any complaints regarding a knee injury. In fact, during this first visit, Dr. King performed a reflex test on plaintiff's knees to check for back injury. This test involved the tapping of each knee on the patella with a rubber mallet in the area of the knee where surgery was subsequently performed. Dr. King did not note any knee pain during this test.

On 9 March 1995, plaintiff again visited Dr. Rommel's office and complained that her knee had been hurting since the accident, but had not become stiff and swollen until the previous day, 8 March 1995. Plaintiff was diagnosed by Dr. Rommel's assistant as suffering from right knee pain with swelling, and hyperextension injury of the neck. Plaintiff was then referred back to Carolina Bone and Joint, where she was treated by Dr. Meade. Thereafter, on 24 March 1995, plaintiff underwent arthroscopic surgery on her knee which revealed a "divot" injury in the articular cartilage under the kneecap. Dr. Rommel next saw plaintiff on 4 April 1995, after her surgery. At that time Dr. Rommel noticed that plaintiff had "much improvement" in her neck and a much better range of motion in her neck. On 24 May 1995, Dr. Rommel again saw plaintiff and made notes regarding her neck injury, but did not make notes regarding her knee.

As to the issue of causation, Dr. Rommel opined that plaintiff's knee injury and her hyperextension of the neck injury were caused by the collision. Dr. Rommel testified that, in cases of neck injuries resulting from car accidents, victims often feel fine immediately after the accident and believe there is no reason to seek medical help. Subsequently, it is not uncommon for the victim to begin to feel pain

a day or two later when the muscles begin to tighten up and the injury becomes more apparent. Dr. Rommel also testified that a twenty-day period is a reasonable period of time for an inflammation to take place following a trauma.

Dr. Meade, who performed the arthroscopic surgery, testified that he found three things wrong with plaintiff's knee. First, plaintiff had a "fresh injury underneath her patella," and, in Dr. Meade's opinion, this injury was consistent with a dashboard injury, because it would require a direct blow with some great force. However, Dr. Meade conceded that he had no way to know what type of trauma had, in fact, caused the injury to plaintiff's knee and that typically such an injury would cause a patient immediate pain. Second, Dr. Meade testified that plaintiff showed some "wear and tear" to her knee that was somewhat greater than the average person, and that this "wear and tear" could have been caused by plaintiff's excessive weight. Finally, Dr. Meade acknowledged that plaintiff was born with a subluxed knee and admitted that this pre-existing condition could, on its own, cause a patient pain, restriction in motion, and loss of function.

In sum, the evidence tended to show that plaintiff suffered some back and neck pain immediately following the collision, but that plaintiff also suffered some lower back pain for which she had sought treatment by Dr. Rommel as recently as a month before the accident. Further, plaintiff's knee injury did not manifest itself until approximately twenty days after the accident, although Dr. Meade testified that an injury of this sort would typically cause a patient immediate pain.

Furthermore, there is evidence in the record calling into doubt plaintiff's credibility. For example, plaintiff's own doctor, Dr. Rommel, testified that plaintiff's testimony at trial, that she is sure that she hit her knee on the dashboard, was inconsistent with Dr. Rommel's notes from her first examination of plaintiff, five days after the collision, indicating that plaintiff stated that she did not know "what hit what." Also, plaintiff testified at trial that when she originally went to Anson County Hospital, she reported pain in her neck, leg and thigh; however, Dr. Rommel testified that the emergency room notes indicated that plaintiff did not report any pain in her neck.

Due to the conflicting nature of the evidence on causation, and due to the inconsistency of the testimony offered by plaintiff, "we

cannot conclude that the trial court's decision to defer to the finality and sanctity of the jury's findings was a manifest abuse of discretion or probably amounted to a substantial miscarriage of justice." *Pearce v. Fletcher*, 74 N.C. App. 543, 546, 328 S.E.2d 889, 891 (1985). This assignment of error is overruled.

[2] In her second argument, plaintiff asserts that the trial court abused its discretion by taking approximately nine months to rule upon her motion for a new trial. At the outset, we acknowledge a general preference that rulings upon motions to set aside jury verdicts be made during the session in which a case has been tried. *See Goldston v. Chambers*, 272 N.C. 53, 56-57, 157 S.E.2d 676, 679 (1967) (quoting *Knowles v. Savage*, 140 N.C. 372, 374, 52 S.E. 930, 931 (1906)). (". . . 'Hearing and determining a motion to set the verdict aside . . . involv[es] . . . incidents of the trial not likely to be impressed upon the memory of the judge that he may safely act upon them after adjournment. . . .' ") However, a ruling on a motion to set aside a verdict, even where such ruling is entered after a significant delay, will not be reversed on appeal absent an abuse of discretion. *See State v. Smith*, 138 N.C. App. 605, 610, 532 S.E.2d 235, 239 (2000).

In support of her argument that the trial court's delay amounts to an abuse of discretion, plaintiff relies upon *Smith*, 138 N.C. App. 605, 532 S.E.2d 235, in which this Court held that the trial court's decision to deny a motion to set aside the verdict was an abuse of discretion. *Smith* is distinguishable because, in that case, this Court placed significant reliance upon the fact that the trial court admitted at a hearing that it had only a vague recollection of the case and of the trial. *Id.* at 611-12, 532 S.E.2d at 240. There is no indication in the case at bar that the trial court did not have a vivid recollection of the trial. In fact, at the time the trial court entered its order on 9 September 1999, it had before it a letter from counsel for defendant reviewing the evidence presented at trial and reminding the trial court that it had yet to rule on plaintiff's motion, as well as a letter from counsel for plaintiff referring the trial court to plaintiff's original motion for a new trial. Plaintiff's original motion, which is over five pages in length, contains a detailed review of the evidence presented at trial, and sets forth extensive legal arguments and case law citations in support of plaintiff's motion. We do not believe plaintiff has satisfied her burden of showing that the length of the trial court's delay in ruling upon her motion constituted an abuse of discretion. This assignment of error is overruled.

[3] Plaintiff's final argument pertains to the trial court's instruction on "peculiar susceptibility." At trial, plaintiff requested that the trial court instruct the jury using North Carolina Pattern Jury Instruction 102.20, which is entitled "Proximate Cause—Peculiar Susceptibility." This instruction provides, in pertinent part:

> In deciding whether the injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence, you must determine whether such negligent conduct, under the same or similar circumstances, could reasonably have been expected to injure a person of ordinary [physical] [mental] condition. If so, the harmful consequences resulting from the defendant's negligence would be reasonably foreseeable and, therefore, would be a proximate cause of the plaintiff's injury. If not, the harmful consequences resulting from the defendant's negligence would not be reasonably foreseeable and, therefore, would not be a proximate cause of the plaintiff's injury.
>
> . . . .
>
> Under such circumstances, the defendant would be liable for all harmful consequences which occur, even though these harmful consequences may be unusually extensive because of the peculiar or abnormal [physical] [mental] condition which happens to be present in the plaintiff.

N.C.P.I., Civ. 102.20 ("P.I. 102.20") (footnotes omitted) (either term in brackets or both may be used depending upon the facts of the case). Plaintiff argued to the court during the trial that this instruction was warranted on two independent grounds. First, plaintiff argued that "the mental aspect of the case . . . has affected [plaintiff's] employability." Second, plaintiff argued that "the [knee] surgery . . . [was] to correct a congenital defect which needs to be corrected because of the injury," and that "[plaintiff's] weight makes her more susceptible to problems secondary to this accident." The trial court agreed to give the instruction. When the trial court read the instruction to the jury during the jury charge, the court used only the word "physical," and not the word "mental," at the two places in the instruction where the words physical and/or mental may be inserted. Immediately after the charge, counsel for plaintiff requested the court to correct the charge on peculiar susceptibility, arguing that the evidence established that "one of the handicaps which this lady had in being able to return to work or even why she is disabled has got a mental component to it,

and . . . that's why she cannot retrain." The court refused to alter the instruction to include the word "mental."

On appeal, plaintiff argues that the trial court's failure to include the word "mental" in its jury charge on peculiar susceptibility undermined plaintiff's case for damages, based on the following reasoning: plaintiff suffers from mild mental retardation and is only capable of physical labor employment; plaintiff's physical injuries caused by the collision prevent her from engaging in this kind of employment; plaintiff's projected damages of $388,732.00 were based on the contention that she is now completely unable to earn a living because she cannot perform physical labor employment. Plaintiff contends that the court's instruction, omitting the word "mental," constitutes reversible error because it made plaintiff's projected damages appear "overreaching" to the jury, left the jury "without guidance as to how to treat the pre-existing mental retardation on the issue of damages," and prejudiced the jury in defendant's favor.

In general, where the facts of a case warrant a jury instruction on peculiar susceptibility, and where the trial court fails to charge the jury accordingly, such failure may constitute reversible error. *See Casey v. Fredrickson Motor Express Corp.*, 97 N.C. App. 49, 387 S.E.2d 177, *disc. review denied*, 326 N.C. 594, 393 S.E.2d 874 (1990). This is so even if the jury (as it did here) returns a verdict finding that the plaintiff was not injured by the negligence of the defendant. *See id.* This is because, as we explained in *Casey*, the "peculiar susceptibility" doctrine (also referred to as the "thin skull" rule) is relevant to the issue of proximate causation, and a finding by a jury that the plaintiff was not injured by the negligence of the defendant implies that the jury may have concluded that the defendant was negligent, but that such negligence did not proximately cause the plaintiff's injuries. *See id.* at 54, 387 S.E.2d at 180. Thus, if the facts in the instant case warranted a jury instruction on peculiar susceptibility due to a pre-existing mental condition, the trial court's failure to instruct the jury accordingly would constitute reversible error, and such error would not be rendered moot by the fact that the jury concluded that plaintiff was not injured by the negligence of defendant. However, we believe that plaintiff's arguments regarding the relevance of her mental condition to this action do not warrant a jury instruction on peculiar susceptibility due to a pre-existing mental condition.

We believe that plaintiff has confused the role that a pre-existing mental condition can play in aggravating an *injury* suffered by the

plaintiff, with the role that a pre-existing mental condition can play in aggravating, or increasing, the amount of the *damages* suffered by the plaintiff, and we believe the difference between these two concepts is crucial. The "peculiar susceptibility" doctrine provides that:

> [A] negligent defendant is subject to liability for harm to the plaintiff although a physical [or mental] condition of plaintiff which is neither known nor should be known to defendant makes the *injury* greater than that which defendant as a reasonable man should have foreseen as a probable result of his conduct. . . .

Lee v. Regan, 47 N.C. App. 544, 550, 267 S.E.2d 909, 912, *disc. review denied*, 301 N.C. 92, 273 S.E.2d 299 (1980) (emphasis added) (citing Restatement of Torts 2d § 461 (1965)); *see also Potts v. Howser*, 274 N.C. 49, 53, 161 S.E.2d 737, 741 (1968) (holding that where plaintiff's *injuries* are aggravated or activated by a pre-existing physical or mental condition, defendant is liable to the extent that his wrongful act proximately and naturally aggravated or activated plaintiff's condition). This rule has been applied by our Courts on numerous occasions. *See, e.g.*, *Lee*, 47 N.C. App. at 550, 267 S.E.2d at 911-12 (where plaintiff's pre-existing syringomyelia is aggravated by a collision which resulted from the negligence of defendant, defendant is liable for the damages due to any enhancement or aggravation of plaintiff's condition); *Poole v. Copland, Inc.*, 348 N.C. 260, 498 S.E.2d 602 (1998) (defendant is liable for all mental injuries resulting from defendant's harassment of plaintiff, even where such injuries result in part from plaintiff's pre-existing susceptibility to matters that cause severe emotional distress); *Holtman v. Reese*, 119 N.C. App. 747, 750, 460 S.E.2d 338, 341 (1995) (plaintiff can recover against defendant for all injuries resulting from accident, including injuries caused in part by plaintiff's pre-existing soft-tissue neck injuries). As indicated by P.I. 102.20, the doctrine applies "[i]n deciding whether the *injury* to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence." N.C.P.I., Civ. 102.20 (emphasis added).

Here, plaintiff has never contended that the presence of her pre-existing mental condition aggravated the *injuries* she allegedly suffered from the collision (namely neck, back and knee injuries). Rather, plaintiff has alleged only that the presence of her pre-existing mental condition, when combined with her alleged physical injuries, aggravated or increased the amount of the *damages* to which she is entitled (based on the contention that an inability to perform physical labor has a greater impact on plaintiff's ability to earn a living than it

would in the case of a plaintiff without a similar mental condition). Thus, although it is clear that a plaintiff's pre-existing mental condition can, in some situations, be relevant to the issue of proximate causation (thereby warranting a jury instruction on peculiar susceptibility due to a pre-existing mental condition), plaintiff's argument here regarding her pre-existing mental condition is not, in fact, relevant to the issue of proximate causation; rather, it is an argument addressing the special damages to which plaintiff contends she is entitled. By way of comparison, plaintiff's arguments regarding her alleged pre-existing knee injury and weight condition were relevant to the issue of proximate causation, because under the "thin skull" rule, defendant could be liable for all physical injuries resulting from the collision even if such injuries were more extensive than they would otherwise have been due to plaintiff's pre-existing physical conditions. For this reason, the trial court properly instructed the jury on "peculiar susceptibility" due to a pre-existing physical condition. However, plaintiff was not entitled to a jury instruction on peculiar susceptibility due to a pre-existing mental condition, and the trial court did not err in refusing to give such an instruction. This assignment of error is overruled.

For the reasons set forth above, we find no error in the trial.

No error.

Judges MARTIN and HUDSON concur.

JOHN MALLOY, D/B/A THE DOGWOOD GUN CLUB, PLAINTIFF v. MICHAEL F. EASLEY, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; DAVID R. WATERS, DISTRICT ATTORNEY FOR THE 9TH PROSECUTORIAL DISTRICT; DAVID S. SMITH, SHERIFF OF GRANVILLE COUNTY; STATE OF NORTH CAROLINA, DEFENDANTS

No. COA00-898

(Filed 4 September 2001)

Declaratory Judgments— constitutionality of criminal statute—subject matter jurisdiction

The trial court lacked subject matter jurisdiction and erred by denying defendant's 12(b)(6) motion to dismiss a declaratory judgment action regarding the constitutionality of N.C.G.S.

§ 14-360 (cruelty to animals) where plaintiff alleged that the district attorney had indicated that plaintiff would be prosecuted under that statute if he held another of his semi-annual pigeon shoots. Prosecution would not result in irreparable injury to plaintiff's property interests or fundamental human rights because plaintiff would be entitled to challenge the constitutionality of the statute and its applicability to his pigeon shoots in the context of the prosecution, where all the necessary facts would be determined.

Appeal by plaintiff and defendants from order entered 9 May 2000 by Judge James C. Spencer, Jr. in Granville County Superior Court. Heard in the Court of Appeals 7 June 2001.

Tharrington Smith, L.L.P., by Roger W. Smith, and Greenberg Traurig, L.L.P., by C. Allen Foster, for plaintiff-appellee.

Michael F. Easley, Attorney General, by John J. Aldridge, III, Assistant Attorney General, for defendants-appellants.

Parker, Poe, Adams & Bernstein, L.L.P., by Cynthia L. Wittmer, for amicus curiae.

HUDSON, Judge.

On 3 March 1999, plaintiff filed a complaint in the Superior Court of Granville County seeking (1) a declaratory judgment regarding the constitutionality of a particular criminal statute, and (2) an injunction prohibiting the State of North Carolina from enforcing the statute against plaintiff. In an order entered 9 May 2000, the trial court ruled partly in favor of plaintiff and partly in favor of defendants; from that order defendants appeal and plaintiff cross-appeals. We hold that plaintiff's declaratory judgment action should have been dismissed in its entirety pursuant to North Carolina Rule of Civil Procedure 12(b)(1).

In general, a trial court may not entertain a civil declaratory judgment action brought by a plaintiff to challenge the constitutionality of a criminal statute, and to seek injunctive relief prohibiting the State from enforcing the statute against him. However, as we explain in further detail below, the law does make exceptions. Declaratory relief may be available to determine the constitutionality of a criminal statute where the plaintiff can show: (1) that the action involves only pure questions of law; (2) that a criminal prosecution is immi-

nent or threatened; and (3) that he stands to suffer the loss of either fundamental human rights or property interests if the criminal prosecution is begun and the criminal statute is enforced. We believe that an examination of these three factors compels the conclusion that plaintiff's action must be dismissed.

We begin with a brief review of the pertinent and uncontroverted facts in the present case. Plaintiff John Malloy, a resident of Granville County, North Carolina, and a tobacco farmer by trade, owns a business called The Dogwood Gun Club. Twice a year, plaintiff hosts a five-day pigeon shoot called The Dogwood Invitational on his private property. Participation is by invitation only, and each contestant pays an entry fee of $275.00 per day, in addition to $6.00 for each "practice bird." At the pigeon shoots, each contestant faces a ring containing a number of boxes holding one pigeon each. The boxes are opened on cue, the pigeons are released, and the contestants shoot at the pigeons. Approximately 40,000 captured pigeons are used as targets at each pigeon shoot. Pigeons that are merely wounded in the shoot are destroyed, and plaintiff disposes of all of the dead birds.

The statute at issue is N.C.G.S. § 14-360 ("Cruelty to animals; construction of section."), which generally prohibits the intentional wounding, torturing or killing of animals, and defines such acts as either Class 1 misdemeanors or Class I felonies. *See* N.C. Gen. Stat. § 14-360 (1999). Plaintiff alleges that the office of the district attorney, at some point in time, "indicated it would prosecute the Plaintiff for violation of N.C.G.S. § 14-360" if plaintiff held another pigeon shoot. In addition, "Mr. Waters [] notified the Plaintiff, through counsel, that he considers the conduct at the Dogwood Invitational to be in violation of amended N.C.G.S. § 14-360 and that if given the opportunity, he will prosecute the Plaintiff."

On 3 March 1999, plaintiff filed a complaint in the Superior Court of Granville County seeking (1) a declaratory judgment regarding the constitutionality of N.C.G.S. § 14-360 on its face and as applied to plaintiff, and (2) a preliminary and permanent injunction prohibiting enforcement of the statute by the State of North Carolina against plaintiff. Defendants subsequently filed a motion to dismiss and a motion for summary judgment. Shortly thereafter, the superior court entered an order granting a preliminary injunction enjoining defendants from enforcing N.C.G.S. § 14-360 against plaintiff. On 9 May 2000, following a full hearing on the motions, the superior court entered an order containing a number of rulings. First, the superior

court denied defendants' motion to dismiss the entire action pursuant to Rule 12(b)(1) (subject matter jurisdiction). With respect to the felony provisions in N.C.G.S. § 14-360, the court granted defendants' motion for summary judgment pursuant to North Carolina Rule of Civil Procedure 56 and dissolved the preliminary injunction. However, with respect to the misdemeanor provisions in N.C.G.S. § 14-360, the court granted summary judgment in favor of plaintiff and permanently enjoined defendants from enforcing the misdemeanor provisions in N.C.G.S. § 14-360 against plaintiff. Finally, the court denied defendants' motion to compel plaintiff to respond to interrogatories. Defendants appeal from this order, and plaintiff cross-appeals.

On appeal, defendants raise four assignments of error and plaintiff raises two assignments of error. Because we hold that plaintiff's complaint should have been dismissed for lack of subject matter jurisdiction, we need only address defendants' first assignment of error. By their first assignment of error, defendants argue that the superior court should have granted their motion to dismiss because the action is beyond the scope of the Declaratory Judgment Act. The Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 to -267 (1999), provides that "(a)ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. "An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 703, 249 S.E.2d 402, 414 (1978). Defendants contend that there is no actual and justiciable controversy because the question raised by plaintiff—whether his future conduct will violate a particular criminal statute—is an inappropriate question for a declaratory judgment action. For this reason, defendants argue, the court lacked subject matter jurisdiction. We agree.

Only a few cases in North Carolina have addressed the issue of whether a plaintiff may maintain a civil declaratory judgment action to challenge the constitutionality of a criminal statute, and to seek injunctive relief prohibiting the State from enforcing the statute against him. In the most recent case, *State ex rel Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984), the Attorney General of North Carolina, on behalf of the State, instituted a declaratory judgment action challenging the constitutionality of the Safe Roads Act of 1983

(the SRA).[1] In that case, our Supreme Court explained that a declaratory action challenging the constitutionality of a criminal statute is inappropriate if it involves questions of fact, and not just pure questions of law:

> "The rationale seems to be that if the facts upon which the propriety of a criminal prosecution are in dispute, the dispute ought to be resolved by the trier of the facts in a criminal prosecution . . . . This reasoning, however, is inapplicable if the crucial question is one of law, since the question of law will be decided by the court in any event and not by the triers of the facts."

Id. at 349, 323 S.E.2d at 309 (quoting *Bunis v. Conway*, 234 N.Y.S.2d 435, 437 (1962)). The Court also explained that even when the issue may be characterized as a pure question of law, declaratory relief is only appropriate if "the *plaintiff* can demonstrate that a criminal prosecution is imminent or threatened, and that he stands to suffer the loss of either fundamental human rights or property interests if the criminal prosecution is begun and the criminal statute is enforced." *Id.* at 350, 323 S.E.2d at 310.

The Court in *Edmisten* placed great reliance upon *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971). In that case, the petitioner had been convicted of various felonies in 1959 and 1960 and had received prison sentences totaling over fifteen years. He was paroled on 5 October 1966, and in 1967, while still on parole, the petitioner was tried and convicted on a charge of larceny and on 6 April 1967 was sentenced to a separate ten-year term of imprisonment. On 10 April 1967, under the authority of N.C. Gen. Stat. § 148-61.1 (1971) (repealed 1977), the Board of Paroles revoked the petitioner's parole of 5 October 1966, and, pursuant to N.C. Gen. Stat. § 148-62 (1971) (repealed 1977), directed that he serve the remainder of the original sentences upon which his parole had been revoked following the completion of the ten-year sentence imposed on 6 April 1967. The petitioner then filed a petition, requesting the superior court reverse the order of the Board of Paroles. *See Jernigan*, 279 N.C. at 557-58, 184 S.E.2d at 261-62.

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1. More recently, the Court in *Simeon v. Hardin* dealt with an issue similar to that in the present case. 339 N.C. 358, 451 S.E.2d 858 (1994). However, in *Simeon*, the Court allowed a civil challenge to a criminal statute because the statute at issue was purely procedural, not substantive, and the criminal defendant had no other method available for challenging the criminal statute. *See id.*

On appeal, our Supreme Court held that the issue raised by the petitioner was an appropriate subject for declaratory judgment. The Court first noted that the challenged statute "is not a criminal law in the sense that it defines or prohibits a specific crime and imposes a penalty for its commission." *Id.* at 560, 184 S.E.2d at 263. Thus, the general rule prohibiting the use of declaratory judgment actions to challenge the constitutionality of a criminal statute was, technically, not applicable. The Court also held that the issue raised by the petitioner was "a pure question of law" and did not involve any questions of fact. *Id.* Finally, the Court held that "fundamental rights [were] involved" because resolution of the issue would determine the duration of petitioner's prison sentence, and the petitioner had no other adequate legal remedy to challenge the decision of the Board of Paroles. *Id.* at 562, 184 S.E.2d at 264.

These principles were also applied in *Chadwick v. Salter*, 254 N.C. 389, 119 S.E.2d 158 (1961). There, the plaintiffs, owners of cattle on Shackleford Banks, instituted a declaratory judgment action against Carteret County, the Sheriff of Carteret County, and the Attorney General of North Carolina. The plaintiffs sought a declaration that statutes enacted in 1957 (the 1957 Act, which generally prohibited any person from allowing certain cattle to run free along the outer banks) and in 1959 (the 1959 Act, which provided that cattle remaining on the outer banks could be confiscated and removed by the State) were unconstitutional, and requested an injunction. The parties stipulated that no facts were in dispute, and, following a hearing, the trial court held that the statutes were constitutional and vacated the temporary restraining order that had previously been granted. *See Chadwick*, 254 N.C. at 390-91, 119 S.E.2d at 159-60.

On appeal, the plaintiffs alleged that the 1957 Act was unconstitutional because in providing an exception for certain horses known as "marsh ponies or banks ponies," it contained an unreasonable and arbitrary classification. *Id.* at 394, 119 S.E.2d at 162. The Court first noted that the 1957 Act declared a violation of that Act to be a misdemeanor and did not provide for enforcement by any means other than criminal prosecution (such as authorizing the destruction or removal of cattle). *See id.* The Court went on to say that plaintiffs, if criminally prosecuted for violation of the 1957 Act, would be entitled to assert their constitutional argument as a defense. *See id.* The Court then stated:

> Ordinarily, the constitutionality of a statute or municipal ordinance will not be determined in an action to enjoin its enforce-

> ment. The well established exception to this rule is . . . "An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees."

Id. (quoting *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957)). Regarding the 1957 Act, the Court held that the plaintiffs could not maintain a declaratory judgment action seeking an injunction to prevent imposition of a statute that provides for enforcement by criminal prosecution only. *See id.* at 395, 119 S.E.2d at 162. However, the Court allowed the plaintiffs to maintain their declaratory judgment action to the extent it challenged the 1959 Act, which, unlike the 1957 Act, *did* provide for enforcement by means other than criminal prosecution. The 1959 Act provided for enforcement by purporting to divest the plaintiffs' title to the cattle and authorizing the Sheriff of Carteret County to remove the cattle from the outer banks. *See id.* at 396, 119 S.E.2d at 163.

Returning to the case before us, the issue is whether the facts presented warrant an exception to the general rule that a plaintiff may not maintain a declaratory judgment action to challenge the constitutionality of a criminal statute and to seek injunctive relief prohibiting the State from enforcing the statute against him. We believe they do not. To begin with, we believe the issues raised in plaintiff's declaratory judgment action necessarily involve questions of fact as well as questions of law. *See Jernigan*, 279 N.C. at 560-61, 184 S.E.2d at 263. This is especially clear since any prosecution would be for future conduct, the nature of which is unknown. However, even assuming *arguendo* that plaintiff's action involves only pure questions of law, plaintiff must also demonstrate (1) that a criminal prosecution is imminent or threatened, and (2) that he stands to suffer the loss of either fundamental human rights or property interests if he is prosecuted under this criminal statute.

We believe the record does establish that the State has threatened plaintiff with prosecution under the statute if plaintiff hosts a subsequent pigeon shoot. Plaintiff has alleged in answers to interrogatories that the office of the district attorney "indicated it would prosecute the Plaintiff for violation of N.C.G.S. § 14-360" if plaintiff held another pigeon shoot, and that, "Mr. Waters [] notified the Plaintiff, through counsel, that he considers the conduct at the Dogwood Invitational to be in violation of amended N.C.G.S. § 14-360 and that if given the opportunity, he will prosecute the Plaintiff."

However, plaintiff has not established that he "stands to suffer *the loss* of either fundamental human rights or property interests," *Edmisten*, 312 N.C. at 350, 323 S.E.2d at 310 (emphasis added), or that enforcement of the challenged statute will result in *the denial* of either property or fundamental human rights in violation of constitutional guarantees. *See Chadwick*, 254 N.C. at 394, 119 S.E.2d at 162. The statute in question, N.C.G.S. § 14-360, does not authorize the State, as a means of enforcement, to confiscate or remove plaintiff's property, or in any way deprive plaintiff of his property rights. The statute in question provides for enforcement by criminal prosecution only, and is therefore similar to the 1957 Act challenged by the plaintiffs in *Chadwick*. The Court, in *Chadwick*, concluded that the case could not be challenged on constitutional grounds in an action to enjoin its enforcement. *See Chadwick*, 254 N.C. at 395, 119 S.E.2d at 162.

Furthermore, we disagree with plaintiff's contention that he stands to suffer the loss of his fundamental rights if at some later date he is prosecuted for violating the statute and, as a result, prevented from earning income through holding pigeon shoots. This is because, put simply, either the statute is constitutional and applicable to plaintiff's pigeon shoots, or it is not. If it is, then enforcement of the statute against plaintiff would not violate plaintiff's fundamental rights since it is not a denial of a person's fundamental rights to prevent that person from earning income by engaging in illegal acts. If the statute is unconstitutional, or if plaintiff's pigeon shoots do not violate the statute, and if the State nonetheless prosecutes plaintiff under the statute, plaintiff will have an opportunity at the criminal trial to defend himself on these grounds.

We also note that if plaintiff is at some future date prosecuted for violating the statute in question, and is forced to defend himself at a criminal trial, this would not amount to a denial of plaintiff's fundamental human rights, even if plaintiff is ultimately acquitted. For example, in *Spence v. Cole*, 137 F.2d 71, 72 (4th Cir. 1943), the Fourth Circuit reversed the lower court's injunction prohibiting the Chief of Police of Elizabeth City from arresting plaintiffs pursuant to a city ordinance. The Court stated that unless a plaintiff shows irreparable injury, a court of equity should not restrain criminal prosecutions. *See id.* The Court further held that even where enforcement of an ordinance against a plaintiff would constitute a violation of the plaintiff's constitutional rights, this is insufficient to establish irreparable injury because there is no reason to think that the court would not protect

the constitutional rights of the plaintiff upon such a prosecution being instituted. *See id.* at 72-73. The Court also stated:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."

Id. at 73 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 163, 87 L. Ed. 1324, 1329 (1942)). In sum, although plaintiff has shown that criminal prosecution has been threatened, we hold that such prosecution would not result in irreparable injury to plaintiff's property interests or fundamental human rights. We note that plaintiff, if prosecuted under the statute, would be entitled to challenge the constitutionality of the statute and its applicability to his pigeon shoots in the context of such prosecution, where all necessary facts would be determined. *See Chadwick*, 254 N.C. at 394, 119 S.E.2d at 162.

For the reasons set forth above, we believe the trial court was without subject matter jurisdiction to entertain plaintiff's declaratory judgment action, and that the trial court erred in denying defendants' motion to dismiss the entire action pursuant to Rule 12(b)(1). Therefore, we reverse the trial court's ruling on defendants' motion to dismiss pursuant to Rule 12(b)(1) and otherwise vacate the trial court's order. We remand for entry of an order granting defendants' motion to dismiss pursuant to Rule 12(b)(1) and dissolving all standing injunctions.

Reversed.

Judges HUNTER and SMITH concur.

STATE OF NORTH CAROLINA v. ELBERT LEBRON WOODARD

No. COA00-1033

(Filed 4 September 2001)

1. Homicide— first-degree murder—felony murder rule—assault with deadly weapon inflicting serious injury—operation of motor vehicle to elude arrest

The trial court erred by allowing the underlying felonies of assault with a deadly weapon inflicting serious injury and operation of a motor vehicle to elude arrest to support the State's application of the felony murder rule and defendant's subsequent conviction of first-degree murder, because: (1) our Supreme Court has already held that it is improper to base a first-degree murder charge on the underlying felony of assault with a deadly weapon inflicting serious injury; and (2) felonious operation of a motor vehicle to elude arrest under N.C.G.S. § 20-141.5 does not provide an intent requirement for the aggravating factors necessary to raise the violation from a misdemeanor to a felony, and culpable negligence cannot serve as the basis for intent in a first-degree murder conviction.

2. Evidence— prior crime or act—DWI convictions

The trial court did not err in a first-degree murder case, arising out of a fatal vehicle collision occurring after defendant drove his vehicle at an excessive rate of speed through an intersection in an effort to elude pursuing law enforcement officers, by admitting evidence of and instructing the jury on defendant's prior DWI charges and convictions because: (1) evidence of other crimes or wrongful acts by a defendant may be used under N.C.G.S. § 8C-1, Rule 404(b) to demonstrate malice; and (2) defendant's prior DWI convictions tended to demonstrate that defendant was aware that his conduct leading up to the collision in this case was reckless and inherently dangerous to human life.

Appeal by defendant from judgment entered 10 December 1999 by Judge Thomas D. Haigwood in Johnston County Superior Court. Heard in the Court of Appeals 16 August 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Mark D. Montgomery for defendant appellant.

McCULLOUGH, Judge.

On 10 December 1999, a jury found defendant Elbert Lebron Woodard guilty of first-degree murder in connection with the death of Victor Manuel Illas, who died after his vehicle was struck by that driven by defendant. Matilda Pemberton, who was a passenger in Mr. Illas' vehicle, was severely injured in the collision. The jury also found defendant guilty of assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest, the two felonies upon which defendant's murder conviction was based. The trial court arrested judgment in the convictions of assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest, and sentenced defendant to life in prison for first-degree murder.

At trial, the evidence tended to show the fatal collision occurred after defendant drove his vehicle at an excessive rate of speed through an intersection in an effort to elude pursuing law enforcement officers. Witnesses estimated defendant's speed to be at least seventy miles per hour when he entered the intersection, where the posted speed limit was thirty-five miles per hour. Defendant's vehicle, a green Lincoln Town Car, collided with a white Honda Prelude driven by eighteen-year-old Victor Illas. According to North Carolina Highway Patrol Trooper C. H. Alford, who had been pursuing defendant, the "Honda Prelude just disintegrated" upon impact. The force of the blow threw Mr. Illas from his vehicle, killing him instantly. In order to reach seventeen-year-old Matilda Pemberton, rescue workers were forced to remove the roof of the vehicle, which "was literally wrapped around her." Ms. Pemberton spent a week in the hospital recovering from her injuries, which included six broken ribs, a bruise to her heart, a punctured lung, and numerous lacerations.

Immediately after the collision, State Highway Patrol Officers discovered defendant hiding under an automobile in a nearby parking lot. Defendant's face was bleeding heavily, and he smelled strongly of alcohol. The results of an Intoxilyzer test confirmed defendant to be appreciably impaired. State troopers later discovered defendant's

drivers license was suspended at the time of the collision due to several past and pending DWI convictions.

The State tried defendant non-capitally for first-degree murder, proceeding under a somewhat novel theory of criminal liability first presented for review by this Court in *State v. Jones*, 133 N.C. App. 448, 516 S.E.2d 405 (1999), *affirmed in part, reversed in part*, 353 N.C. 159, 538 S.E.2d 917 (2000); and *State v. Blackwell*, 135 N.C. App. 729, 522 S.E.2d 313 (1999), *certs. allowed*, 351 N.C. 360, 541 S.E.2d 731, 351 N.C. 361, 541 S.E.2d 731 (1999). Applying the felony murder rule, the State charged defendant with first-degree murder based upon the underlying felonies of assault with a deadly weapon inflicting serious injury and operation of a motor vehicle to elude arrest. In *Jones* and *Blackwell*, the underlying felony was also assault with a deadly weapon inflicting serious injury, which may be proven by showing culpable negligence by defendant. *See Jones*, 133 N.C. App. at 453, 516 S.E.2d at 409; *Blackwell*, 135 N.C. App. at 730, 522 S.E.2d at 315. During the pendency of present defendant's appeal, our Supreme Court concluded in these cases that the intent requirement for a first-degree murder charge cannot be supported by culpable negligence, and accordingly reversed and remanded both cases. *See Jones*, 353 N.C. at 172, 538 S.E.2d at 927; *Blackwell*, 353 N.C. at 259, 538 S.E.2d at 929.

[1] Defendant now argues the trial court erred in allowing the underlying felonies of assault with a deadly weapon inflicting serious injury and operation of a motor vehicle to elude arrest to support the State's application of the felony murder rule and defendant's subsequent conviction of first-degree murder. The State concedes that, in light of our Supreme Court's decision in *Jones*, it was improper to base defendant's first-degree murder charge on the underlying felony of assault with a deadly weapon inflicting serious injury. The State contends, however, that defendant's conviction was nevertheless proper, as the jury also based their verdict on the underlying felony of operation of a motor vehicle to elude arrest. For reasons set forth herein, we disagree with the State and remand defendant's case to the trial court for a new trial on the murder charge and re-sentencing on the defendant's convictions of assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest.

The felony murder rule in North Carolina applies to any killing "committed in the perpetration or attempted perpetration of any

arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (1999). All of the enumerated offenses contained in the felony murder statute require actual, rather than implied intent on the part of the accused in order to support a conviction for first-degree murder. *See Jones*, 353 N.C. at 167-68, 538 S.E.2d at 924-25. In other words, "the 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." *Id.* at 167, 538 S.E.2d at 924. Culpable or criminal negligence cannot serve as the basis for a first-degree murder conviction. *See id.* at 169, 538 S.E.2d at 925. The State argues the underlying felony of operation of a motor vehicle to elude arrest supports defendant's first-degree murder conviction in that defendant purposely and knowingly drove his vehicle at an excessive rate of speed in order to elude arrest. The State contends defendant's actions satisfy the intent requirement set forth in *Jones* that an accused "be purposely resolved to participate in the conduct that comprises the criminal offense" in order to be charged with first-degree murder under the felony murder rule. *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. Thus, according to the State, defendant was properly charged under the felony murder rule's umbrella grouping of "other felon[ies] committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17. It is well settled in North Carolina that an automobile may be used as a deadly weapon. *See State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955); *State v. McBride*, 118 N.C. App. 316, 318-19, 454 S.E.2d 840, 841-42 (1995).

The Supreme Court in *Jones* lists numerous crimes that have qualified as underlying felonies under the catchall grouping of felonies committed or attempted with the use of a deadly weapon as stated in N.C. Gen. Stat. § 14-17. *See Jones*, 353 N.C. at 168, 538 S.E.2d at 924-25 (listing various felonies, including, *inter alia*, discharge of a firearm into an occupied vehicle or structure, felonious escape, and armed felonious breaking and entering and larceny). In each of these crimes, actual intent to commit the felony is a necessary element for conviction. *See id.* The State contends felonious operation of a motor vehicle to elude arrest is a specific intent crime, and therefore properly supports defendant's first-degree murder conviction. We now examine the essential elements of the crime of felonious operation of a motor vehicle to elude arrest.

N.C. Gen. Stat. § 20-141.5 (1999) provides, in relevant part:

(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) Speeding in excess of 15 miles per hour over the legal speed limit.

(2) Gross impairment of the person's faculties while driving due to:

a. Consumption of an impairing substance; or

b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.

(3) Reckless driving as proscribed by G.S. 20-140.

(4) Negligent driving leading to an accident causing:

a. Property damage in excess of one thousand dollars ($1,000); or

b. Personal injury.

(5) Driving when the person's drivers license is revoked.

(6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).

(7) Passing a stopped school bus as proscribed by G.S. 20-217.

(8) Driving with a child under 12 years of age in the vehicle.

Id. The State admits that N.C. Gen. Stat. § 20-141.5, on its face, does not specify a required state of mind, i.e., general or specific intent, as an element of the crime of felonious operation of a motor vehicle to elude arrest. The State argues the pattern jury instructions for violation of N.C. Gen. Stat. § 20-141.5 provide the proper *mens rea* and

establish felonious operation of a motor vehicle as a specific intent crime. The pattern jury instruction for operation of a motor vehicle to elude arrest reads, in pertinent part, as follows:

> A person [flees] [attempts to elude] arrest or apprehension by a law enforcement officer when he knows or has reasonable grounds to know that an officer is a law enforcement officer, is aware that the officer is attempting to arrest or apprehend him, and acts with the purpose of getting away in order to avoid arrest or apprehension by the officer.

N.C.P.I.—Crim. 270.54A (1998). The State contends that, because the prosecution must prove beyond a reasonable doubt that a defendant charged with a violation of N.C. Gen. Stat. § 20-141.5 knowingly and intentionally sped in order to elude law enforcement officers, felonious operation of a motor vehicle to elude arrest is a specific intent crime and may properly serve as the underlying felony in a first-degree murder charge. We disagree.

As stated above, N.C. Gen. Stat. § 20-141.5(a) prohibits the operation of a motor vehicle in order to elude law enforcement officers. Violation of this section is a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 20-141.5(a). The crime does not become a felony unless two or more of the aggravating factors listed in the statute are present at the time of the violation. *See* N.C. Gen. Stat. § 20-141.5(b)(1-8); *State v. Funchess*, 141 N.C. App. 302, 307, 540 S.E.2d 435, 438 (2000). The aggravating factors used to elevate a violation of this statute to a felony include both negligent and reckless driving. *See* N.C. Gen. Stat. § 20-141.5(b)(3)(4). Thus, while we agree that a defendant accused of violating N.C. Gen. Stat. § 20-141.5 must actually intend to operate a motor vehicle in order to elude law enforcement officers, there is no intent requirement for the aggravating factors necessary to raise the violation from a misdemeanor to a felony. In other words, an accused may actually intend to commit the misdemeanor, but only negligently commit the felony. As stated heretofore, culpable negligence cannot serve as the basis for intent in a first-degree murder conviction. *See Jones*, 353 N.C. at 169, 538 S.E.2d at 925. We conclude, therefore, that the intent required for a violation of N.C. Gen. Stat. § 20-141.5 falls short of the "actual intent to commit the felony" necessary for a first-degree murder conviction. *Jones*, 353 N.C. at 168, 538 S.E.2d at 925.

Furthermore, we note that under the State's interpretation of *Jones*, a person who speeds in an effort to elude law enforcement

officers, and who thereby negligently or recklessly causes an accident resulting in death would be eligible for prosecution for first-degree murder under the felony murder rule. Thus, a person who negligently causes an accident would be treated no differently from one who intentionally causes a death, as long as the negligent person intended to speed in order to elude arrest. Like the Court in *Jones*, we can find no language in N.C. Gen. Stat. § 20-141.5 suggesting that our state's Legislature intended such a result. *See Jones*, 353 N.C. at 169-70, 538 S.E.2d at 925-26 (noting the Legislature has enacted separate statutes specifically addressing punishment for homicides arising from impaired or negligent drivers). *See also* N.C. Gen. Stat. § 20-141.5(d) (stating that the punishment for felonious operation of a motor vehicle to elude arrest may include revocation of the accused's drivers license for up to three years). "It is apparent that the General Assembly has demonstrated its belief that the conduct described, though egregious and deserving of severe punishment, does not warrant the severity of sanctions concomitant with felony murder." *Jones*, 353 N.C. at 170, 538 S.E.2d at 926.

Because neither assault with a deadly weapon inflicting serious injury nor felonious operation of a motor vehicle may serve as the underlying felonies in a first-degree murder conviction, we hold the trial court improperly denied defendant's motion to dismiss the first-degree murder indictment. Accordingly, defendant's first-degree murder conviction must be reversed. Furthermore, we find there is ample evidence in the record to support a charge of the lesser included offense of second-degree murder. *See State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (upholding a second-degree murder conviction in a DWI-related collision causing death where evidence demonstrated that defendant acted with malice). Therefore, we remand this case for a new trial.

[2] Defendant additionally contends the trial court erred by admitting evidence of and instructing the jury on defendant's prior DWI charges and convictions. We disagree. In *Jones* our Supreme Court stated, "Evidence of defendant's pending DWI charge was used to demonstrate that he had the requisite state of malice, one of the elements of the charge of second-degree murder that was submitted to the jury." *Jones*, 353 N.C. at 172, 538 S.E.2d at 928. Under Rule 404(b) of the North Carolina Rules of Evidence, evidence of other crimes or wrongful acts by a defendant may be used to demonstrate malice. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999); *Jones*, 353 N.C. at 172-73, 538 S.E.2d at 928. Defendant's past DWI convictions tended to

"demonstrate that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life" and thus were properly admitted and included in the jury instructions at trial. *Jones*, 353 N.C. at 173, 538 S.E.2d at 928.

In light of our holding, we need not address further arguments by defendant concerning selective prosecution, the short-form murder indictment, and constitutional violations. In conclusion, we affirm defendant's convictions of assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest. As we have reversed defendant's conviction and sentence for first-degree murder, however, it is not necessary to arrest judgments for the assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest convictions, as they are no longer underlying felonies for the murder. We thus remand these convictions for sentencing. We reverse defendant's conviction and sentence of life imprisonment without parole for the first-degree murder of Victor Manuel Illas, and we remand this case for a new trial and re-sentencing.

New trial.

Judges MARTIN and BIGGS concur.

JOHNNY E. BREWER, PLAINTIFF v. CABARRUS PLASTICS, INC., DEFENDANT

No. COA00-364

(Filed 4 September 2001)

Civil Rights— racial discrimination—Equal Employment Practices Act—race or retaliation as determinative factor

The trial court erred in a racial discrimination case under 42 U.S.C. § 1981 and the Equal Employment Practices Act of N.C.G.S. § 143-422.1 by failing to give plaintiff employee's proposed jury instructions that plaintiff must prove by a preponderance of the evidence that race or retaliation was a determinative factor in the action taken by defendant to terminate plaintiff's employment based on plaintiff filing discrimination charges with the Equal Employment Opportunity Commission because the

instant case of intentional discrimination was in the category of a circumstantial evidence or pretext case, meaning the dispositive question should be whether race or retaliation was a determinative factor in the adverse employment decision.

Judge WALKER dissenting.

Appeal by plaintiff from judgment entered 18 May 1999 and orders entered 12 May and 17 July 1999 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 22 February 2001.

Julie H. Fosbinder; and Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for plaintiff appellant.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Frank H. Lancaster, for defendant appellee.

SMITH, Judge.

This is the second appeal arising out of the present case. For a complete statement of the facts in this case, see this Court's previous opinion at *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 504 S.E.2d 580 (1998), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999) (*Brewer I*). However, under the facts of the case *sub judice*, no recitation of the facts is necessary for an understanding of our opinion other than as stated herein.

Plaintiff's action was initiated by application and order extending time to file complaint dated 16 March 1995. Plaintiff alleged that defendant discriminated against him on the basis of race and for retaliation for filing a complaint of racial discrimination, in violation of 42 U.S.C. § 1981 and the Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.1 (1999). Cabarrus Plastics, Inc. (CPI) filed a motion for summary judgment, which was denied on 6 November 1995.

The case was first tried in May 1996. At the close of plaintiff's evidence, CPI moved for directed verdict. The motion was granted and judgment entered on 28 May 1996. Plaintiff appealed. This Court reversed and remanded the matter for a new trial. *Brewer I*, 130 N.C. App. at 681, 504 S.E.2d at 580.

The second trial was held in May 1999. On 14 May 1999, the jury returned with a verdict in favor of defendant. The trial court entered judgment on 18 May 1999. Plaintiff appeals.

We first consider whether the trial court erred by failing to give plaintiff's proposed jury instructions. Plaintiff's proposed instruction in part stated:

> The plaintiff must prove by a preponderance of the evidence that race or retaliation was a determinative factor in the action taken by the Defendant. The plaintiff need not establish that race and/or retaliation was the sole factor motivating the defendant. Other factors may have motivated the Defendant as well. The Plaintiff demonstrates that race and/or retaliation was a determinative factor if he shows that "but for" either or both of those factors, the discipline or the termination would not have taken place.

Instead, the trial court instructed the jury that the burden of proof was on plaintiff to prove by the greater weight of the evidence "that the defendant terminated the plaintiff's employment *on account* of his race or on account of his filing discrimination charges with the equal employment opportunity commission." (Emphasis added). Plaintiff argues that the trial court's instruction does not address the issue of dual motivation, and suggested to the jury that if an employer had a separate lawful motivation for the termination, plaintiff could not prevail. Plaintiff additionally argues that the trial court should have granted its request for an instruction that if the jury found direct evidence of a discriminatory or retaliatory motive, then the burden would shift to defendant to prove "by a preponderance of the evidence that it would have made the decision to discipline and/or terminate [plaintiff] irrespective of the motivation which has been shown by the direct evidence."

After careful review of the record, briefs, and contentions of the parties, we reverse and remand the matter for a new trial. Plaintiff alleged in his complaint that defendant discriminated against him on the basis of race in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. Plaintiff also alleged that defendant fired him in retaliation for filing a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC). "Plaintiff's retaliation claim is likewise actionable under § 1981." *Brewer I*, 130 N.C. App. at 686, 504 S.E.2d at 583.

We also note that, although plaintiff filed suit pursuant to a federal statute in state court, plaintiff's relief would be the same as though he had proceeded in federal court under § 1981. *See Glenn-Robinson v. Acker*, 140 N.C. App. 606, 612, 538 S.E.2d 601, 607 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001). Furthermore, plaintiff's state claims alleging discrimination and retaliation in violation of the Equal Employment Practices Act, N.C. Gen. Stat. § 143-422, *et seq.*, are likewise analyzed under federal law. *Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

In determining claims of intentional discrimination in employment under § 1981, two categories of analysis have developed: (1) the circumstantial evidence or pretext model, and (2) the direct evidence or mixed-motive model. *Brewer I*, 130 N.C. App. at 686, 504 S.E.2d at 584; *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995). The distinction between these two categories is crucial, because plaintiffs enjoy more favorable standards of liability in mixed-motive cases. *Fuller*, 67 F.3d at 1141.

In circumstantial evidence cases:

> Establishment of a *prima facie* case gives rise to a presumption that "the employer unlawfully discriminated against the employee." The employer then has the "burden of *producing* evidence to rebut the presumption of discrimination." The employer's burden of production is satisfied "if he simply explains what he has done or produces evidence of legitimate non-discriminatory reasons."
>
> Upon production by the employer of an "explanation . . . legally sufficient to support a judgment" in its favor, "the [employee] is then given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination." In doing so, the employee may rely on evidence offered to establish a *prima facie* case "to carry his burden of proving pretext."

Brewer I, 130 N.C. App. at 687, 504 S.E.2d at 584 (citations omitted). *See also Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 278 (4th Cir. 2000). Most discrimination cases fall within this category. *Fuller*, 67 F.3d at 1141. This framework applies to retaliation claims as well. *Hawkins*, 203 F.3d at 281 n.1.

"By contrast, if plaintiffs can present sufficiently direct evidence of discrimination, they qualify for the more advantageous standards of liability applicable in mixed-motive cases." *Fuller*, 67 F.3d at 1141. "To earn a mixed-motive instruction . . . a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case. This requires 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion.' " *Id.* at 1142 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 104 L. Ed. 2d 268, 305 (1989) (plurality opinion)). Specifically, plaintiff must present "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude *and* that bear directly on the contested employment decision." *Id.* (emphasis added). "Whether a plaintiff has satisfied this evidentiary threshold is a decision for the [trial] court after it has reviewed the evidence." *Fuller*, 67 F.3d at 1142 (footnote omitted).

In the case at bar, plaintiff failed to present sufficient evidence to satisfy both prongs necessary to establish a mixed-motive case. While plaintiff did put on evidence of racial epithets allegedly used by plaintiff's supervisor, the alleged epithets *were not directly related in any way to the contested employment decision. Id.* Thus, the trial court properly denied plaintiff's request for a direct evidence or mixed-motive instruction. Accordingly, because plaintiff presented no direct evidence of discrimination, the instant case is more properly categorized as a pretext case.

As discussed previously, in pretext cases, the plaintiff must prove that the defendant's explanation for an adverse employment decision is really a pretext, and the contested employment decision was racially motivated. The "dispositive question" in a pretext case should be whether race or retaliation "was a *determinative factor* in the adverse employment decision." *Id.* at 1144 (emphasis added). By "determinative factor," it is meant that "liability depends on whether the protected trait . . . actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 346 (1993). In the instant case, the trial court never instructed the jury that the standard to be applied was that if race was "a determinative factor" in the employment decision, they would find for plaintiff. Instead, the trial court instructed the jury that plaintiff must prove that defendant terminated plaintiff's employment *on account* of race or retaliation, omitting the "determinative factor" test approved and utilized in *Fuller*. We find that the trial court's instruction was erroneous. The term "on account of," without a modifier, even when read

in the context of the overall charge, could have been misconstrued by the jury to require that race be the *sole* decisional factor in the employment decision. *See Fuller*, 67 F.3d at 1144 (explaining that instructions are in error if the jury could construe them to require that race be the sole decisional factor in the adverse employment decision). Accordingly, we reverse and remand the matter for a new trial.

We finally note that plaintiff argued at trial that the trial court should instruct the jury that race, retaliation, *or a combination of both factors* could be the determinative factor in the adverse employment decision. We disagree. Although claims of retaliation are determined under the same evidentiary standards as claims of discrimination, each is a separate claim and plaintiff has the burden of establishing a *prima facie* case to support each claim independent of the other. Thus, we believe that on retrial, the trial judge should submit issues on each claim to the jury rather than combining them.

In light of our disposition in this matter, we need not address the other issues raised in this appeal.

Reversed and remanded for new trial.

Judge BIGGS concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting:

I respectfully dissent from the majority opinion which concludes there was reversible error in the jury instructions as given by the trial court and grants plaintiff a new trial. I agree with the majority opinion which holds that plaintiff presented no direct evidence of discrimination and the case is more properly categorized as a pretext case.

In a pretext case, the jury must determine whether the employer " 'intentionally discriminated against [the employee]' because of his race." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 418 (1993) (*quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207 (1981)). *See also Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995); *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1137 (4th Cir. 1988). In *Fuller*, the plaintiff was alleging race discrimination. The court reviewed the

jury instructions which asked the jury to determine whether "his race was **the** determinative factor" and whether "**but for** the fact that he is black he would have been reappointed." *Fuller*, 67 F.3d at 1141 (emphasis added). Further, the jury was instructed that "if [the employer] chose not to hire Fuller **for any other reason**, then Fuller cannot recover." *Id.* (emphasis added). The instructions concluded with the jury having to decide whether "race was **a** determinative factor in Fuller not being hired." *Id.* (emphasis added). The court held that those jury instructions, taken as a whole, did not rise to the level of reversible error. *Id.* at 1145. The court also specifically recognized that "the 'but for' instruction is an accurate one in pretext cases." *Id.* at 1144.

In the present case, the jury instructions given were similar to those in *Fuller*. The jury was asked to determine whether the termination of the plaintiff was "**on account of** his race or **on account of** his filing discrimination charges with the Equal Employment Opportunity Commission." (emphasis added). The jury was further instructed that "employers are prohibited from treating employees differently **because of** their race." (emphasis added). This instruction is an accurate statement of the law in pretext cases. *See Hicks*, 509 U.S. at 511, 125 L. Ed. 2d at 418; *Fuller*, 67 F.3d at 1141; *Mullen*, 853 F.2d at 1137. The phrase "because of" was approved by the U.S. Supreme Court in *Hicks*. *Hicks*, 509 U.S. at 511, 125 L. Ed. 2d at 418.

The question in the present case then becomes whether the phrase "on account of" is sufficiently similar to the approved language "because of" and "but for" when construing the jury instructions as a whole. Jury instructions should be a "straightforward explanation" of the law made in a "simple fashion." *Mullen*, 853 F.2d at 1137, 1138. In the common vernacular, the phrases "but for," "because of," and "on account of" are used interchangeably. Using language which is in the common vernacular and easily understood by the jury, such as "on account of" and "because of," is a proper means of instructing the jury on the law it is to apply to the facts. Just as the "but for" instruction in *Fuller* "restates in different language the court's unobjectionable 'a determinative factor' instruction," the "on account of" instruction in this case restates the same unobjectionable instruction. *Fuller*, 67 F.3d at 1144.

Although the plaintiff has cast his proposed jury instructions under the title "Circumstantial Evidence—Pretext," he did not submit an accurate statement of law to be applied in pretext cases. The plain-

tiff tendered instructions which state in part: "The plaintiff need not establish that race and/or retaliation was the sole factor motivating the defendant. Other factors may have motivated the Defendant as well." However, this proposed instruction on the "sole factor" and "other factors" is to be applied in a mixed-motive case rather than in a pretext case as here. *See Fuller*, 67 F.3d at 1141 (explaining that instruction based on statutory language, which reads in part: "race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice," was "meant to apply only in mixed-motive cases, not in pretext cases").

Because the plaintiff did not present sufficient evidence to make out a mixed-motive case, this case is properly categorized as a pretext case. As in *Fuller*, the jury instructions, when taken as a whole, "plainly put before the jury the appropriate standards of liability in a pretext case." *Fuller*, 67 F.3d at 1145. Thus, jury instructions using the phrases "on account of" and "because of" when stating the law to be applied in pretext cases do not rise to the level of reversible error.

SHEPPARD N. MOORE, PLAINTIFF v. NORTH CAROLINA COOPERATIVE EXTENSION SERVICE; NORTH CAROLINA STATE UNIVERSITY COLLEGE OF AGRICULTURE AND LIFE SCIENCES; EVERETT M. PROSISE, DISTRICT EXTENSION DIRECTOR, NORTH CAROLINA COOPERATIVE EXTENSION SERVICES, IN HIS OFFICIAL CAPACITY; F. DANIEL SHAW, COUNTY DIRECTOR, NORTH CAROLINA COOPERATIVE EXTENSION SERVICES, NORTH CAROLINA STATE UNIVERSITY COLLEGE OF AGRICULTURE AND LIFE SCIENCES, IN HIS OFFICIAL CAPACITY; NORTH CAROLINA STATE UNIVERSITY; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA00-961

(Filed 4 September 2001)

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

The denial of a motion for summary judgment was immediately appealable where defendants had asserted a claim of sovereign immunity.

2. **Public Officers and Employees— extension agent—state employee with valid contract**

Defendants were not protected by sovereign immunity and the trial court did not err by denying defendants' motion for summary judgment where plaintiff was an Area Education Extension

Agent, the letter which offered plaintiff the appointment indicated that the position would be evaluated at the end of three years and a decision made then as to whether to continue the position, plaintiff began his employment on 1 August 1994, plaintiff was notified of his dismissal on 31 March 1995, and he filed a complaint alleging breach of contract in that the appointment letter constituted a contract for three years. The District Extension Director had the authority to offer plaintiff the appointment and the duties of the position, coupled with its supervision, clearly make the Area Education Extension Agent a State employee rather than the holder of a public office. Plaintiff was an employee of the State with a valid employment contract and the State impliedly consented to be sued for damages for breach of the contract.

Appeal by defendants from order entered 12 July 2000 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 23 May 2001.

Voerman Law Firm, PLLC, by David P. Voerman and David E. Gurganus, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Sylvia Thibaut and Assistant Attorney General Thomas O. Lawton, III, for defendants-appellants.

CAMPBELL, Judge.

Defendants appeal the trial court's denial of their motion to dismiss and motion for summary judgment.[1] For the reasons discussed herein, we affirm the trial court.

By letter dated 26 July 1994 and signed by Everett M. Prosise ("Prosise"), District Extension Director, North Carolina Cooperative Extension Service ("NCCES"), plaintiff was offered appointment as Area Specialized Environmental and Natural Resources Education Extension Agent ("Area Education Extension Agent") with responsibilities in Onslow, Brunswick, New Hanover, Pender, Carteret, Craven, Pamlico and Beaufort Counties. According to the letter, the

1. For purposes of this appeal, defendants' motion to dismiss is converted into defendants' motion for summary judgment, because the record indicates that matters outside the pleadings were presented and considered by the trial court. *See N.C. Steel v. National Council on Compensation Ins.*, 123 N.C. App. 163, 472 S.E.2d 578 (1996). Therefore, we review the trial court's order as simply a denial of summary judgment.

position to which plaintiff was offered appointment was to be evaluated at the end of three years, at which time a decision would be made whether to continue the position. Plaintiff's salary was to be thirty-nine thousand dollars ($39,000) annually, paid from State sources, and plaintiff was advised that a performance appraisal was to be conducted at the end of his first year to assess his effectiveness. Plaintiff accepted the appointment and began his employment on or about 1 August 1994. After attending an orientation program, plaintiff began the performance of his duties, with his office located in Onslow County.

On or about 31 March 1995, plaintiff was notified by letter dated 1 March 1995 and signed by F. Daniel Shaw ("Shaw"), County Extension Director ("CED") for Onslow County, that he was being terminated from his position. The termination letter advised plaintiff that his position had been established on a probationary basis, and that based on plaintiff's unsatisfactory performance rating on his six-month performance appraisal, his employment was being terminated as of 31 March 1995. Plaintiff was informed that he would continue to receive his salary and employee benefits through 30 June 1995. By letter dated 4 April 1995 and addressed to Dr. Billy Caldwell, Director of the NCCES, plaintiff requested reversal of his termination and relocation to another county. Despite this request, plaintiff was terminated as of 31 March 1995 and paid through the end of June 1995.

On 31 March 1998, plaintiff filed the complaint in the instant action against the State of North Carolina, North Carolina State University, North Carolina State University College of Agriculture and Life Sciences, NCCES, Prosise, in his official capacity as District Extension Director of the NCCES, and Shaw, in his official capacity as CED of Onslow County (collectively, "defendants"). In his complaint, plaintiff alleged that the 26 July 1994 letter constituted a contract between him and defendants, whereby he would be employed for three years at an annual salary of $39,000.00, with a review of his performance to be conducted in one year. Further, plaintiff alleged that he was never advised of his status as a probationary employee prior to receiving the termination letter, and that he had satisfactorily performed all of the requirements of his position and his termination was not based upon any justifiable reasons or cause. Plaintiff alleged that defendants had breached the contract between the parties, and that defendants' breach was willful, intentional and malicious, entitling plaintiff to recover punitive damages.

By order dated 20 October 1999 and filed on 12 January 2000, Judge Jay D. Hockenbury denied defendants' motion for summary judgment. On 1 February 2000, the parties entered into a final pretrial order signed by Judge Charles H. Henry, and the trial was scheduled for 9 October 2000. On 23 March 2000, defendants filed a motion to dismiss and a motion for summary judgment, claiming defendants were entitled to sovereign immunity from plaintiff's suit. Defendants' motion was denied by order entered 12 July 2000 by Judge Charles H. Henry. Defendants appeal, arguing they are entitled to sovereign immunity. We disagree.

[1] We note initially that the order denying defendants' motion for summary judgment is interlocutory, and, as a general rule, such orders are not immediately appealable. *Price v. Davis*, 132 N.C. App. 556, 558, 512 S.E.2d 783, 785 (1999). If, however, "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review[,]" an immediate appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). We have repeatedly held "that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785 (1999); *See also Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998). In the instant case, defendants have asserted a claim of sovereign immunity and, therefore, this appeal is properly before us.

[2] Defendants argue that summary judgment should have been granted as to plaintiff's breach of contract claim. 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. R. Civ. P. 56(c) (2000). The movant bears the burden of proving that no triable issue exists, and he may do this "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Defendants contend that the doctrine of sovereign immunity protects them from plaintiff's suit. It has long been the established law of

North Carolina that the State and its agencies cannot be sued except with consent or upon waiver of sovereign immunity. *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998); *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 192, 371 S.E.2d 503, 506 (1988), *disc. review denied*, 323 N.C. 706, 377 S.E.2d 229, *cert. denied*, 493 U.S. 808, 107 L. Ed. 2d 19 (1989). This immunity from suit also protects public officials sued in their official capacity. *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). However, the North Carolina Supreme Court has held "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). In *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998), the Supreme Court held that the State's waiver of sovereign immunity only applies to express contracts and that contracts implied in law, such as a claim in *quantum meruit*, are insufficient to constitute a waiver of the State's sovereign immunity. Thus, "[o]nly when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach." *Whitfield*, 348 N.C. at 43, 497 S.E.2d at 415 (emphasis in original).

Defendants argue that Prosise, as District Extension Director of NCCES, did not have the actual authority to enter into an employment contract with plaintiff, or anyone else, on behalf of the State of North Carolina or North Carolina State University. Therefore, defendants contend that the alleged employment contract in the instant case is not a valid contract expressly authorized by law and, thus, the State has not consented to being sued upon its breach. We disagree.

In his complaint, plaintiff alleges that Prosise, as District Extension Director, had the authority to enter into contracts with employees of the NCCES. In their answer, defendants admit that the 26 July 1994 appointment letter offered plaintiff employment as Area Education Extension Agent, and that plaintiff accepted employment with the NCCES. By affidavit dated 16 June 1999, Prosise admits that, as with all other CED and County Extension Agent ("CEA") positions, the final decision to hire plaintiff was a joint decision made by Prosise, as District Extension Director of the NCCES, and the NCCES Director of County Operations, with the advice and approval of the

NCCES Personnel Director. In his later affidavit, dated 21 March 2000, Prosise again admits that he offered plaintiff appointment as Area Education Extension Agent. However, in this subsequent affidavit, Prosise states that the appointment letter was not an offer of an employment contract, because he had no authority to offer a contract of employment to anyone under his supervision. Defendants also introduced the affidavit of Larry K. Monteith ("Monteith"), Chancellor of North Carolina State University ("NCSU") at the time plaintiff was offered appointment as Area Education Extension Agent. In this affidavit, Monteith states that he never granted Prosise the authority to enter into employment contracts on behalf of NCSU, but that as District Extension Director of NCCES, Prosise did have the authority to make offers of appointment to County Extension Agents.

We believe that this evidence indicates that Prosise in fact had the actual authority to offer plaintiff appointment as Area Education Extension Agent. By their sworn affidavits, both Prosise and former Chancellor Monteith admit that Prosise was authorized to offer the appointment. Having found no genuine issue of material fact, we conclude as a matter of law that Prosise was authorized to offer plaintiff the appointment. Therefore, the only way defendants can prevail on summary judgment on their claim of sovereign immunity is if plaintiff's appointment can properly be considered not to constitute an employment contract.

Defendants briefly address in their brief the argument that plaintiff's appointment does not constitute an employment contract. However, we are not persuaded by defendants' argument.

In order for plaintiff's breach of contract action against the State for the salary and other benefits he alleges he would have earned during the remainder of his unexpired three-year term as Area Education Extension Agent to be tenable, it must be based upon his status as a State employee under a valid contract of employment. *See Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). In *Smith*, Chief Justice Sharp reiterated "the law of this State that 'an appointment or election to public office does not establish contract relations between the persons appointed or elected and the State.' " *Smith*, 289 N.C. at 307, 222 S.E.2d at 416 (quoting *Mial v. Ellington*, 134 N.C. 131, 149, 46 S.E. 961, 967 (1903) (citation omitted)).

In drawing the distinction between public office and employment, Chief Justice Sharp wrote:

> "[A] position is a public office when it is created by law, with duties cast on the incumbent which involves some portion of the sovereign power and in the performance of which the public is concerned. . . ."

Id. at 307-08, 222 S.E.2d at 416 (citation omitted). Based on this distinction, the Court in *Smith held* that the plaintiff, Superintendent of Broughton Hospital, was an employee of the State, and, upon his appointment as superintendent, the State had entered into an employment contract with the plaintiff. The Court reasoned that, as Superintendent of Broughton Hospital, the plaintiff was simply a medical expert employed to supervise a psychiatric hospital owned and operated by the State. The plaintiff had no duties which required or permitted him to exercise any portion of the sovereign power of the State, such duties being exercised by the State Board of Mental Health.

In the instant case, plaintiff was appointed by the District Extension Director of the NCCES to the newly created position of Area Education Extension Agent. According to the affidavit of Prosise dated 16 June 1999, this position was created to serve as a consultant to County Extension Agents in the Southeast District on environmental and natural resources issues, with a focus on those issues affecting coastal counties. The office for the position was to be located in Onslow County, with the position being directly supervised by the Onslow County CED. The position was to be treated like any other CEA and CED position, with the final hiring decision to be made by the NCCES District Extension Director and the NCCES Director of County Operations, with advice and approval of the NCCES Personnel Director. Having been approved for funding, the position was advertised to the public by way of a vacancy announcement that read as follows:

> The individual in this position will monitor environmental regulations and the programming opportunities that affect North Carolina's counties. This position will be charged with supporting county programs with environmental information, developing grants to support programming for critical needs, coordinating state specialists, interpreting regulations, and assisting county staffs with special projects that affect their counties. Areas of responsibilities include: waste water and residuals management, storm water management, drinking water, solid waste, and environmental assessment. . . .

The foregoing duties that the Area Education Extension Agent was expected to perform, coupled with the fact that the position was to be directly supervised by the Onslow County CED, with further supervision from the NCCES District Extension Director and the NCCES Director of County Operations, clearly make the Area Education Extension Agent a State employee, as opposed to the holder of a public office. The position of Area Education Extension Agent was not responsible for duties which require or permit the exercise of any portion of the sovereign power of the State. Therefore, we hold that plaintiff, through his appointment as Area Education Extension Agent, was an employee of the State with a valid employment contract.

Having found that plaintiff's appointment as Area Education Extension Agent constituted an employment contract between him and the State, and that Prosise had actual authority to offer plaintiff the appointment, we hold that the State has impliedly consented to be sued for damages on the contract in the event it breaches the contract. Therefore, defendants are not protected by the doctrine of sovereign immunity, and the trial court did not err in denying defendants' motion for summary judgment.

At this stage of the case, we are not concerned with the underlying controversy between plaintiff and defendants and thus want to emphasize that we are expressing no opinion as to whether the State breached its employment contract with plaintiff. However, we do hold that plaintiff was a State employee under an authorized and valid contract and that he is not precluded from presenting his claims against the State by the State's plea of sovereign immunity.

Affirmed.

Judges WYNN and BIGGS concur.

JAMES R. CREECH, PLAINTIFF v. RANMAR PROPERTIES, A NORTH CAROLINA GENERAL PARTNERSHIP, MARY HOBBS AND RANDAL HOBBS, DEFENDANTS

No. COA00-950

(Filed 4 September 2001)

Landlord and Tenant— lease agreement—termination—option to purchase

The trial court erred in an action for breach and/or anticipatory breach of contract, unjust enrichment, and unfair and deceptive trade practices by concluding as a matter of law that defendants had properly terminated the parties' lease agreement based on plaintiff's failure to pay the 1996 real property taxes in a timely manner and that plaintiff could no longer exercise the option to purchase provided in the agreement, because: (1) the lease contains no provision for termination of the lease upon the occurrence of any breach; (2) the lease does not indicate that the parties clearly intended for plaintiff's obligation to pay taxes to be regarded as part of plaintiff's rental obligation, and thus plaintiff's covenant to pay taxes was not "rent" within the meaning of N.C.G.S. § 42-3; and (3) N.C.G.S. § 42-27, which causes a tenant to forfeit his right of possession for neglecting or refusing to perform the terms of the contract, does not apply since the lease was entered into on 12 March 1996, the property that is the subject of the lease is located in New Hanover County, and New Hanover County was added to the statute after the date the lease was entered.

Appeal by plaintiff from judgment entered 7 January 2000 and amended 17 February 2000 by Judge W. Allen Cobb in New Hanover County Superior Court. Heard in the Court of Appeals 6 June 2001.

Ryals, Robinson & Saffo, P.C., by Mark F. Carter, for plaintiff-appellant.

Stephen E. Culbreth for defendant-appellees.

CAMPBELL, Judge.

On 12 March 1996 plaintiff-tenant ("plaintiff") entered into a lease agreement ("the lease") with defendants-landlord ("defendants") whereby plaintiff agreed to lease the property located at 1209 Market Street, Wilmington, North Carolina, for a term beginning 1 February

1996 and ending 1 September 2005. Plaintiff agreed to pay rent at the rate of $1600 per month from 1 July 1996 through 31 December 1996, and $2000 per month for the remainder of the lease term. In addition to the obligation to pay monthly rent, the lease held plaintiff responsible for payment of all real and personal property taxes assessed against the property, as well as property insurance. Further, the lease granted plaintiff an option to purchase the property, which could be exercised by giving defendants sixty-days written notice.

On 13 January 1998, defendants' attorney sent plaintiff a letter purporting to terminate the lease for plaintiff's failure to pay the 1996 real property taxes ("1996 taxes") and the property insurance premiums in a timely manner. In addition, defendants' attorney sent plaintiff a new lease agreement for him to execute. At this time, plaintiff was current on his rent and insurance payments, but had not yet paid any of the 1996 taxes. The parties were in dispute as to the amount of plaintiff's liability for the 1996 taxes, which plaintiff expected to be prorated between him and defendants. Plaintiff refused to sign the new lease agreement and continued paying rent. On 25 March 1998, plaintiff sent defendants a check for the full amount of the 1996 taxes plus interest. On 20 April 1998, defendants' attorney again wrote plaintiff contending that the lease was void and demanding that he surrender the premises by 31 May 1998 or execute the previously proposed new lease, which had a higher monthly rent and did not include an option to purchase. In response, by letter dated 24 April 1998, plaintiff notified defendants that he was exercising the option to purchase contained in the lease, and that he was ready, willing and able to close the transaction on 24 June 1998. However, defendants refused to convey the property to plaintiff.

On 16 June 1998, plaintiff brought this action in New Hanover County Superior Court, alleging breach and/or anticipatory breach of contract, unjust enrichment (for the value of improvements plaintiff had allegedly made to the property) and unfair and deceptive trade practices. Plaintiff also sought specific performance of the option to purchase, as well as a preliminary injunction ordering defendants to immediately convey the property to plaintiff. In addition, plaintiff filed a notice of *lis pendens* as to the property. Defendants filed their answer on 20 July 1998, along with a counterclaim seeking removal of the cloud on title allegedly created by plaintiff's earlier recording of the lease, together with his written notification to defendants that he was exercising the option to purchase. On 31 July 1998, plaintiff filed a notice of cancellation of the *lis pendens* when the parties agreed to

sell the property to a third party and place the proceeds of the sale in an escrow account. After a bench trial, the trial court made detailed findings of fact and concluded, as a matter of law, that defendants were justified in declaring the lease to be void, and that plaintiff had no rights under the lease. On 19 January 2000, plaintiff filed a motion to amend the judgment pursuant to N.C. R. Civ. P. 52(b) ("Rule 52(b)").[1] On 17 February 2000, the trial court entered an amended judgment, again concluding, as a matter of law, that "the defendants were justified in declaring the lease contract to be void," that "the plaintiff has no rights under the lease" and that "the option [is] not binding on the defendants." Based on its conclusions of law, the trial court ordered that plaintiff recover nothing on his first, third, fifth and sixth causes of action, and that defendants were entitled to the proceeds from the sale of the property, which were being held in escrow. The court's amended judgment further provided that "this is a final judgment as to the Plaintiff's First, Third, Fifth and Sixth Causes of Action and there is no just reason for delay in entering this order" pursuant to N.C. R. Civ. P. 54(b) ("Rule 54(b)"). Plaintiff appeals, arguing that the trial court's conclusions of law are not supported by its findings of fact, and that the trial court failed to make conclusions of law as to plaintiff's claims of waiver and estoppel.

We first note that plaintiff appeals from an interlocutory order, as the trial court's judgment fails to resolve plaintiff's second and fourth causes of action, and defendants' counterclaim. *See Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999) ("Where, as here, an order entered by the trial court does not dispose of the entire controversy between all parties, it is interlocutory."). "As a general rule, a party is not entitled to immediately appeal an interlocutory order." *Id.* However, where the order represents a final judgment as to one or more but fewer than all of the claims presented in an action, an immediate appeal may be had if the trial court certifies that there is "no just reason for delay" in entering final judgment as to those claims. N.C.R. Civ. P. 54(b) (1999). In the instant case, the trial court's judgment operates as a final judgment as

1. It appears from the record that plaintiff's motion under Rule 52(b) was not filed within ten days of entry of the judgment, which occurred on 7 January 2000, thereby making plaintiff's notice of appeal, filed 16 March 2000, untimely. *See* N.C. R. App. P. 3(c)(2) (30-day time period for giving notice of appeal is tolled by filing of a *timely* motion under Rule 52(b)). However, the record does not indicate that defendants objected to plaintiff's Rule 52(b) motion to amend. Further, the motion was granted by the trial court. Therefore, we choose to exercise our discretionary authority pursuant to N.C. R. App. P. 21(a)(1) and review the merits of this appeal by certiorari. *See Anderson v. Hollifield*, 345 N.C. 480, 480 S.E.2d 661 (1997).

to plaintiff's first, third, fifth and sixth causes of action, and it contains the trial court's certification pursuant to Rule 54(b). Therefore, plaintiff's appeal is properly before us.

By his first three assignments of error, plaintiff argues that the trial court committed reversible error in concluding as a matter of law that defendants had validly terminated the lease and that plaintiff had no right to exercise the option to purchase. We agree, and hold that the trial court's findings of fact do not support its conclusions of law.

When the trial court sits as a fact-finder, its findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence which would support alternative findings. *K&S Enters. v. Kennedy Office Supply Co.*, 135 N.C. App. 260, 264, 520 S.E.2d 122, 125 (1999), *aff'd*, 351 N.C. 470, 527 S.E.2d 644 (2000). Here, plaintiff only challenges the trial court's conclusions of law. Where no exceptions are taken to findings of fact, such findings are binding on appeal. *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). What remains for us to determine is whether the trial court's conclusions of law are supported by its findings of fact. Conclusions of law are entirely reviewable on appeal. *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994).

" 'An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited. The lease is a sufficient consideration to support specific performance of the option to purchase granted therein.' " *Reynolds v. Earley*, 241 N.C. 521, 526, 85 S.E.2d 904, 907-08 (1955) (quoting *Crotts v. Thomas*, 226 N.C. 385, 387, 38 S.E.2d 158, 159 (1946)). It follows from this rule that termination of the lease terminates the option to purchase, but, where the lease is still in effect, the option to purchase is still valid. Indeed, the lease in the instant case indicates that the option is valid "during the term of the lease." Thus, we must determine whether the lease was still valid when plaintiff attempted to exercise his option to purchase by letter dated 24 April 1998.

Absent an express provision for termination or forfeiture of a lease, a breach of a covenant in a lease does not terminate the lease. *Morris v. Austraw*, 269 N.C. 218, 222, 152 S.E.2d 155, 159 (1967); *Couch v. ADC Realty Corp.*, 48 N.C. App. 108, 113, 268 S.E.2d 237, 241 (1980). Here, the lease in question contains no provision for ter-

mination of the lease upon the occurrence of any breach. However, N.C. Gen. Stat. § 42-3 provides that in all leases with a fixed time for the payment of rent,

> there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

N.C. Gen. Stat. § 42-3 (1999).

Either the letter dated 13 January 1998 or the letter dated 20 April 1998 from defendants' attorney to plaintiff could be considered a demand for past-due rent under N.C.G.S. § 42-3, but the question remains as to whether plaintiff in fact owed past-due rent at the time these payment demands were made. The trial court found as fact that "[a]t the time of the [13 January 1998] notification, plaintiff was current on his rent and insurance but had not yet paid 1996 taxes on the property." Therefore, the dispositive issue is whether plaintiff's responsibility to pay taxes was part of his rental obligation, or a separate covenant between the parties.

As a general rule, a tenant's covenant to pay taxes is not the same as a covenant to pay rent, and such taxes are not regarded as part of the rent in the absence of a clear intention of the parties to that effect expressed in the lease. 49 Am. Jur. 2d *Landlord and Tenant* § 452 (1995). Whether taxes are part of the rental depends on the contract between the parties and its construction. *Id.* In the instant case, the lease identifies the monthly payment as "monthly rental," while insurance payments are identified as "additional rental." In regards to the payment of taxes, Section 5 of the lease reads as follows:

> lessee shall be liable for payment of all real and personal property taxes assessed against the property, payment for all repairs and alterations to the property or the buildings on the property, and payment for all utility services used in the operation of its business on the premises.

Unlike the provision of the lease identifying insurance as "additional rental," Section 5 does not indicate that the parties clearly intended for plaintiff's obligation to pay taxes to be regarded as part of plaintiff's rental obligation. Absent such clear intention, we believe the parties intended for plaintiff's obligation to pay taxes to be consid-

ered a separate covenant. Therefore, we conclude that plaintiff's covenant to pay taxes was not "rent" within the meaning of N.C.G.S. § 42-3, and, thus, defendants cannot rely on the statute as a basis for terminating plaintiff's lease. Further, since the lease lacked an express provision for termination upon breach of a covenant, defendants had no legal authority to cause plaintiff to forfeit his rights under the lease. Consequently, the lease was still valid on 24 April 1998, and plaintiff's notification to defendants that he was exercising the option to purchase was valid.

Defendants contend that the lease is also governed by N.C. Gen. Stat. § 42-27, which causes a tenant to forfeit his right of possession for "neglect[ing] or refus[ing] to perform the terms of his contract [for the rental of land] without just cause. . . ." N.C. Gen. Stat. § 42-27 (1999). N.C.G.S. § 42-27 applies only to those counties specifically listed in that section. New Hanover County was added to N.C.G.S. § 42-27 by 1995 N.C. Sess. Laws ch. 566, which was ratified on 19 June 1996. N.C. Sess. Laws ch. 566, § 3 provides that "[t]his act is effective upon ratification and applies to contracts entered into on or after that date." 1995 N.C. Sess. Laws ch. 566, § 3. While the property that is the subject of the lease is located in New Hanover County, the lease was entered into on 12 March 1996, and thus N.C.G.S. § 42-27 does not apply.

Having found in favor of plaintiff on his first three assignments of error, we need not address his remaining assignments of error.

Based on the foregoing, we hold that the trial court erred in concluding as a matter of law that defendants had properly terminated the lease and that plaintiff could no longer exercise the option to purchase. Therefore, the trial court's judgment is reversed, and the cause is remanded to the trial court with instructions to enter judgment in favor of plaintiff in his action for specific performance, and order disbursement of the funds being held in escrow in a manner consistent with this opinion and the escrow agreement.

Reversed and remanded.

Judges WYNN and BIGGS concur.

COUNCILL v. TOWN OF BOONE BD. OF ADJUST.

[146 N.C. App. 103 (2001)]

JOHN H. COUNCILL, PETITIONER v. TOWN OF BOONE BOARD OF ADJUSTMENT AND FRED HAY, ETHEL SIMPSON, LORI NICKLIN, RICK FOSTER, JERRY KIRKSEY, DIANA PERRY, LEE STROUPE AND O.K. WEBB, MEMBERS OF THE TOWN OF BOONE BOARD OF ADJUSTMENT, RESPONDENTS

No. COA00-1023

(Filed 4 September 2001)

1. Appeal and Error— mootness of appeal—consent judgment after motion to intervene

The Court of Appeals denied a motion to dismiss an appeal as moot where plaintiff alleged that the defendant board of adjustment improperly denied his application for a conditional use permit, neighbors filed a motion to intervene, that motion was denied, and plaintiff and the board entered into a consent judgment allowing issuance of a conditional use permit. Preventing the issuance of the permit was not the sole object of the motion to intervene or of the appeal; the issues raised include whether the consent judgment is contrary to law.

2. Parties— motion to intervene—standing

The trial court erred by denying a motion to intervene in an action involving the issuance of a conditional use permit where the court concluded that the proposed intervenors had not sustained damages distinct from the rest of the community, but they alleged that the permit would result in increased traffic, significant risks to the health and safety of the intervenors and their families, and a reduction in the value of their property. There being no allegations or evidence to the contrary, all three requirements of Rule 24 have been satisfied and appellants had standing to intervene.

Appeal by proposed intervenors from order entered 30 May 2000 by Judge Loto G. Caviness in Watauga County Superior Court. Heard in the Court of Appeals 30 May 2001.

Clement & Yates, by Charles E. Clement and David W. Yates, for petitioner-appellee.

David R. Paletta, for respondents-appellees.

Don Willey, for intervenors-appellants.

HUDSON, Judge.

Proposed intervenors Barbara Speir, Barbara Talman, and Barbara Hudnall ("appellants") appeal from an order entered 30 May 2000 denying their motion to intervene in an action between petitioner John H. Councill ("Councill") and respondents Town of Boone Board of Adjustment and members thereof ("the Board"). We deny the Board's motion to dismiss this appeal as moot, reverse the denial of appellants' motion to intervene, and remand.

The pertinent procedural history is as follows. On 23 March 2000, Councill filed a "Petition for Writ of Certiorari" in Watauga County Superior Court pursuant to N.C. Gen. Stat. § 160A-388(e) (1999). Councill's petition alleges that he is the owner and developer of a tract of land located in Boone, North Carolina ("the property"), that he filed an "Application for Conditional Use Permit" with the Board on 30 November 1999 seeking a permit to construct a single family residential development on the property, and that the Board improperly denied his application. On 4 May 2000, appellants filed a "Motion to Intervene and Motion for Stay" with the superior court pursuant to North Carolina Rule of Civil Procedure 24. This motion alleges that appellants are citizens, residents, and taxpayers of Boone, that they own real estate in close proximity to Councill's property, and that the Board properly denied Councill's application. The motion also alleges that "the Town of Boone Board of Adjustment, through counsel, intends to settle this lawsuit by illegally modifying, amending or withdrawing its previous denial of the petitioner's application for a conditional use permit." The motion requests that the court stay the proceedings pending a hearing on the merits of the motion to intervene, that the court allow the motion to intervene, and that the court ultimately uphold the Board's denial of Councill's application.

On 30 May 2000, the superior court entered an order denying the motion to intervene, finding that appellants "have not sustained special damages that are distinct from the rest of the community," and that appellants therefore "lack standing to become a party in this action." On the same day, the superior court entered a "Consent Judgment," signed by counsel for Councill and the Board, reversing the Board's denial of Councill's application, and remanding the matter to the Board for approval of the permit. Appellants appeal from the denial of their motion to intervene.

I.

[1] The Board has filed a motion to dismiss this appeal, arguing that the appeal is moot because the underlying controversy between Councill and the Board has been resolved pursuant to the consent judgment entered on 30 May 2000. Our Supreme Court has explained the mootness doctrine as follows:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). The Board relies primarily upon the case of *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *disc. review denied*, 350 N.C. 93, 527 S.E.2d 664-65 (1999), to support its argument. In *Estates*, the Chapel Hill Town Council (the "Town Council") denied the petitioners' application for a special use permit. The petitioners filed a petition for review in the nature of certiorari pursuant to N.C. Gen. Stat. § 160A-381 (1999). Individual owners of property in the immediate vicinity of the petitioners' proposed development filed a motion to intervene, which was granted. By order filed 15 May 1997 and modified effective 3 June 1997, the superior court reversed the Town Council's denial of the petitioners' application and directed the Town Council to approve the application and issue the permit. The intervenors filed notice of appeal with this Court on 5 June 1997. On 9 June 1997, the Town Council issued the permit to petitioners. On appeal, the petitioners moved to dismiss the appeal, arguing that because the Town Council had issued the permit, the questions raised in the appeal had become moot. We agreed with the petitioners' argument because the intervenors in their appeal only assigned error to the superior court's reversal of the Town Council's denial of the special use permit; we specifically noted that "Intervenors have *not* assigned error to the superior court's order that the Town Council issue the special use permit." *Estates*, 130 N.C. App. at 668, 504 S.E.2d at 300. Thus, we stated:

> Our review of this case is limited to determining whether the Town Council's quasi-judicial decision to deny the permit in the first place was lawful. A reversal of the superior court's ruling by this Court would have the limited effect of affirming the

> Council's initial denial of petitioners' request for a special use permit. It would do nothing to invalidate the permit later issued voluntarily by the Council pursuant to the superior court's mandate.

Id. (citation omitted). We also distinguished the facts in *Estates* from the facts in *Ferguson v. Riddle*, 233 N.C. 54, 62 S.E.2d 525 (1950). In *Ferguson*, the plaintiffs brought suit against a local Board of Elections, arguing that a scheduled vote, if held, would be unlawful and void. On appeal from the superior court's ruling against the plaintiffs, our Supreme Court held that the fact that the election had already been held following the superior court's ruling did not moot the issues in the plaintiffs' appeal. The Court noted that "restraining the election was not the sole object" of the plaintiffs' case; the plaintiffs had also "alleged that the election, if called and held on the date named, . . . would be illegal and void." *Id.* at 56, 62 S.E.2d at 527. This Court in *Estates* concluded by stating: "Intervenors' purpose in bringing their appeal was, plainly, to prevent the special use permit from being issued to petitioners. That relief can no longer be granted in this case. The issues raised in intervenor's [sic] appeal are therefore moot, and we will not address them." *Estates*, 130 N.C. App. at 669, 504 S.E.2d at 300.

We find the present facts to be more analogous to those in *Ferguson* than to those in *Estates*. Here, preventing the Board from issuing a permit to Councill was not the sole object of appellants' motion to intervene in the action, and is not now their sole object in appealing to this Court. In addition to alleging on appeal that they have standing to intervene and should be made parties to this case, appellants have consistently maintained: (1) that any settlement entered into between the Board and Councill constitutes a violation of N.C.G.S. § 160A-388(e), local ordinance, and appellants' due process rights; and (2) that the superior court exceeded its authority and the proper scope of review by entering the consent judgment. Based upon these allegations, appellants contend that the consent judgment is invalid and must be vacated. Because the permit was issued pursuant to the consent judgment, and because the issues raised by appellants include whether that consent judgment is contrary to law and must be vacated, we believe the fact that the Board has issued a permit to Councill does not moot the issues raised by appellants. The Board's motion to dismiss this appeal is, therefore, denied.

II.

[2] Having determined that this appeal has not been rendered moot, we proceed to examine the primary issue raised by this appeal: whether the trial court erred in its finding that "intervenors have not sustained special damages that are distinct from the rest of the community," and in its conclusion that, therefore, "intervenors lack standing to become a party in this action." Appellants correctly moved to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, which provides:

> (a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:
>
> . . .
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.R. Civ. P. 24(a)(2). We believe Rule 24 governs intervention in all civil actions, including appeals pursuant to N.C.G.S. § 160A-388(e). *See Proctor v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999).[1] The following three requirements must be met in order for a party to be granted intervention as a matter of right: "(1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Id.* at 184, 514 S.E.2d at 747.

Here, in appellants' verified motion to intervene, and in a supplemental affidavit signed by one of the appellants, appellants alleged that approval of Councill's application for a conditional use permit would: (1) result in an increase of traffic volume by more than a factor of nine (from approximately 100 automobile trips per day to approximately 964); (2) cause significant risks to the health and safety of appellants and their families; and (3) cause a reduction in

1. We are aware that a similar case from this Court, *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997), holds that a party seeking to intervene in an action brought pursuant to N.C.G.S. § 160A-388(e) must be an "aggrieved" party. However, we believe that Rule 24, as applied in *Proctor*, is the applicable standard for intervention in all civil actions.

the fair market value of their property. The Board did not present any evidence to negate these allegations. We hold that such undisputed allegations are sufficient to establish that appellants are interested parties. As to the second and third requirements—a practical impairment of the protection of the party's interest and inadequate representation of that interest by existing parties—appellants alleged that the Board intended to settle the dispute with Councill without appellants' input, and that the Board intended to issue a permit to Councill. There being no allegations or evidence to the contrary, we hold that all three requirements of Rule 24 have been satisfied and appellants have standing to intervene. We therefore reverse the trial court's 30 May 2000 order denying appellants' motion to intervene.

III.

Having determined that this appeal is not moot, and that appellants' motion to intervene was improperly denied, we turn to the remaining argument in appellants' brief. Appellants contend that the consent judgment between Councill and the Board is invalid and must be vacated. Appellants argue that the superior court was without authority to enter the consent judgment, and that such a consent judgment is illegal and void. Appellants are correct that the superior court sitting as an appellate court in an appeal pursuant to N.C.G.S. § 160A-388(e) has a limited scope of review. The superior court's review in such a situation is limited to:

> "(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."

Simpson v. City of Charlotte, 115 N.C. App. 51, 54, 443 S.E.2d 772, 775 (1994) (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)). It is also true that a board

of adjustment engages in illegal contract zoning when it enters into a bilateral contract with a landowner who seeks a conditional use permit, thereby abandoning its role as an independent decision-maker. *See Chrismon v. Guilford County*, 322 N.C. 611, 636, 370 S.E.2d 579, 594 (1988). However, we decline to address appellants' final argument regarding the legality of the consent judgment because we believe the interests of justice would be better served by allowing all parties to the action an opportunity to fully argue the merits of this issue.

For the foregoing reasons, we deny the Board's motion to dismiss this appeal, reverse the order of the superior court denying appellants' motion to intervene, and remand to the superior court for further proceedings consistent with this opinion. *See Proctor*, 133 N.C. App. at 184, 514 S.E.2d at 747.

Reversed and remanded.

Judges MARTIN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 SEPTEMBER 2001

BREWINGTON v. WOOLARD No. 00-485	Craven (98CVS41)	Affirmed
HUMANE SOC'Y OF MOORE CTY., INC. v. TOWN OF SOUTHERN PINES No. 00-1343	Moore (00CVS618)	Dismissed
IN RE BILES No. 00-1270	Davidson (99J264)	Dismissed
IN RE BRADLEY No. 00-1145	Rutherford (98J128) (98J129) (00J31) (00J30)	Affirmed
IN RE THOMPSON No. 00-1456	Bertie (96J28)	Appeal dismissed
KAWALES v. WHITE No. 00-468	Macon (96CVS511)	No error
MASON v. ERWIN No. 00-698	Mecklenburg (91CVD13874)	Affirmed in part; reversed and remanded in part
McCLERIN v. ALEXANDER No. 00-959	Mecklenburg (96CVS2469)	Reversed and remanded
STATE v. ARMSTRONG No. 00-1172	Guilford (98CRS023046)	No error
STATE v. BAKER No. 00-302	Mecklenburg (98CRS17998) (98CRS17999) (98CRS18000) (98CRS18001) (98CRS18002) (98CRS18003)	No error
STATE v. BAKER No. 00-1214	Guilford (99CRS11647) (99CRS11648) (99CRS97110) (99CRS97111) (99CRS97112) (99CRS97114)	Affirmed

STATE v. BOYD No. 00-970	Rowan (99CRS9565) (99CRS9566) (99CRS9858)	No error
STATE v. BROWN No. 00-1295	Mecklenburg (98CRS20467) (98CRS20468) (98CRS20469) (98CRS20470)	Affirmed
STATE v. EATMON No. 00-989	Wilson (99CRS053056)	No error
STATE v. HAMRICK No. 00-289	Cleveland (92CRS2798) (92CRS2800) (92CRS3628)	No error in part; new trial in part
STATE v. JOHNSON No. 00-1256	Mecklenburg (98CRS26040)	No error
STATE v. LIS No. 00-1016	Craven (99CRS409)	Affirmed
STATE v. McCANN No. 00-1041	Alleghany (99CRS740) (99CRS741) (99CRS742) (99CRS743)	Appeal dismissed
STATE v. OLLIS No. 00-871	Johnston (99CRS12558)	No error
STATE v. STEWART No. 00-1028	Buncombe (99CRS2317) (96CRS58336-A)	No error
STATE v. SUMMERS No. 00-1375	Guilford (98CRS101422)	No error
STATE v. WASHINGTON No. 00-1401	Craven (97CRS16498) (97CRS16499) (97CRS16500)	No error
SUMNER v. LAW OFFICES OF K.G. SUMNER No. 00-217	Ind. Comm. (820679)	Affirmed
TAYLOR v. TAYLOR No. 00-554	McDowell (96CVD418)	Affirmed
WALTON v. BURNS No. 00-1029	Guilford (99CVD2245)	Affirmed in part; remanded in part

WEST v. NEWCOMB No. 00-918	Vance (96CVS761)	Affirmed
WOODWARD v. PIZZA HUT OF NEW BERN, INC. No. 00-641	Halifax (95CVS1010)	Affirmed in part, reversed and remanded in part

STATE OF NORTH CAROLINA v. MAECHEL SHAWN PATTERSON

No. COA00-484

(Filed 18 September 2001)

1. Confessions and Incriminating Statements— motion to suppress—voluntariness—custody

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress statements he made to State Bureau of Investigation Special Agents at the Pitt County Mental Health Center and a diagram defendant drew for the agents with a note describing his involvement in the victim's death, because: (1) the agents did not promise, threaten, or coerce defendant into making his statements; (2) defendant appeared coherent in his responses to the agents' questions; (3) defendant had an opportunity to confer privately with his sisters prior to making his statements; (3) defendant told the agents he had not taken any drugs in the last twenty-four hours; (4) defendant was in voluntary commitment at the Detox Center and could leave if he so desired; (5) the agents were granted permission by the supervisor at the Detox Center to speak to defendant prior to questioning him; (6) defendant had voluntarily agreed to speak to the agents about the victim's death; and (7) defendant was not in custody or restrained in any way and was told that he could end the interview at any time by telling the agents he wished to stop.

2. Evidence— opinion testimony—confession—not under influence of drugs, narcotics, or alcohol

The trial court did not err in a first-degree murder case by allowing an S.B.I. agent to testify that defendant did not appear to be under the influence of drugs, narcotics, or alcohol or any other controlled substance when defendant spoke to agents at the Pitt County Detox Center about the victim's death, because: (1) a lay person may give his opinion as to whether a person is under the influence of an intoxicating substance so long as that opinion is based on the witness's personal observation; (2) a police officer is allowed to give his opinion of the defendant's mental capacities at the time of a confession; and (3) it was necessary for the agent in this case to give his opinion as to defendant's mental state at the time of the confession to help with the determination that defendant voluntarily gave the statement to police.

3. Evidence— first-degree murder—photographs of victim's body

The trial court did not abuse its discretion in a first-degree murder case by allowing the State to introduce into evidence eight photographs of the victim's body, because: (1) none of the photographs were particularly gruesome or inflammatory; and (2) all of the photographs were relevant to illustrate the testimony of the State's witnesses and were not excessive or repetitious.

4. Evidence— hearsay—state-of-mind exception—relevancy

The trial court did not err in a first-degree murder case by admitting hearsay evidence of the victim's statements tending to show that defendant did not like the fact that the victim would not allow defendant to move in with him, because: (1) the evidence was admitted under N.C.G.S. § 8C-1, Rule 803(3) to demonstrate the victim's state of mind as to his relationship with defendant; (2) the statements were relevant under N.C.G.S. § 8C-1, Rule 402 to shed light on the victim's relationship with defendant; and (3) the statements rebutted defendant's claim in his confession that he and the victim were not having any type of disagreement or argument prior to the night of the victim's death.

5. Homicide— first-degree murder—premeditation and deliberation—malice—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on malice, premeditation, and deliberation because the evidence taken in the light most favorable to the State reveals that: (1) defendant stabbed the victim in the back with a sword and, upon realizing that the victim would die, stabbed the victim again; (2) prior to leaving the victim's home, defendant removed his fingerprints from the sword and every other object he had touched while in the victim's home, and took some marijuana and a smoking pipe belonging to the victim; (3) there was no evidence the victim provoked the stabbing; and (4) defendant and the victim had been involved in a homosexual relationship for several years and the victim had recently rejected defendant's request to move in with the victim, which angered and upset defendant.

6. Homicide— first-degree murder—felony murder—robbery—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on felony murder with robbery serving as the underlying felony, because: (1)

defendant's confessions that he stabbed the victim in the back and stabbed the victim again after realizing he would die, and that he took the victim's marijuana and smoking pipe, were corroborated by substantial independent evidence; and (2) a reasonable juror could infer that defendant's murder and subsequent robbery of the victim were all part of one transaction.

7. Homicide— first-degree murder—failure to submit voluntary manslaughter

The trial court did not err in a first-degree murder case by failing to submit the lesser included offense of voluntary manslaughter, because the jury's finding of premeditation, deliberation, and malice required for a first-degree murder conviction precludes the possibility that the same jury would find defendant guilty of a lesser manslaughter charge.

8. Criminal Law— prosecutor's argument—equating members of jury to the State of North Carolina

The trial court did not commit plain error in a first-degree murder case by failing to intervene ex mero motu when the prosecutor during his closing argument equated members of the jury to the State of North Carolina, because it is proper to urge the jury to act as the voice and conscience of the community.

Judge GREENE concurring in the result.

Appeal by defendant from judgment and commitment entered 28 October 1999 by Judge Carl L. Tilghman in Beaufort County Superior Court. Heard in the Court of Appeals 17 April 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

CAMPBELL, Judge.

Defendant, Maechel Shawn Patterson, was indicted for first degree murder on 7 December 1998 in the death of Bobby Wayne Andrews, Jr. ("the victim"). Defendant was tried non-capitally and found guilty of first degree murder on the basis of premeditation and deliberation and under the felony murder rule. On 28 October 1999, the trial court sentenced defendant to life in prison.

The State introduced into evidence defendant's confession, which tended to show that defendant and the victim had been involved in a homosexual relationship for several years prior to the victim's death. On the afternoon of 30 September 1998, defendant visited the victim's residence on the corner of Wharton Street, in Washington, North Carolina. The victim had told defendant he was welcome to stop by at anytime. When defendant arrived at the victim's residence, the victim was eating a sandwich. Defendant did not join him, because defendant had been using crack cocaine that day and was not hungry. Defendant left the victim's house between 5:00 and 6:00 p.m. with plants that the victim had given him.

After leaving the victim's house, defendant drove by the home of Chris Elks ("Elks"). Elks was not home, so defendant went to visit John and Denise Tufte ("the Tuftes"), to whom defendant was trying to sell an insurance policy. Defendant ate supper with the Tuftes, the Tuftes purchased and signed for an insurance policy from defendant, and defendant left around 10:30 p.m. Defendant then went back to Elks' house, where defendant claims the two of them shared one-sixteenth of an ounce of crack cocaine. Elks denied sharing crack cocaine with defendant on 30 September 1998, but corroborated that defendant had visited him on that night.

Defendant left Elks' house and returned home between 1:00 and 2:00 a.m. Defendant lay down for an hour-and-a-half, but was unable to sleep. Defendant left his house and returned to the victim's house between 4:00 and 4:30 a.m. Defendant knocked on the front door, the victim let him in, and the two of them went back to the victim's bedroom. The victim got back into bed, while defendant sat on the floor and smoked some marijuana that belonged to the victim.

Around 5:00 a.m., the victim's alarm went off and both men reached up to cut it off. The victim then lay back down. Defendant, knowing the victim had to be at work at Lowe's at around 6:00 a.m., grabbed a cane from the corner of the bedroom and began poking the victim in the back and telling him to wake up. Defendant was aware that the cane he had grabbed contained a sword on the inside. As defendant poked the victim, the cover came off the end of the cane and defendant stuck the sword into the victim's back. Realizing he had stuck the sword through the victim's body, defendant immediately pulled it out. The victim sat up, faced defendant, and asked, "What the f—k are you doing?" Defendant, realizing the victim was going to die, stabbed him again, this time in the chest. The victim fell back onto the bed, making noises but unable to speak.

Defendant then picked up a towel and wiped down the cane and the sword to remove his fingerprints. Defendant also wiped down the front doorknob and anything else he thought he had touched while in the house. He then laid the sword and the cane on the floor at the foot of the bed. After removing his fingerprints from everything he had touched, defendant took the the box of marijuana and smoking pipe he had been using, both of which belonged to the victim, and returned to his own home around 5:30 a.m. Defendant did not call EMS or try to help the victim in any way prior to leaving the victim's house.

The State also introduced the following evidence which tended to corroborate defendant's confession: Evelyn Respess ("Respess"), who had known the victim for ten years and was being paid to clean his house once each month, called the victim's house several times on the evening of 30 September 1998 and the morning of 1 October 1998. The victim's phone line was continuously busy, which worried Respess, because she knew the victim had telephone call-waiting. Respess drove to the victim's house on the morning of 1 October 1998, knocked on the door and rang the doorbell, but received no answer. Respess then let herself in, walked back to the victim's bedroom, and discovered the victim's dead body. The telephone was off the hook and a sharp object lay at the foot of the bed. Respess called 911 from her car phone and the police responded. Respess further testified that she knew defendant and that she also knew that the victim was a homosexual.

J.T. Sheppard ("Sheppard") testified that while visiting Ronald Dando, who lived next door to the victim, on 30 September 1998 between 5:00 and 5:30 p.m., he observed defendant carrying plants from the victim's house and placing them in his white pickup truck, which Sheppard had seen parked at the victim's house on several occasions. Sheppard also saw defendant's truck at the victim's house late that evening, but testified that it was not there at 7:00 a.m. on the morning of 1 October 1998.

Ronald Dando ("Dando") testified that he saw defendant's truck parked at the victim's house when he returned home late on 30 September 1998. Dando also testified that he observed the headlights of a vehicle backing out of the victim's driveway between 4:30 and 5:00 a.m. on 1 October 1998. A vehicle returned a short time later, but did not stay very long.

Denise Tufte testified that defendant came to her house around 9:15 p.m. on 30 September 1998, stayed for dinner, and sold the Tuftes

an insurance policy. Defendant did not appear unusual or act like he was under the influence of anything that evening. Before leaving around 10:15 p.m., defendant told the Tuftes that he was not selling much insurance and the lack of income was causing stress in his marriage. According to Mr. Tufte, defendant returned a week or two later trying to sell some coins and mentioned that he was the suspect in a murder case. Defendant also told the Tuftes that he had a cocaine problem and that he needed treatment.

Chris Elks testified that defendant was at his house until 11:30 or 12:00 on the night of 30 September 1998, but that the two of them did not use cocaine. Elks also testified that defendant was at his house on 2 October 1998 when a news report about the victim's death was shown on the television. Defendant stated, "I was just at the guy's [victim's] house." Defendant also told Elks that the victim had given him some plants and had promised to give him an entertainment center.

Dr. Thomas Clark, III, associate chief medical examiner for the State of North Carolina and a forensic pathologist, performed the autopsy on the victim, which revealed a shallow stab wound to the left side of the victim's chest and a deeper stab wound to the left side of the victim's back. This wound to the back, which Dr. Clark determined to be the cause of death, ran through the victim's left lung and aorta, under his right lung, and into his liver. Dr. Clark testified that the sword found in the victim's bedroom could have caused the victim's wounds, and that the wounds could have been inflicted by someone seated on the floor. Dr. Clark's autopsy also revealed a hairline fracture of the seventh rib, which Dr. Clark believed could have occurred near the time of death. In Dr. Clark's opinion, the victim's wounds were intentionally inflicted. Additional evidence will be set forth hereinafter where pertinent.

At the close of the State's evidence, defendant moved to dismiss the first degree murder charge. This motion was denied. Defendant chose not to introduce any evidence, and renewed his motion to dismiss, which was again denied.

On appeal to this Court, defendant makes several arguments. After reviewing the record, transcript, briefs, and oral arguments of counsel, we conclude that defendant received a fair trial, free from prejudicial error.

I.

[1] Defendant first argues that the trial court erred in denying his motion to suppress statements he made to State Bureau of Investigation ("SBI") Special Agents Kelly Moser ("Moser") and Phil Brinkley ("Brinkley") (collectively, "the agents") at the Pitt County Mental Health Center on 9 October 1998. Defendant also assigns error to the admission of a drawing he made in connection with his statements to the agents. An evidentiary hearing on defendant's motion to suppress was held during a recess in jury selection on 25 October 1999. The next day, in open court, the trial court denied defendant's motion to suppress. On appeal, defendant argues that his statements should have been excluded from evidence because they were made while defendant was subjected to custodial interrogation and had not been advised of his *Miranda* rights. Defendant also contends the statements were not voluntary.

Following the evidentiary hearing, the trial court made detailed findings of fact with regard to defendant's interview with Agents Moser and Brinkley, which we summarize: At approximately 7:00 p.m. on 9 October 1998, Agents Moser and Brinkley went to the Pitt County Mental Health Detox Facility looking for defendant. Upon arrival, the agents saw defendant sitting outside, smoking and talking with other patients. The agents went inside the facility, identified themselves, and learned from the supervisor on duty that defendant was there by voluntary commitment. The supervisor advised defendant that the agents were there to talk with him, and defendant agreed to speak with the agents. The agents and defendant entered a small conference room, where defendant was told he could stop the agents' questioning and leave the room at anytime. Defendant was advised that the agents were not there to arrest him, and defendant was not restrained in any way. The agents advised defendant that they were there to get any information he may have about the death of the victim, Bobby Wayne Andrews, Jr., so that they could relay defendant's side of the story to the district attorney so the district attorney could decide how to handle the case. The agents advised defendant that they could make no promises to him related to the handling of the case. The agents did not advise defendant of his *Miranda* rights. Defendant told the agents he had voluntarily committed himself earlier that day and that he had not taken any drugs in the last twenty-four hours. Defendant made statements about not wanting to go to jail, not having any intent, and wanting treatment for his drug problem.

During the interview, defendant's sisters came into the room and told defendant he should not be talking with the agents. Defendant left the interview room with his sisters, but told the agents that he wanted them to wait for him in the parking lot. Defendant talked to his sisters in his private room at the facility, then went out to the parking lot, where he made his statements to the agents and drew a diagram and wrote a note describing his involvement in the victim's death. His sisters were present in the parking lot when defendant made his statements. According to the agents, defendant did not appear to be under the influence of any drug or narcotics. Defendant was not arrested after giving his statement. There were no threats, promises, or coercion on the part of Agents Moser and Brinkley. The agents did not inquire of any staff person at the Detox Center as to defendant's physical or mental condition, proceeding only on their personal observations of defendant. Based on these findings of fact, the trial court concluded that defendant's statements were given in a non-custodial interview.

The trial court also made findings of fact concerning whether defendant's statements were voluntary. Specifically, the trial court found that the agents did not promise, threaten, or coerce defendant into making his statements; defendant appeared coherent in his responses to the agents' questions; defendant had an opportunity to confer privately with his sisters prior to making his statements; defendant told the agents he had not taken any drugs in the last twenty-four hours; defendant was in voluntary commitment at the Detox Center and could leave if he so desired; and the agents were granted permission by the supervisor at the Detox Center to speak to defendant prior to questioning him. Based on these findings of fact, the trial court concluded that defendant's statements were voluntary. The trial court therefore denied defendant's motion to suppress.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact " 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 992 (2001) (citations omitted)). However, the determination of whether a defendant was in custody, based on those findings of fact, is a question of law that is fully reviewable by this Court. *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000). Likewise, a trial court's conclusion that a

defendant's statements were voluntary is a conclusion of law that is fully reviewable on appeal. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

It is well established that *Miranda* warnings are required only when a defendant is subjected to custodial interrogation. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). In *Miranda*, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). "[T]he appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' " *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (quoting *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).

Our review of the record, in its entirety, reflects that defendant had voluntarily committed himself to the Pitt County Mental Health Center, and voluntarily agreed to speak with SBI Agents Moser and Brinkley about the death of Bobby Wayne Andrews, Jr. Defendant was told that the agents had no intention of arresting him, and that they were only there to get his side of the story concerning what happened to the victim so that it could be relayed to the district attorney for a decision on how to handle the case. Defendant was not restrained in any way, and was told that he could end the interview at anytime by telling the agents he wished to stop and simply walking out of the examination room. Defendant informed the agents that he had voluntarily committed himself earlier that day, and that he had not used drugs in the last twenty-four hours. Defendant did not appear to be under the influence of any drugs at that time.

After being asked by the agents to give his side of the story, defendant responded, "It didn't matter how you looked at it, either way, it was still murder." The agents reiterated to defendant that they would not know what the charges would be until his side of the story was relayed to the district attorney, so a decision could be made on what, if any, charges there would be. During the questioning, defendant asked the agents several times whether it would be possible for him to serve any jail time he received in a treatment facility. The agents told defendant those decisions were up to the district attorney

and that they could not give defendant any promises regarding where any jail time would be spent.

Defendant's questioning was interrupted when defendant left the interview room and went to his private room to talk with his sisters. Defendant told the agents as he exited the interview room that he would be back shortly to continue talking with them. When defendant returned to the interview room, he asked the agents if they could come back the following morning. The agents told defendant they could not come back and that they wished he would tell them the truth so that it could be relayed to the district attorney as soon as possible. The agents once again explained to defendant that he did not have to make any statement, and that they just wanted his side of the story so that it could be relayed to the district attorney for a decision on what, if any, charges were to be filed.

After five or ten minutes, defendant's sisters again entered the interview room, and defendant again left with them. Defendant told the agents to wait for him in the parking lot of the facility, and that his sisters would be gone soon. The agents went outside and waited on defendant approximately fifty yards from the front door of the facility. After about twenty minutes, defendant came out to the parking lot, and again asked about the possibility of serving time in a treatment facility. The agents again stated they could make no promises regarding charges and sentencing. After a few minutes passed, defendant told the agents he would tell them the truth. At that time, one of defendant's sisters asked if he should contact a lawyer first. Agent Moser explained that defendant would have to make that decision himself. Defendant was asked if he wanted his sisters present while he explained what happened, and defendant said that was fine. Defendant then told the agents it was an accident and began explaining how he had stabbed the victim. At this time, defendant indicated he wanted a soft drink, so Agent Brinkley went to the store to buy defendant a drink. While Agent Brinkley was gone, defendant explained to Agent Moser in detail what had happened on the night of the victim's death. During the questioning, defendant never requested a lawyer.

Based on the foregoing, we conclude that the record contains ample competent evidence to support the trial court's findings of fact. We also conclude that the evidence does not indicate that defendant's freedom of movement was restrained in any way to the degree associated with a formal arrest. Defendant had voluntarily committed himself to the Detox Center, was told by the agents that he was free

to leave at anytime, and volunteered to meet the agents in the parking lot of the facility, where his statements were given. Therefore, we hold that the trial court correctly determined that, under the totality of the circumstances, defendant was not in custody when he made his statements to Agent Moser, and *Miranda* warnings were not required. We now consider whether defendant's statements were voluntary.

In determining whether a defendant's confession was voluntary and " 'the product of an essentially free and unconstrained choice by its maker,' " we also examine "the totality of the circumstances." *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckcloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973) (citation omitted). Factors to be considered in this inquiry include:

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, 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 mental condition of the declarant.

Id. Defendant's age and the deprivation of food or sleep may also be considered. *See Schneckcloth*, 412 U.S. at 226, 36 L. Ed. 2d at 862.

Applying these principles to the case at hand, we conclude that the trial court correctly concluded that defendant's confession was voluntary. The trial court found as fact that defendant had voluntarily committed himself to the Detox Center. Defendant was not placed in custody prior to, during, or after the interview. Defendant was told he was free to leave at anytime and defendant was not restrained in any way. Defendant appeared coherent in his responses to the agents' questions, and defendant specifically told the agents he had not used drugs in the last twenty-four hours. The agents wore civilian clothes and displayed no weapons. Defendant had an opportunity to confer privately with his sisters prior to making his statements to the agents. The agents did not promise, threaten, or coerce defendant in any way. These findings are supported by competent evidence in the record.

Defendant argues that during the course of questioning Agent Moser made statements that contained implicit promises of leniency

or escape from prosecution which gave defendant hope of a lighter punishment if defendant confessed. The record reflects that Agent Moser stated the following during his conversation with defendant:

> I explained to him [the defendant] that we would not know exactly what any charges would be until he explained his side of the story so that that could be relayed to the D.A.'s office, to the district attorney, so that a good decision could be made on what if any charges there would be in the case.

Defendant contends that *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), is controlling in light of this comment and compels the conclusion that defendant's confession was the product of a hope of benefit from confessing and, therefore, not freely and voluntarily given. We disagree.

In *Pruitt*, the investigating officers "repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' " *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102. They also told him that they "considered [him] the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' " *Id.* The Court found that under these circumstances the defendant's confessions "were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody." *Id.* at 458, 212 S.E.2d at 102-03. We find the facts in *Pruitt* distinguishable from those in the instant case, and, therefore, we do not consider *Pruitt* controlling.

We agree with defendant that Agent Moser's statement "what if any charges there would be in the case" taken in isolation could be interpreted to contain an implicit promise that defendant would be treated more favorably if he confessed to the murder. However, taken in context, it does not mandate a conclusion that defendant's statements were coerced. We note that defendant asked the agents on several occasions if he would be able to serve any jail time he received in a treatment facility. The agents repeatedly explained to defendant that they could not make any promises regarding charges or sentencing, and that all they could do was relay defendant's side of the story to the district attorney. We find that the agents' repeated assertions that they could make defendant no promises in regard to sentencing leads to the conclusion that defendant was not led to believe that the criminal justice system would treat him more favorably if he confessed to the murder.

Looking to the totality of the circumstances, we conclude that defendant's statements were "the product of an essentially free and unconstrained choice by its maker." *Schneckcloth*, 412 U.S. at 225, 36 L. Ed. 2d at 862. However, we deem it appropriate to reiterate Justice Mitchell's statement for our Supreme Court in *State v. Branch*, 306 N.C. 101, 291 S.E.2d 653 (1982):

> We caution the law enforcement officers of the State . . . that they should always be circumspect in any comment they make to a defendant, particularly in connection with any confession the defendant is to give or has given. The better practice would be for law enforcement officers not to engage in speculation of any form with regard to what will happen if the defendant confesses.

Branch, 306 N.C. at 110, 291 S.E.2d at 659-60.

Having concluded that the trial court was correct in its determination that defendant was not in custody when his statements were given, and that defendant's statements were voluntary, we overrule this assignment of error.

II.

[2] Defendant next argues that the trial court erred in allowing Agent Moser to testify that defendant did not appear to be under the influence of drugs, narcotics, alcohol or any other controlled substance when defendant spoke to the agents at the Pitt County Detox Center. Specifically, defendant argues that this opinion testimony lacked a sufficient foundation and was not rationally based on the observations of the witness. We do not agree.

On *voir dire*, Agent Moser twice answered in the negative when asked whether during the interview defendant appeared to be under the influence of drugs, narcotics, alcohol, or any other controlled substance. At trial, Agent Moser was again asked the question and again responded in the negative. Based on the following, we conclude the trial court properly admitted Agent Moser's opinion testimony.

The rule concerning admissibility of opinion testimony by lay witnesses provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (1999). Additionally, it is a well-settled rule that a lay person may give his opinion as to whether a person is under the influence of an intoxicating substance so long as that opinion is based on the witness' personal observation. *State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 209 (1974). Likewise, a police officer is allowed to give his opinion of the defendant's mental capacities at the time of a confession. *State v. Jones*, 342 N.C. 523, 467 S.E.2d 12 (1996).

In the instant case, Agent Moser not only observed defendant outside the Detox Center talking to other individuals, but also conducted a face-to-face interview with defendant both inside the interview room and outside in the parking lot of the facility. Agent Moser was able to describe defendant's actions and responses to questions over an extended period of time. Defendant explained to Agent Moser that he understood he did not have to speak with the agents if he so chose. Defendant also told the agents that he had not taken any drugs in the last twenty-four hours. These facts are sufficient to support the conclusion that Agent Moser's opinion that defendant was not under the influence of a controlled substance at the time of his confession was rationally based on Agent Moser's perception of defendant at the time of the confession. "Furthermore, it was necessary that he give his opinion as to defendant's mental state at the time of the confession to help determine a crucial fact in issue, that is, that defendant voluntarily gave the statement to police." *Id.* at 538, 467 S.E.2d at 21. Therefore, this assignment of error is overruled.

III.

[3] Defendant next argues that the trial court erred in allowing the State to introduce into evidence photographs of the victim's body, in that they were repetitious, prejudicial, and inflammatory.

"Whether to admit photographic evidence requires the trial court to weigh the probative value of the photographs against the danger of unfair prejudice to defendant." *State v. Gregory*, 340 N.C. 365, 387, 459 S.E.2d 638, 650 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996); N.C. Gen. Stat. § 8C-1, Rule 403 (1999). "This determination lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

" 'Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971)). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Over defendant's objection, the State introduced eight photographs showing all or a portion of the victim's body and used these photographs to illustrate the testimony of the State's witnesses. Having examined the photographs, we are of the opinion that none of them are particularly gruesome or inflammatory. Further, all of the photographs were relevant to illustrate the testimony of the State's witnesses and were not excessive or repetitious. Therefore, we cannot say that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 285, 372 S.E.2d at 526-27. Consequently, this assignment of error is overruled.

IV.

[4] Defendant next argues that the trial court erred in admitting highly prejudicial hearsay evidence tending to show defendant did not like the fact that the victim would not allow defendant to move in with him. We disagree.

At trial, the State's first witness, Evelyn Respess, was asked whether she had ever had a conversation with the victim about defendant wanting to move into the victim's residence with him. Defense counsel immediately objected on hearsay grounds, but the State countered by arguing that testimony of such a conversation was admissible under the state-of-mind exception to the hearsay rule. The State further proffered that Respess' testimony would demonstrate defendant was upset and angry at the fact the victim would not let him move in. Defendant's objection was overruled, and Respess testified as follows:

> Q. What did Wayne [the victim] say to you in the course of this conversation?
>
> A. He said, "Shawn wants to move in here, and I've told him, no, I don't want him to, and he don't like it."

Q. That he, Shawn [defendant], didn't like it?

A. (Witness nods affirmatively.)

Q. Did he tell you he got angry and upset—

MR. HARRELL: Objection. Leading.

THE COURT: Sustained.

Q. Just that he didn't like it.

A. He didn't like it.

Defendant argues that the victim's statement to Evelyn Respess should not have been admitted because the statement is merely a recitation of remembered facts and does not demonstrate the victim-declarant's own state of mind at the time.

" '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) (1999). Under N.C. R. Evid. 802, hearsay is generally not admissible; however, numerous exceptions to this rule exist, including N.C. R. Evid. 803(3), which allows admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed. . . ." N.C. R. Evid. 803(3) (1999). "Such a statement must also be relevant to a fact at issue in the case (Rule 402) and its probative value must not be substantially outweighed by its prejudicial impact (Rule 403)." *State v. Jones*, 137 N.C. App. 221, 227, 527 S.E.2d 700, 704, *disc. review denied*, 352 N.C. 153, 544 S.E.2d 235 (2000).

In this case, defendant argues that the victim's statements should not have been admitted because the statements were recitations of remembered facts and not statements about the victim's existing state of mind, emotions, sensation, or physical condition. However, "our courts have repeatedly found admissible under Rule 803(3) a declarant's statements of fact that indicate her state of mind, even if they do not explicitly contain an accompanying statement of the declarant's state of mind." *Id.*

In *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), our Supreme Court held that a decedent's factual statements about the status of his marriage exposed how he felt about the marriage and were therefore state-of-mind statements, despite the fact that he did

not explicitly state how he felt about the situation. The Court also held that the statements corroborated a possible motive for the defendant's act of murder. Moreover, the decedent's statements in *Brown* rebutted testimony by the defendant that her marriage to the victim was a happy marriage.

In the instant case, the victim's statement that defendant wanted to move in with him, that the victim had told defendant that he did not want defendant to move in, and that defendant did not like it, are arguably no more than recitations of fact. However, as in *Brown*, these facts tend to show the victim's state of mind as to his relationship with defendant and were therefore admissible under Rule 803(3). *See State v. Exum*, 128 N.C. App. 647, 655, 497 S.E.2d 98, 103 (1998) (noting with approval that fact-laden statements are usually purposeful and deliberate expressions of some state of mind). Specifically, these facts tend to show that the victim did not want defendant to move in with him, and that the victim was aware that defendant did not like that fact. Further, since the victim's statements shed light on his relationship with defendant, they were relevant under Rule 402. *See State v. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618 (1996) ("It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant."). Finally, the statements rebutted defendant's claim in his confession that he and the victim were not having any type of disagreement or argument prior to the night of the victim's death. Therefore, this assignment of error is overruled.

V.

[5] Defendant next argues that the trial court erred in denying his motions to dismiss made at the close of the State's evidence and at the close of all the evidence. First, defendant contends that there was insufficient evidence of premeditation and deliberation to support first degree murder based on premeditation and deliberation. Second, defendant contends there was insufficient evidence of felony murder, in that (1) the only evidence of robbery, the underlying felony upon which the felony murder conviction was based, was defendant's extrajudicial confession, and (2) the evidence was insufficient to show that the victim's death and the taking of the victim's property were part of a continuous transaction. We disagree.

In ruling on a motion to dismiss on the ground of insufficiency of the evidence, the trial court must determine whether there is sub-

stantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "If there is substantial evidence-whether direct, circumstantial, or both-to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). "In ruling on 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 inference to be drawn from that evidence.' " *Crawford*, 344 N.C. at 73-74, 472 S.E.2d at 926 (quoting *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)).

"First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being." *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994); *see also* N.C. Gen. Stat. § 14-17 (1999). "Premeditation means that defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing." *Id.* "Deliberation means that defendant carried out the intent to kill in a cool state of blood, 'not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.' " *Id.* (quoting *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984)). "Ordinarily, premeditation and deliberation must be proved by circumstantial evidence." *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986).

In determining whether a killing was done with premeditation and deliberation, the following circumstances are to be considered:

> " '(1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner.' "

Crawford, 344 N.C. at 74, 472 S.E.2d at 926 (quoting *State v. Saunders*, 317 N.C. 308, 313, 345 S.E.2d 212, 215 (1986) (quoting *State v. Calloway*, 305 N.C. 747, 751, 291 S.E.2d 622, 625-26 (1982))).

Taken in the light most favorable to the State, the evidence in the instant case tended to show the following: Defendant stabbed the victim in the back, and, upon realizing the victim would die, defendant

stabbed the victim again, this time in the chest. Prior to leaving the victim's home, defendant removed his fingerprints from the sword and every other object he had touched while in the victim's home, and took some marijuana and a smoking pipe belonging to the victim. The victim suffered a shallow stab wound to the left side of the chest, as well as a stab wound to the left side of the back that caused significant damage to the victim's left lung and aorta, and also damaged the victim's diaphragm and liver. The victim also suffered a cut on his right thumb and a fractured rib. There was no evidence that the victim provoked the stabbing. Defendant and the victim had been involved in a homosexual relationship for several years, and the victim had recently rejected defendant's request to move in with the victim, angering and upsetting defendant.

We conclude that the circumstantial evidence in this case, taken as a whole, was sufficient to permit the jury reasonably to infer that defendant murdered the victim with premeditation and deliberation. The other elements of murder being clearly present, the judge did not err in denying defendant's motion to dismiss the charge of murder in the first degree based on malice, premeditation and deliberation.

[6] Defendant also argues that the evidence is insufficient as a matter of law to support his conviction of felony murder because there is no evidence of robbery, the underlying felony upon which the felony murder conviction was based, apart from defendant's extrajudicial confession.

It is settled law in this State that a conviction cannot be sustained upon a naked, uncorroborated extrajudicial confession. *State v. Franklin*, 308 N.C. 682, 690, 304 S.E.2d 579, 584 (1983). There must be independent proof, either direct or circumstantial, of the *corpus delicti* of the crime in order for the conviction to be sustained. *Id.* However, in *Franklin*, the Supreme Court held "that independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony." *Id.* at 693-94, 304 S.E.2d at 586.

In the instant case, defendant confessed to stabbing the victim in the back, and, after realizing the victim would die, stabbing him again in the chest. Defendant also confessed to taking the victim's marijuana and smoking pipe. Defendant's confession was corroborated by substantial independent evidence. The State presented evidence of defendant's presence at the victim's home on the morning of the vic-

tim's death, which corroborated defendant's confession concerning his whereabouts during that same time period. The State also presented evidence of the number and location of the victim's stab wounds, the location of the towel, sword, and cover near the foot of the victim's bed, and the absence of defendant's fingerprints in the victim's house; all evidence which corroborated defendant's statement of the stabbing and his actions afterwards. Although there was no independent evidence of armed robbery, the State's evidence provided sufficient corroboration of the victim's murder to make defendant's entire confession trustworthy. Therefore, defendant's confession is sufficient evidence of felony murder if, as the State contends, the victim's death occurred during the perpetration of robbery.

"A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree . . . ." N.C. Gen. Stat. § 14-17 (1999). "The evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events." *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992).

> "Where there is a continuous transaction, the temporal order of the killing and the taking is immaterial. Provided that the theft and the killing are aspects of a single transaction, it is immaterial whether the intent to commit the theft was formed before or after the killing."

State v. Morganherring, 350 N.C. 701, 734, 517 S.E.2d 622, 641 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000) (quoting *State v. Handy*, 331 N.C. 515, 528, 419 S.E.2d 545, 552 (1992)).

Here, the evidence shows that upon stabbing the victim, defendant immediately grabbed a towel and began trying to remove his fingerprints from anything he had touched. Defendant then took the victim's marijuana and smoking pipe, which defendant had been using, and left the victim's house. There was no evidence that defendant left the victim's house after the stabbing and returned later to steal the victim's property. Based on this evidence, a reasonable juror could infer that defendant's murder and subsequent robbery of the victim were all part of one transaction. Therefore, there was sufficient evidence of armed robbery to support the felony murder charge in this case.

VI.

[7] In the instant case, the trial court submitted the following possible verdicts: guilty of first degree murder on the basis of malice, premeditation and deliberation; guilty of first degree murder under the felony murder rule; guilty of second degree murder; and not guilty. The jury found defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule. Defendant assigns error to the trial court's failure to submit the lesser included offense of voluntary manslaughter, arguing the evidence supported a finding that defendant did not act with malice.

"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 utilized or the defendant is the aggressor.' " *State v. Jarrett*, 137 N.C. App. 256, 263, 527 S.E.2d 693, 698, *disc. review denied*, 352 N.C. 152, 544 S.E.2d 233 (2000) (citation omitted). However, "[a]ny error in the trial court's failure to instruct on voluntary manslaughter was rendered harmless by the jury's verdict finding that defendant had acted with malice, premeditation and deliberation." *Id.* "The finding of premeditation, deliberation and malice required for a first-degree murder conviction precludes the possibility of the same jury finding the defendant guilty of a lesser manslaughter charge." *Id.* (quoting *State v. Exxum*, 338 N.C. 297, 301, 449 S.E.2d 554, 556 (1994)). Therefore, this assignment of error is overruled.

VII.

[8] In his final assignment of error, defendant argues that the trial court committed plain error in failing to intervene *ex mero motu* when the prosecutor argued to the jury that "the State of North Carolina is each and every one of you," in that this put the jurors in an adversarial role instead of an impartial one. We disagree.

During his closing argument, the prosecutor told the jury:

> Now, one of the things that Judge Tilghman will tell you is that the burden of proof in this case is on the State, or on the people of North Carolina, really, if you will, because you must first I think ask yourself who is the State of North Carolina. Is it me? Am I the State? Jim Hunt, is he the State? Jim Martin before him? No. I submit to you that the State of North Carolina is each and every one of you and the rest of your friends and neighbors in this county

> and the other counties throughout this state. Maybe we ought to refer to the case as People versus Maechel Shawn Patterson.

Defendant contends that this argument impermissibly placed the jury in an adversarial role against defendant.

We begin by noting that prosecutors are generally granted wide latitude in the scope of their argument, and the conduct of the arguments of counsel is generally left to the sound discretion of the trial judge. *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). "In order for defendant to be granted a new trial, the error must be sufficiently grave that it is prejudicial." *Id.* at 185, 400 S.E.2d at 418 (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)). Further, the North Carolina Supreme Court has said that " 'the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Gell*, 351 N.C. 192, 211, 524 S.E.2d 332, 345, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). Thus, "[i]n order to establish that the trial court abused its discretion by failing to intervene *ex mero motu*, a 'defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *Id.* (quoting *State v. Davis*, 349 N.C. 1, 45, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)). Defendant has not done so in this case.

Defendant argues that, by equating the members of the jury to the State of North Carolina, the prosecutor severely prejudiced defendant by aligning the jurors with the State and against defendant. However, the courts of this State have repeatedly stated that it is proper to urge the jury to act as the voice and conscience of the community. *See State v. Locklear*, 349 N.C. 118, 153, 505 S.E.2d 277, 297 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); *State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997). Therefore, defendant's final assignment of error is overruled.

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

No error.

Judge McGEE concurs.

Judge GREENE concurs in the result with a separate opinion.

GREENE, Judge, concurring in the result.

I believe (I) the killing and robbery of the victim did not form one continuous transaction, and it was therefore error to submit a felony murder instruction to the jury; (II) the testimony of Respess regarding the victim's statements to her was inadmissible hearsay; and (III) neither of these errors require a new trial. As I otherwise fully concur with the majority, I join the majority in affirming Defendant's conviction for first-degree murder.

I

Our statutes specifically provide that a murder "committed in the perpetration . . . of . . . robbery . . . shall be deemed to be murder in the first degree." N.C.G.S. § 14-17 (1999). This is commonly known as the felony murder doctrine and traditionally required the homicide occur subsequent to or during the commission of the underlying felony. *See* 40 Am. Jur. 2d *Homicide* § 67 (1999) (death must "be caused by an act in [the] course of or in furtherance of the [underlying] felony"); *State v. Squire*, 292 N.C. 494, 511, 234 S.E.2d 563, 573 (there must be no break in the chain of events leading from the initial felony to the act causing death), *cert. denied*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977). Although the original rationale for the felony murder doctrine remains intact, *State v. Richardson*, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995) ("to deter . . . killings from occurring during the commission of . . . a dangerous felony"), our courts have more recently held "the temporal order of the killing and the felony is immaterial" and neither does it matter that the intent to commit the felony may have been formed after the killing, provided the killing and the commission of the felony constitute one continuous transaction, *State v. Roseborough*, 344 N.C. 121, 127, 472 S.E.2d 763, 767 (1996). The two events are not considered continuous if there is any "break in the chain of events." *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992).

In this case, the evidence, considered in the light most favorable to the State, reveals defendant, some thirty minutes after he killed the victim and attempted to clean his fingerprints from the premises, picked up the box of marijuana and smoking pipe as he was leaving the house. There is no evidence defendant formed his intent to take the items before the murder. The intent was formed just as he was leaving the premises some thirty minutes after the killing and after

defendant sought to remove his fingerprints from the premises and, thus, does not constitute a taking occurring as part of a single transaction beginning with the killing of the victim. *See State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119 (1980) (taking of property was an "afterthought" and did not constitute a "continuous chain of events"). To hold otherwise in this case would be an abuse of the felony murder doctrine and this type of abuse, if sanctioned by the courts, could lead to its abrogation. *See* 2 Charles E. Torcia, *Wharton's Criminal Law* § 149, at 306 (15th ed. 1994) (felony murder doctrine eliminated in England and limited in some United States jurisdictions). The trial court thus erred in submitting a jury instruction on felony murder.

II

"Evidence tending to show the victim's state of mind is admissible [as an exception to the hearsay rule] so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). Evidence of the victim's state of mind includes evidence indicating "the victim's mental condition by showing the victim's fears, feelings, impressions or experiences." *State v. Walker*, 332 N.C. 520, 535, 422 S.E.2d 716, 725 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993). However, statements relating only factual events and "made in isolation, unaccompanied by a description of [the victim's] emotion[s]," generally fall outside the scope of Rule 803(3). *State v. Lathan*, 138 N.C. App. 234, 240, 530 S.E.2d 615, 621, *disc. review denied*, 352 N.C. 680, 545 S.E.2d 723 (2000).

In this case, the testimony of Respess was unaccompanied by descriptions of the victim's emotions or mental state and instead reflected only *defendant's* mental state. Thus, it was error for the trial court to admit these statements into evidence.

III

The error in submitting the felony murder instruction does not require a new trial because I agree with the majority there was sufficient evidence to support the jury's alternative determination defendant was guilty of first-degree murder on the basis of premeditation and deliberation. *See State v. Green*, 321 N.C. 594, 606, 365 S.E.2d 587, 594, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

The error in allowing Respess to offer her testimony about the comments of Andrews does not entitle defendant to a new trial as he was not prejudiced by their admission. Defendant argues he is entitled to a new trial because without the testimony of Respess there is

no showing Defendant had a motive for the killing. The State, however, was not required to develop a motive as there was undisputed evidence defendant killed the victim. *See State v. Heavener*, 298 N.C. 541, 548, 259 S.E.2d 227, 231 (1979) (the State is not required to establish motive to prove guilt of first-degree murder).

REICHHOLD CHEMICALS, INC., PLAINTIFF-APPELLANT/APPELLEE v. ANIL B. GOEL, DEFENDANT-APPELLANT/APPELLEE

No. COA00-459

(Filed 18 September 2001)

1. Appeal and Error— contention raised in appellee's brief—properly heard in oral argument—reply brief struck

The Court of Appeals granted defendant's motion to strike plaintiff's reply brief where defendant's brief raised no new contention that did not arise naturally and logically from the record and questions presented, and oral arguments were heard. Oral arguments were the proper place for plaintiff's contention. N.C. R. App. P. 28(h)(1) and (2).

2. Appeal and Error— record amended—improperly pled defense—argued in trial court by consent

The Court of Appeals granted plaintiff's motion to amend the record on appeal where the amendment supported the argument that an affirmative defense was raised by express or implied consent even though it was not properly pled.

3. Wrongful Interference— lawsuit—objectively reasonable

Plaintiff could still be liable for tortious interference with defendant's consulting contract with another company (Imperial) even if plaintiff's suit against Imperial was objectively reasonable. There is no relation between tortious interference and the legislative intent behind federal antitrust law.

4. Wrongful Interference— legal malice—findings—anti-competitive purpose

The trial court properly concluded that plaintiff acted with legal malice in addition to actual malice in bringing a suit against another company where the court found that the suit was brought solely for anti-competitive purposes. A good faith belief that

trade secrets were misappropriated in no way necessitates the conclusion that the suit was brought without legally malicious intent.

5. Wrongful Interference— counterclaim to trade secrets suit—liability for anti-competitive purposes

A plaintiff was liable on a counterclaim for tortious interference for its anti-competitive purposes in bringing a trade secrets lawsuit rather than simply for bringing the lawsuit.

6. Wrongful Interference— business relationship—knowledge of relationship

A plaintiff was not shielded from liability on a counterclaim for tortious interference with a consulting agreement by the fact that it may not have known of the consulting agreement. Plaintiff's knowledge of the business relationship satisfies the knowledge requirement of tortious interference.

7. Wrongful Interference— trade secret suits—liability for tortious interference—no lawful reason for suit

A trade secret owner will not be liable for tortious interference in a suit legitimately brought to protect his legal rights; liability for tortious interference will only lie where such suit is brought with no sufficient lawful reason.

8. Wrongful Interference— trade secrets—FBI statements

The trial court did not err in a tortious interference counterclaim by finding that the FBI did not state that trade secret theft had occurred. Although plaintiff (defendant in the counterclaim) argues that the trial court erred by considering incompetent and irrelevant evidence from the FBI investigation, the court gave weight to what the FBI did not say rather than to what it said.

9. Damages and Remedies— future profits—conservative business estimate

The trial court did not err in a tortious interference counterclaim by awarding compensatory damages for future royalty payments where the product pro forma used by the trial court was a conservative business projection of a planned product line prepared well before trial and approved by a publicly held parent company. While it may be difficult to calculate and prove future profits for a new business, North Carolina has not adopted a per se rule against the award of such damages.

10. Employer and Employee— non-compete agreement—Illinois law—narrowly construed

The trial court did not err in its interpretation of a non-compete agreement under Illinois law where defendant and plaintiff-corporation signed a non-compete agreement when defendant went to work with plaintiff as the vice president of research and development for plaintiff's Swift Adhesives division; defendant was subsequently moved to the automotive adhesives division as a sales and marketing manager in a demotion; and the trial court held that defendant had not breached the agreement because the company for which defendant began working (Imperial) had no intention of competing with plaintiff's automotive adhesives business.

11. Employer and Employee— non-compete agreement—finding concerning defendant's activities—supported by evidence

The trial court did not err when construing a non-compete agreement by finding that plaintiff was not involved in research and development activities (which were covered by the agreement) where defendant was transferred from research and development to marketing and sales of automotive adhesives and was involved in the development of new adhesives only in the limited capacity of seeing that the needs of particular automotive customers were met.

12. Employer and Employee— non-compete agreement—publicly known information

The trial court did not err in an action on a non-compete agreement by holding that plaintiff failed to meet its burden of proving that defendant breached the confidentiality provision of the agreement where there was no evidence that defendant and the company for which he was going to consult discussed anything more than publicly known product lines and customers.

13. Fiduciary Relationship— workplace—managerial position

The trial court did not err by finding that defendant did not breach a fiduciary duty owed to plaintiff in an action on a non-compete agreement. A fiduciary relationship will generally not be found in the workplace and a managerial position alone does not demonstrate the domination and influence required to create a fiduciary obligation.

14. Trade Secrets— information commonly known

The trial court's conclusion that plaintiff's information was not a trade secret was supported by competent evidence that the information was commonly known.

15. Employer and Employee—vacation and bonus pay

The trial court did not err in an action arising from a non-compete agreement by awarding vacation and bonus pay to defendant or by doubling that award for lack of good faith.

16. Unfair Trade Practices— filing lawsuit—objectively reasonable—federal antitrust reasoning

The trial court did not err by granting summary judgment for plaintiff on defendant's counterclaim for unfair trade practices arising from a non-compete agreement and a lawsuit filed against another company (Imperial) with whom defendant had a consulting agreement where the suit was for no legitimate purpose but was objectively reasonable. Chapter 75 of the North Carolina General Statutes was modeled after federal antitrust law and the reasoning of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, and *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, apply to N.C.G.S. § 75-1.1. Moreover, there was no indication that plaintiff's activities preceding the filing of its suit (including filing a complaint with the FBI) were undertaken for any trade purpose other than preparation for the suit.

17. Employer and Employee— salaried executive—time spent elsewhere—company reimbursed

The trial court did not err in an action against an employee who was consulting with another company by awarding plaintiff a reimbursement for salary paid to defendant while defendant was visiting that company. Although defendant argued that he was a salaried executive who was entitled to adjust his schedule to meet his own needs, plaintiff's executives have a limited number of vacation days and plaintiff should be compensated for days defendant did not spend working for plaintiff insofar as defendant was compensated for vacation days not taken.

18. Trade Secrets–attorney fees— misappropriation

The trial court did not err by denying attorney fees under N.C.G.S. § 66-154(d) for bringing a trade secret misappropriation claim in bad faith where the court found that the plaintiff

acted with legal malice in its final judgment. The fact that a suit was brought with malicious intent does not exclude the possibility of a good faith belief that the suit has a legitimate basis.

Appeal by plaintiff from orders entered 3 August 1999 by Judge Abraham Penn Jones in Superior Court, Wake County. Appeal by defendant from orders entered 9 September 1998 and 3 August 1999 by Judge B. Craig Ellis and Judge Abraham Penn Jones, respectively, in Superior Court, Wake County. Heard in the Court of Appeals 14 March 2001.

Maupin Taylor & Ellis, P.A., by M. Keith Kapp, Mark S. Thomas, Kevin W. Benedict and Joanne Lambert, for plaintiff-appellant/appellee.

McConwell Law Offices, by Edward A. McConwell; and Grafstein & Walczyk, P.L.L.C., by Lisa Grafstein, for defendant-appellant/appellee.

McGEE, Judge.

Reichhold Chemicals, Inc. (plaintiff) filed a complaint against Anil B. Goel (defendant) on 5 February 1997 and amended the complaint on 1 August 1997. The amended complaint states claims of misappropriation of trade secrets, breach of express confidentiality agreement, breach of fiduciary duty, breach of employment agreement, misapplication of plaintiff's money, fraud, and two claims of constructive fraud. Defendant filed counterclaims of tortious interference, defamation per se, employment compensation and expenses, and unfair and deceptive trade practices.

The trial court granted plaintiff's motion for summary judgment on defendant's counterclaim of unfair and deceptive trade practices on 9 September 1998. Following a bench trial, the trial court entered an order on 3 August 1999 denying plaintiff's claims of trade secret misappropriation, breach of express confidentiality agreement, breach of fiduciary duty, breach of employment agreement, and the first claim of constructive fraud. The trial court granted plaintiff's claims of misapplication of plaintiff's money, fraud, and the second claim of constructive fraud. The trial court granted defendant's counterclaims of tortious interference and employment compensation but denied defendant's claim of defamation.

Plaintiff appeals from the trial court's 3 August 1999 orders. Defendant appeals both the 9 September 1998 order and the 3 August 1999 orders.

The trial court found the following facts in its 3 August 1999 order. Defendant began working for Swift Adhesives, Inc. (Swift), a division of plaintiff, in February 1990. Defendant, a recognized expert in the field of moisture cured polyurethane adhesives, was hired by Swift as vice president of research and development because of his knowledge of reactive urethanes and their manufacture. Defendant and Swift specifically negotiated a non-compete agreement which would permit defendant to compete in the reactive adhesives market after leaving Swift.

In 1994, plaintiff eliminated defendant's position as vice president of research and development for Swift and moved defendant to plaintiff's automotive adhesives unit. From November 1994, defendant was not involved in research and development activities for plaintiff. Plaintiff's president did not consider plaintiff's automotive adhesives unit to be a viable business unit. Defendant's reassignment was a demotion and an attempt by plaintiff's president to induce defendant to leave.

Defendant, recognizing the reassignment as a demotion, decided to leave plaintiff once he found an opportunity to work in the field of polyurethane reactive adhesives. Beginning no later than November 1994, defendant had discussions with Imperial Adhesives, Inc. (Imperial) about defendant's possible employment for the purpose of developing moisture cured polyurethane reactive adhesives for Imperial. At some point after March 1995, Imperial decided it could not afford to hire defendant as an employee, and Imperial and defendant discussed the possibility of a consulting agreement.

Defendant signed a consulting agreement with Imperial in March 1996 which was not to go into effect until defendant left plaintiff's employ. Both defendant and Imperial intended to begin the consulting relationship in January 1997. Defendant began teaching Imperial employees about the formulation and manufacture of polyurethane reactive adhesives in the spring of 1996. Imperial's legal counsel advised defendant that defendant's discussions with Imperial did not violate defendant's non-compete agreement with Swift. Defendant and Imperial specifically agreed that there would be no transfer of confidential or trade secret information, and defend-

ant insisted that Imperial not target any of plaintiff's customers in marketing the products they were contemplating.

The consulting agreement provided that defendant was to work for 203 days over four years at a fixed rate of pay. The agreement further provided for defendant to receive royalties on any products he developed for Imperial for fifteen years. Imperial compiled a product pro forma, conservatively forecasting the first five years of its entry into the hot melt moisture cured urethane segment of the adhesive industry, for presentation to Imperial's publicly held parent company. Five or six accountants sitting on the board of Imperial's parent company reviewed and approved the product pro forma. The hot melt adhesives covered by the product pro forma were not the only reactive urethane adhesives contemplated in the consulting agreement. Based solely on the minimum days of consulting and the product pro forma, the trial court concluded that defendant had a reasonable expectation of earning $2,493,585.00 under the consulting agreement.

Between November 1995 and October 1996, defendant made at least sixteen trips to Imperial. At no time did defendant inform plaintiff of his consulting agreement with Imperial. Defendant spent at least fourteen days primarily engaged in meetings with Imperial while on plaintiff's payroll, a value of not less than $6,440.00, and submitted $7,500.00 in expense reimbursements for those trips. However, during the time he was meeting with Imperial, defendant continued his work with plaintiff and met or exceeded his projected goals for the automotive adhesives unit.

A secretary at Imperial contacted plaintiff in September 1996 and indicated that she believed defendant was engaged in improper conduct. The secretary provided confidential Imperial documents to plaintiff for review, none of which contained information proprietary to plaintiff. Through the secretary's attorneys, plaintiff made a report of trade secret theft to the Federal Bureau of Investigation (FBI). The FBI interviewed both defendant and Imperial's president on 30 October 1996 and indicated to plaintiff at that time that the allegations of trade secret theft were not substantiated. Nonetheless, plaintiff's president had defendant escorted from the building, telling defendant that defendant's reputation would be ruined, that defendant would not get another job in the adhesives industry, and that Imperial would never get into the reactive urethane adhesives business.

Plaintiff filed a complaint against Imperial on 30 October 1996, alleging that defendant had misappropriated plaintiff's trade secrets and other confidential and proprietary information. Imperial abandoned its consulting agreement with defendant, feeling intimidated, threatened and embarrassed by the allegations made by plaintiff, a much larger company than Imperial. Plaintiff sought to coerce defendant into cooperating in its suit against Imperial by threatening to sue defendant, then sued defendant anyway despite his cooperation. Plaintiff's costs in obtaining the testimony of the Imperial secretary and internal Imperial documents far exceeded its potential loss from the alleged trade secret theft.

The trial court found that, at the time he was terminated, defendant had seventeen days of vacation accrued in 1996 and was entitled to ten days of accrued vacation carried over from 1995 under plaintiff's policy of allowing vacation days to be carried over with supervisor approval. In addition, plaintiff had a written policy entitling defendant to a prorated bonus paid at separation unless the separation was a voluntary quit or discharge for cause, and defendant's was neither. The trial court concluded that defendant was entitled to those payments, and that defendant was entitled to have those payments doubled because of plaintiff's failure to demonstrate that they were withheld in good faith.

The trial court also found, in connection with plaintiff's trade secret misappropriation claim, that in late 1995, a chemist working for plaintiff developed a liquid moisture cured urethane adhesive formula labeled "2U026-1N" after a customer requested a modified version of plaintiff's formula 22005. The chemist had never developed a moisture cured urethane adhesive formula before. Plaintiff's 2U026-1N had three ingredients: two Dow polyols, in a two-to-one ratio, with one Dow solid isocyanate.

An Imperial chemist developed a moisture cured urethane adhesive designated UL9001 in the summer of 1996. Imperial's UL9001 had two Olin polyols and a Dow liquid isocyanate, plus a catalyst, none of which were used in plaintiff's formula. The use of polyols in a two-to-one ratio in urethanes had been discussed in urethane literature as early as 1961 and was commonly known and used in the industry. The Imperial chemist's lab notes indicated that he considered several ratios of polyol to polyol and polyol to isocyanate before arriving at the formulation for UL9001.

The trial court found that Imperial's UL9001 was materially different from plaintiff's 2U026-1N in formulation, manufacture and functionality. The two were not the same formula, and each could be easily derived from information provided by raw material suppliers such as Dow and Olin. Imperial's UL9001 was independently developed, and Imperial was not aware of plaintiff's 2U026-1N until its litigation with plaintiff. Defendant, a recognized expert in the field of reactive moisture cured urethane adhesives, would have no reason to misappropriate a formula developed by a novice in the field.

Moreover, plaintiff's 2U026-1N was developed for a single customer and failed to meet that customer's needs. Plaintiff had no sales or prospect of sales since the formula was developed and plaintiff had made no effort to market it until the present litigation was well underway. The trial court concluded that plaintiff's 2U026-1N had no actual or potential commercial value.

The trial court further found that information about the design and operation of a manufacturing facility similar to the information defendant provided to Imperial was widely known and previously published in a 1990 brochure. The trial court found that defendant had sufficient information prior to 1990 about the manufacture of moisture cured urethane adhesives to provide information on the process to Imperial. Also based on knowledge acquired prior to 1990, defendant provided plaintiff with the information necessary to create the manufacturing process at its facility.

I.

Plaintiff first assigns error to the trial court's conclusion that plaintiff tortiously interfered with the consulting agreement between defendant and Imperial.

> The tort of interference with contract has five elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954)).

A.

Plaintiff first asserts that it acted with justification in bringing suit against Imperial. Plaintiff presents several arguments supporting its defense of justification.

1.

First, plaintiff encourages this Court to apply the reasoning of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464 (1961), as applied in *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 123 L. Ed. 2d 611 (1993) (*PRE*), to the present case. Under *Noerr* and *PRE*, the filing of a lawsuit with anti-competitive intent does not violate the federal antitrust statutes if the lawsuit is "objectively reasonable." *See PRE* at 57, 123 L. Ed. 2d at 621. Plaintiff argues that, under that reasoning, plaintiff is shielded from liability for tortious interference as long as its suit against Imperial was objectively reasonable, regardless of plaintiff's subjective intent.

Defendant, in his appellee brief before this Court, asserts that plaintiff failed to plead immunity under *Noerr* as an affirmative defense and therefore that plaintiff was prohibited from arguing the applicability of *Noerr* on appeal. Plaintiff responded by filing a reply brief and a motion to amend the record on appeal in support of plaintiff's contention that it had properly pleaded *Noerr* before the trial court. Defendant filed a motion to strike plaintiff's reply brief and opposed plaintiff's motion to amend the record on appeal.

[1] We first address defendant's motion to strike plaintiff's reply brief. Plaintiff asserts that it filed its reply brief under N.C.R. App. P. 28(h)(1), which provides that, "[i]f the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions." N.C.R. App. P. 28(c) provides that,

> Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

Defendant did not raise any cross-assignments of error under N.C.R. App. P. 10(d), and plaintiff does not seek judgment n.o.v. on appeal.

In *Newsome v. N.C. State Bd. of Elections*, 105 N.C. App. 499, 415 S.E.2d 201 (1992), our Court permitted a reply brief where

> appellants, in their reply brief, responded to two new issues raised in the briefs by defendants-appellees and intervening defendants-appellees. These issues concerned whether the appeal was moot and whether the plaintiffs lacked equity. Although appellees claim that they have adopted verbatim the question presented by appellants, the matters they argue in their brief do not arise naturally and logically from the record and question presented.

Id. at 504, 415 S.E.2d at 204. Plaintiff argues that defendant's contention on appeal that plaintiff had failed to plead *Noerr* was similarly a new issue that did not "arise naturally and logically from the record and question presented." We disagree. Once defendant raised the question of whether *Noerr* was properly pleaded, plaintiff was entitled to argue that *Noerr* was properly pleaded during oral arguments or, if there were no oral arguments, in a reply brief under N.C.R. App. P. 28(h)(2). Because oral arguments were heard, that was the proper place for plaintiff to challenge defendant's contention that *Noerr* had not been properly pleaded. We therefore grant defendant's motion to strike plaintiff's reply brief.

[2] We next address plaintiff's motion to amend the record on appeal. Plaintiff moves to amend the record to include: (1) plaintiff's brief in support of partial summary judgment on defendant's claim of unfair and deceptive trade practices; (2) defendant's brief in opposition to partial summary judgment; and (3) plaintiff's trial brief. N.C.R. App. P. 9(b)(5) provides that, "[o]n motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal." Plaintiff argues that its proposed amendment supports plaintiff's contention that *Noerr* was properly pleaded before the trial court and explains the material's absence from the record on appeal as due to plaintiff's failure to anticipate defendant's contention to the contrary. We have held that, "while the failure to plead an affirmative defense ordinarily results in a waiver of the defense, the issue may still be raised by express or implied consent." *Miller v. Talton*, 112 N.C. App.

484, 487, 435 S.E.2d 793, 796 (1993). Plaintiff's proposed amendment supports plaintiff's contention that *Noerr* was argued before the trial court by the consent of both parties. We therefore grant plaintiff's motion to amend the record on appeal.

[3] However, without addressing whether *Noerr* was properly pleaded and thus is properly before us on appeal, we decline to apply the reasoning of *Noerr* to defendant's claim of tortious interference. The U.S. Supreme Court based its decision in *Noerr* both on the First Amendment right to petition and on a statutory interpretation of federal antitrust law. *Noerr*, 365 U.S. at 137-38, 5 L. Ed. 2d at 471. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 646 (1972), the U.S. Supreme Court indicated that the right to petition, and therefore the reasoning of *Noerr*, extended to the filing of a lawsuit. However, in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 76 L. Ed. 2d 277 (1983), the U.S. Supreme Court held that, while the right to petition entitled a plaintiff to file an objectively reasonable lawsuit despite malicious intent, *see id.* at 743, 76 L. Ed. 2d at 289, the bringing of such a lawsuit with malicious intent could be penalized as an unfair labor practice after the suit had concluded. *See id.* at 747, 76 L. Ed. 2d at 291-92. It follows that, because the present case does not seek to interfere with plaintiff's suit against Imperial, plaintiff's right to petition is not implicated.

Plaintiff therefore relies solely on the U.S. Supreme Court's statutory interpretation of federal antitrust law for its contention that, given an objectively reasonable lawsuit, it should not be liable for the state tort of tortious interference. Because we see no relation between the tort of tortious interference and the legislative intent behind federal antitrust law, we decline to attempt to conform the reasoning of *Noerr* to the present case. We therefore hold that, even if plaintiff's suit against Imperial was objectively reasonable, plaintiff could still be liable for tortious interference. *Cf.* Section VIII, *infra*.

2.

Plaintiff next argues that the trial court erred in its interpretation of the law of tortious interference in North Carolina, insofar as the trial court concluded that plaintiff could be held liable for tortious interference through the malicious filing of a lawsuit, regardless of the objective reasonableness of the lawsuit.

Our Supreme Court has stated that "legal malice" demonstrates a lack of justification in an action for tortious interference and has distinguished "legal malice" from "actual malice":

> There are frequent expressions in judicial opinions to the effect that malice is requisite to liability in an action for inducing a breach of contract. . . . The term "malice" is used in this connection in its legal sense, and denotes the intentional doing of the harmful act without legal justification. Indeed, actual malice and freedom from liability for this tort may coexist. If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability for so doing, no matter how malicious in actuality his conduct may be. . . . For this reason, actual malice is ordinarily material in an action for inducing a breach of contract only on the issue of whether punitive damages should be awarded. Notwithstanding it is not an element of the cause of action, actual malice may negative the existence of justification in a particular case. This is true because the outsider is never justified in inducing a breach of contract solely for the purpose of visiting his personal hatred, ill will, or spite upon the plaintiff.

Childress, 240 N.C. at 675, 84 S.E.2d at 182 (citations omitted). *See also*, *Robinson, Bradshaw, & Hinson v. Smith*, 129 N.C. App. 305, 318, 498 S.E.2d 841, 851 (1998). Thus, plaintiff was justified in bringing suit against Imperial only if plaintiff acted with sufficient lawful reason.

> "The privilege [to interfere with a contractual relationship] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved."

Smith v. Ford Motor Co., 289 N.C. 71, 91, 221 S.E.2d 282, 294 (1976) (emphasis in original) (citation omitted). Moreover, a subjective belief that interference is permissible is insufficient to defeat a claim of tortious interference if legal malice is present. *See United Laboratories*, 322 N.C. at 663, 370 S.E.2d at 388 ("[W]e reject defendant's argument that a good faith belief that the covenants are unenforceable automatically justifies contractual interference.").

We conclude that a showing of legal malice will defeat plaintiff's defense of justification in filing suit against Imperial, and that insofar as legal malice relates to intent, the "objective reasonableness" of the

suit is irrelevant. We therefore find no error in the trial court's application of the law of tortious interference.

3.

[4] Plaintiff challenges the trial court's conclusion that plaintiff exhibited legal malice sufficient to defeat its defense of justification in interfering with the consulting agreement between defendant and Imperial. Plaintiff first asserts that the trial court found only actual malice, not legal malice, and therefore that, under *Childress*, plaintiff's defense of justification was not defeated. However, in addition to holding that plaintiff demonstrated actual malice sufficient to support a grant of punitive damages, the trial court held that plaintiff's suit against Imperial was brought solely for anti-competitive, and therefore not legitimate, purposes. The trial court thus found that plaintiff acted with legal malice.

Plaintiff also contends that the trial court's conclusion of legal malice is unsupported by its findings of fact, insofar as the trial court found that plaintiff's suit against Imperial "stated in good faith" that defendant had misappropriated plaintiff's trade secrets. However, a good faith belief that trade secrets were misappropriated in no way necessitates that a suit alleging such misappropriation was brought without legally malicious intent. We conclude that the trial court's conclusion of legal malice, in the form of anti-competitive purpose, is well supported by its findings of fact.

4.

[5] Finally, plaintiff asserts that it was justified in bringing its suit against Imperial because, under N.C. Gen. Stat. § 66-152, it was required to file suit to protect its trade secret rights. However, had the trial court found that plaintiff brought its suit against Imperial to protect plaintiff's legal rights, the trial court would not have found that plaintiff acted with legal malice in bringing suit. Plaintiff is liable, not for bringing suit, but for plaintiff's anti-competitive purposes in bringing suit.

B.

[6] Plaintiff's next challenge to defendant's claim of tortious interference in the present case is that plaintiff cannot be held to have tortiously interfered with the consulting agreement between defendant and Imperial because it had no actual knowledge of the agreement. *See United Laboratories*, 322 N.C. at 661, 370 S.E.2d at 387. However,

while the trial court made no specific finding that plaintiff knew of the consulting agreement before filing suit, plaintiff does not challenge the trial court's finding that plaintiff knew of the business relationship between defendant and Imperial.

> The outsider has knowledge of the contract within the meaning of the second element of the tort if he knows the facts which give rise to the plaintiff's contractual right against the third person. "If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that there is no contract or that the contract means something other than what it is judicially held to mean."

Childress, 240 N.C. at 674, 84 S.E.2d at 182 (citation omitted). We conclude that, insofar as plaintiff sought to disrupt the relationship between defendant and Imperial, plaintiff's knowledge of that relationship satisfies the knowledge requirement of tortious interference. Inducing a person not to enter into a contract is as much a tort as interference with an established contract. *See Equipment Co. v. Equipment Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). The fact that plaintiff may not have known, at the time it filed suit against Imperial, that defendant had already signed the consulting agreement with Imperial cannot shield plaintiff from liability.

C.

[7] Plaintiff asserts that adoption by this Court of the trial court's reasoning on defendant's claim of tortious interference will have a "chilling" effect on future efforts by trade secret owners to protect against misappropriation. Plaintiff suggests that unless this Court adopts the reasoning of *Noerr* and prohibits liability for tortious interference in any objectively reasonable lawsuit, owners of trade secrets will hesitate in acting to protect their interests for fear of such liability. We disagree. Under the reasoning of the trial court, as adopted by this Court, a trade secret owner will not be liable for tortious interference in a suit legitimately brought to protect its legal rights. Liability for tortious interference will only lie where such a suit is brought with *no* sufficient lawful reason.

D.

[8] Finally, plaintiff asserts that the trial court erred in considering evidence of the FBI investigation of defendant's and Imperial's activities in finding tortious interference. Plaintiff argues that the FBI investigators' statements to plaintiff that there was no protectable

trade secret interest in the information that plaintiff claimed was a trade secret was incompetent and irrelevant evidence as to the basis of plaintiff's suit against Imperial, both because the criminal standard of proof differs from the civil standard and because the FBI investigators were not trained experts in the field of chemistry.

However, the trial court's conclusion was that plaintiff "knew or should have known, prior to filing suit against Imperial, that it had *insufficient information to determine* whether Imperial or [defendant] were misappropriating its trade secrets" (emphasis added). Thus the FBI investigators' statements did not act to support an inference of no protectable trade secret interest, but instead *failed* to support an inference that there *was* a protectable trade secret interest. The trial court did not give any weight to what the FBI investigators said; instead, it merely noted what they did not say. We conclude that, insofar as a statement by the FBI that trade secret theft had occurred might have acted to justify plaintiff's suit against Imperial, the trial court did not err in finding as fact that the FBI made no such statement.

II.

[9] Plaintiff next assigns error to the trial court's award of compensatory and punitive damages to defendant on defendant's claim of tortious interference. Plaintiff asserts that the trial court erred in awarding compensatory damages for future royalty payments on a line of products never created based solely on the projections of Imperial's product pro forma. Plaintiff argues that defendant failed to meet its burden in proving those damages, insofar as "the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987) (citation omitted).

However, while it may be difficult to calculate and prove future profits for a new business, North Carolina has declined to adopt a *per se* rule against the award of such damages. *See id.* at 546, 356 S.E.2d at 585. The product pro forma used by the trial court in the present case was prepared well before trial as a conservative business projection of one planned line of products and was approved by Imperial's publicly held parent company. Moreover, defendant is a recognized expert in the field of developing and manufacturing such products. We conclude that the trial court did not err in holding that

the product pro forma's conservative revenue projections produced a reasonably certain estimate of defendant's damages.

Plaintiff challenges the punitive damages awarded to defendant solely on the grounds of plaintiff's contention that the trial court improperly found plaintiff liable for tortious interference. Because we have upheld plaintiff's liability for tortious interference, we find no error in the trial court's award to defendant of punitive damages on that claim.

III.

Plaintiff assigns error to the trial court's holding that defendant did not breach the terms of the non-compete agreement defendant signed with Swift. The trial court held, and the parties do not challenge, that the agreement is governed by the law of Illinois.

A.

[10] Plaintiff first challenges the trial court's interpretation under Illinois law of the first paragraph of the non-competition section of the non-compete agreement:

> Employee agrees that, while employed by the Company, Employee will undertake no planning for or organization of any business activity competitive with the work Employee performs, or with the business Employee works in, as an employee of the Company.

The trial court held that, given the Illinois courts' position that "private covenants restraining trade are disfavored in the law and will be carefully scrutinized to ensure that they are reasonable and not contrary to public policy[,]" *Peterson-Jorwic Group v. Pecora*, 586 N.E.2d 676, 677 (Ill. App. Ct. 1st Dist. 1991) (citation omitted), the above paragraph should be read to encompass only defendant's work as a sales and marketing manager for plaintiff's automotive adhesives unit. The trial court concluded that, because Imperial had no intention of competing with plaintiff's automotive adhesives business, defendant did not breach his non-compete agreement.

Plaintiff argues that the paragraph should not be construed so narrowly. However, we note that the non-compete agreement was drafted by defendant's employer, and ambiguities in written instruments are to be strictly construed against the drafting party. *See Camp v. Leonard*, 133 N.C. App. 554, 562, 515 S.E.2d 909, 914 (1999). Moreover, insofar as defendant signed the non-compete agreement

with Swift and then moved to the automotive adhesives unit of Swift's much larger parent company, it could be unreasonable to extend the meaning of the agreement to cover the entirety of the parent company. We hold that, because the language of the paragraph specifically limits its application to the business the employee performs, not the employer as a whole, the trial court did not err in applying the non-compete agreement under Illinois law.

[11] Plaintiff also argues that defendant was in fact involved in developing hot-melt adhesive products for plaintiff's automotive adhesives business, and therefore that the trial court erred in concluding that defendant was not involved in research and development activities for plaintiff. However, defendant's responsibilities were the marketing and sales of automobile adhesives, and defendant was involved in the development of new adhesives only in the limited capacity of seeing that the needs of particular automotive customers were met. We hold that the trial court's finding that defendant was not involved in research and development activities is supported by competent evidence.

The trial court further held that, insofar as the non-compete agreement permitted defendant to compete with plaintiff in the field of polyurethane reactive adhesives after leaving plaintiff's employ, and insofar as defendant's meetings with Imperial were not competition but merely preparatory to the activation of the consulting agreement, plaintiff had no legitimate business interest in interfering with defendant's efforts to work for Imperial. There is no indication that the trial court believed the non-compete agreement explicitly allowed defendant to compete with plaintiff while employed for plaintiff, despite plaintiff's contention to the contrary.

B.

[12] Plaintiff next challenges the trial court's conclusion that defendant did not violate the confidentiality provision of the non-compete agreement. In particular, plaintiff suggests that, insofar as defendant and Imperial agreed that Imperial would not target any of plaintiff's customers, defendant must have disclosed to Imperial information about plaintiff's product lines and who plaintiff's customers were. However, the confidentiality provision does not apply to information in the public domain, and there is no evidence to suggest that defendant and Imperial discussed anything more than those product lines and customers of plaintiff's that were publicly known. The trial court's holding that plaintiff failed to meet its burden in proving

defendant breached the confidentiality provision of the non-compete agreement is supported by the trial court's findings of fact and by competent evidence.

IV.

[13] Plaintiff assigns error to the trial court's failure to determine that defendant breached a fiduciary duty owed to plaintiff. However, our Supreme Court has recently indicated that a fiduciary relationship will generally not be found in the workplace. *See Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). A managerial position alone does not demonstrate the requisite " 'domination and influence on the other' " required to create a fiduciary obligation. *Id.* at 652, 548 S.E.2d at 708 (citation omitted). We conclude that defendant owed no fiduciary duty to plaintiff, and therefore that the trial court did not err in finding no breach of such a duty.

V.

[14] Plaintiff next assigns error to the trial court's determination that plaintiff's formula 2U026-1N and information about its manufacturing process were not trade secrets under North Carolina law. *See* N.C.G.S. § 66-152(3). In particular, plaintiff argues that the trial court's conclusion that information about the composition and manufacture of plaintiff's 2U026-1N was commonly known and used in the industry is unsupported by the industry publications submitted by defendant to the trial court. However, plaintiff does not contest that defendant's witnesses testified that the information was commonly known. We hold that the trial court's conclusion that plaintiff's information was not a trade secret is supported by competent evidence, and thus find no error in the trial court's conclusion that defendant did not misappropriate plaintiff's trade secrets.

VI.

[15] Plaintiff assigns error to the trial court's award to defendant of vacation and bonus pay after defendant left plaintiff's employ, as well as the doubling of that award for lack of good faith. Although plaintiff asserts on appeal that it acted in good faith in withholding payments from defendant, we find the trial court's conclusion to the contrary to be supported by its uncontested findings of fact.

Plaintiff asserts that, while vacation days can be carried over from one year to the next with supervisor approval, the trial court made no express finding of fact that such supervisor approval was

received. However, the parties stipulated before trial that defendant had received the required authorization. Plaintiff also asserts that defendant is not entitled to a prorated bonus because he resigned voluntarily. However, we hold that the trial court's finding that defendant did not resign voluntarily is supported by competent evidence. We therefore find no error in the trial court's awards of vacation and bonus pay to defendant.

VII.

Finally, plaintiff assigns error to the trial court's failure to consider plaintiff's claims of fraud and constructive fraud in connection with expense reimbursements submitted to plaintiff for trips to visit Imperial. However, those claims were considered and addressed together with plaintiff's claim for misapplication of plaintiff's money. We therefore hold that the trial court did not fail to consider plaintiff's fraud and constructive fraud claims.

VIII.

[16] In his first assignment of error, defendant asserts that the trial court erred in granting summary judgment on defendant's claim of unfair and deceptive trade practices. Defendant argues that plaintiff's tortious interference with the consulting agreement between defendant and Imperial constitutes an unfair trade practice under N.C. Gen. Stat. § 75-1.1. *See, e.g., McDonald v. Scarboro*, 91 N.C. App. 13, 370 S.E.2d 680 (1988). Defendant further contends that, under *Sara Lee Corp. v. Carter*, 351 NC 27, 34, 519 S.E.2d 308, 312 (1999), the employment relationship between plaintiff and defendant does not protect plaintiff from liability for unfair and deceptive trade practices.

Plaintiff argues that a reasonably objective lawsuit can never be an unfair trade practice, under the reasoning of *Noerr* and *PRE*. *See* Section I.A.1, *supra*. *Noerr* was based on a statutory interpretation of federal antitrust law. *See Noerr*, 365 U.S. at 137-38, 5 L. Ed. 2d at 471. This Court has noted that Chapter 75 of the North Carolina General Statutes was modeled after that federal antitrust law, and that federal decisions may "provide guidance in determining the scope and meaning of chapter 75." *DKH Corp. v. Rankin-Patterson Oil Co.*, 131 N.C. App. 126, 128-29, 506 S.E.2d 256, 258 (1998) (citations omitted). We therefore hold that the reasoning of *Noerr* and *PRE* apply to N.C.G.S. § 75-1.1. We note that both plaintiff and defendant argued *Noerr* in their briefs supporting and opposing plaintiff's motion for summary judgment of defendant's trade secret claim.

Under *PRE*, a plaintiff may not be held liable under federal antitrust law for bringing an objectively reasonable lawsuit, regardless of the plaintiff's subjective intent in bringing the suit. *See PRE*, 508 U.S. at 57, 123 L. Ed. 2d at 621. A lawsuit is objectively reasonable if "an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome[.]" *Id.* at 60, 123 L. Ed. 2d at 624. We agree with the trial court's conclusion in the present case that, though filed for no legitimate purpose, plaintiff's trade secret suit against Imperial was not utterly baseless. *See* Section I.A.3, *supra*. We therefore hold that plaintiff's suit against Imperial was objectively reasonable, and thus that the suit did not constitute an unfair trade practice under N.C.G.S. § 75-1.1.

Defendant suggests that plaintiff's activities preceding the filing of its suit against Imperial, including acquiring confidential Imperial documents and filing a complaint with the FBI, constitute an unfair trade practice independent of the suit against Imperial. However, there is no indication that plaintiff undertook those acts for any trade related purpose other than preparation for the suit against Imperial. We hold that those actions alone are insufficient to qualify as unfair trade practices under N.C.G.S. § 75-1.1.

We therefore find no error in the trial court's order granting plaintiff summary judgment on defendant's unfair and deceptive trade practices claim.

IX.

[17] In his second assignment of error, defendant asserts that the trial court erred in awarding plaintiff a reimbursement for salary paid to defendant while defendant was visiting Imperial. Defendant asserts that, as a salaried executive, defendant was entitled to adjust his schedule to meet his personal needs. Defendant argues that, as long as he fulfilled his employment duties with plaintiff, he was entitled to his full salary. Plaintiff counters that even executives have a limited number of vacation days per year, and that defendant's freedom to be compensated while taking time away from his employment is limited. We agree with plaintiff that, insofar as defendant was compensated by plaintiff for vacation days not taken, plaintiff should be compensated for days defendant did not spend working for plaintiff. We also agree with plaintiff that plaintiff's pleadings and the statement of issues in the pre-trial order are broad enough to support plaintiff's recovery of those wages. We find no error in the trial court's award.

X.

[18] In his third and final assignment of error, defendant asserts that the trial court erred in failing to award attorneys' fees to defendant under N.C. Gen. Stat. § 66-154(d), which provides that, "[i]f a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party." In denying attorneys' fees to defendant under N.C.G.S. § 66-154(d), the trial court found, in a separate 3 August 1999 order, that plaintiff did not bring its trade secret misappropriation claim against defendant in bad faith. However, the trial court also stated in the separate order denying attorneys' fees that, in the event of an inconsistency between the findings in that order and the findings in what the trial court referred to as its final judgment, the findings in the final judgment would prevail. Defendant argues that the trial court's findings that plaintiff acted with legal malice are inconsistent with a finding that plaintiff did not bring its trade misappropriation claim in bad faith.

However, as discussed in Section I.A.3, *supra*, the fact that a suit was brought with malicious intent does not exclude the possibility of a good faith belief that the suit has legitimate basis. *See also*, *United Laboratories*, 322 N.C. at 663, 370 S.E.2d at 388. We conclude that the findings of the trial court's final judgment are not inconsistent with the trial court's finding that plaintiff did not bring its trade misappropriation claim against defendant in bad faith.

In summary, we affirm the trial court's orders.

Affirmed.

Judges WYNN and THOMAS concur.

CREEK POINTE HOMEOWNER'S ASSOCIATION, INC. AND KENNETH C. KREMER, PLAINTIFFS V. RICHARD HAPP, DEFENDANT AND THIRD-PARTY PLAINTIFF V. WEYERHAEUSER REAL ESTATE COMPANY, INC., THIRD-PARTY DEFENDANT

No. COA00-556

(Filed 18 September 2001)

1. Appeal and Error— appealability—homeowner's association dismissed from suit—substantial right affected

An order dismissing a homeowner's association but not an individual from an action involving a fence across a road was interlocutory but appealable because a substantial right was affected.

2. Standing— homeowner's association—case by case analysis

The North Carolina Planned Community Act (NCPCA), N.C.G.S. Chapter 47F, does not automatically confer standing upon homeowners' associations in every case, and questions of standing should be resolved by the courts in the context of the specific factual circumstances presented and with reference to the principles of law and equity as well as other North Carolina statutes that supplement the NCPCA.

3. Standing— homeowner's association—representative capacity

A homeowner's association lacked standing to bring suit as the representative of individual members of the association in an action arising from a fence placed across a road where, under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, individual members would have standing to bring individual suits and the alleged injury was germane to the organization's purpose, but the participation of individual members was necessary because the financial impact of the fence upon individuals could vary from minimal to substantial. The association may have had standing in its representative capacity if it had sought only declarative or injunction relief and not monetary damages.

4. Standing— homeowner's association—injury to the association

A homeowner's association had standing to pursue claims alleging injury to the association itself from a fence placed across a road where the covenants stated that it had a duty to maintain

the private roads within the development. The presence of a fence across a subdivision road clearly injures the association's ability to carry out this duty, the injury is causally connected to defendant's alleged behavior, and the injury likely would be redressed by a favorable verdict.

5. Parties— joinder motions granted—additional motions considered

The trial court did not err in an action arising from the placement of a fence across a road by considering a motion to dismiss the homeowner's association's claims "after" joining other homeowners as necessary parties. Both rulings were part of orders issued at the conclusion of a hearing and the court took no actions affecting the resolution of the issues to be tried. The cases cited by the association all addressed situations in which substantive matters were determined in the absence of necessary parties.

Judge WALKER concurring in part and dissenting in part.

Appeal by plaintiff from order entered 21 March 2000 by Judge Arnold O. Jones in Pamlico County Superior Court. Heard in the Court of Appeals 14 March 2001.

Harris, Shields, Creech and Ward, P.A., by C. David Creech, for plaintiff-appellant.

McCotter, McAfee, & Ashton, PLLC, by Charles K. McCotter, Jr., for defendant-appellee.

Chesnutt, Clemmons, Thomas & Peacock, P.A., by Gary H. Clemmons for third party defendant-appellee.

BIGGS, Judge.

Plaintiff, Creek Pointe Homeowner's Association, Inc., appeals from the trial court's dismissal of its claims for lack of standing, pursuant to N.C.R. Civ. P. 12(b)(6). This matter arises out of a dispute over a fence that Richard Happ (defendant), a resident of the Creek Pointe subdivision, placed across Deep Creek Road, in Creek Pointe. We reverse the decision of the trial court.

The pertinent facts are as follows: Defendant owns lots 27 through 31 in Creek Pointe, which is located in Pamlico County, about sixteen miles from New Bern, North Carolina. His lots comprise over

200 acres, and lie on either side of Deep Creek Road. This land includes the entire eastern portion of Creek Pointe subdivision. His lots are contiguous; they are bordered by Deep Creek Road, by Goose Creek, and by a small triangular portion of lot 22. Defendant purchased the lots in 1994, and erected the fence shortly thereafter.

In November, 1999, the Creek Pointe Homeowner's Association (association) and individual plaintiff Kenneth C. Kremer (Kremer), one of the owners of lot 22, brought suit against defendant, seeking an injunction to require the defendant to remove the fence across Deep Creek Road, and to bar him from replacing it with another fence. The plaintiffs asked for compensatory and punitive damages and for attorneys' fees. In their complaint, plaintiffs alleged that the fence violated a restrictive covenant granting an easement in favor of all Creek Pointe residents and entitling them to the use of all roads in Creek Pointe, including Deep Creek Road. Defendant's answer asserted that permission to erect a fence had been a condition of his contract of sale with Weyerhaeuser Real Estate Co., Inc. (developer), and also that the Creek Pointe Homeowner's Association previously had consented to the fence.

In addition, defendant filed a motion under N.C.R. Civ. P. 19, "Necessary Joinder of Parties," seeking dismissal for failure to join all individual homeowners as necessary parties, and a motion under Rule 12(b)(6), seeking dismissal of all claims of the association for lack of standing or interest. Defendant also filed a third party complaint against the developer. In January, 2000, the defendant filed a motion for summary judgment against both plaintiffs. This was followed by the developer's February, 2000, motion for summary judgment, and by the association's motion of 15 February 2000 seeking an injunction to prohibit defendant from harassing its members.

All motions were heard on 25 February 2000, at which time the trial judge issued the following orders:

1. Granted defendant's 12(b)(6) motion, dismissing all claims as to the association based on lack of standing or interest.

2. Ordered that plaintiff Kremer's wife, all other Creek Pointe homeowners, and the developer, all must be joined as necessary parties to the suit.

3. Ordered the fence moved so that it did not block any part of lot 22.

4. Denied the injunction regarding harassment of association members.

5. Denied the developer's motion for summary judgment.

6. Denied defendant's motion for summary judgment.

On 27 March 2000, the association filed notice of appeal from the dismissal of their claims for lack of standing or interest. It is this appeal that is presently before this Court. The other orders entered by the trial court in this matter are not before this Court.

[1] We first note that the trial court did not dismiss the case as to plaintiff Kremer. Thus, its ruling that the association lacked standing is an interlocutory order. *See Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984) (order dismissing claims against one defendant is interlocutory where other defendants remain in suit). Interlocutory orders generally are not immediately appealable. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980); *Mabrey v. Smith*, 144 N.C. App. 119, 548 S.E.2d 183 (2001). However, an interlocutory order may be appealed before final judgment under two circumstances: (1) there is a certification by the trial court that there is no just reason to delay the appeal, or (2) the ruling affects a substantial right. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001); *Smith v. Young Moving & Storage, Inc.*, 141 N.C. App. 469, 540 S.E.2d 383 (2000), *aff'd*, 353 N.C. 521, 546 S.E.2d 87 (2001); *Norris v. Sattler*, 139 N.C. App. 409, 533 S.E.2d 483 (2000).

The determination of whether a substantial right is affected is made on a case by case basis. *Collins v. Talley*, 135 N.C. App. 758, 522 S.E.2d 794 (1999); *Stafford v. Stafford*, 133 N.C. App. 163, 515 S.E.2d 43, *aff'd*, 351 N.C. 94, 520 S.E.2d 785 (1999). The reviewing court must determine whether denial of immediate review exposes a party to multiple trials with the possibility of inconsistent verdicts. *Murphy v. Coastal Physician Grp., Inc.*, 139 N.C. App. 290, 533 S.E.2d 817 (2000); *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 444 S.E.2d 694 (1994). In the present case we find that, although there was no certification by the trial judge, the order dismissing all claims as to the association affects a substantial right of appellants and is, therefore, appealable. *See Jenkins*, 69 N.C. App. 140, 316 S.E.2d 354 (substantial right affected where order dismissed claims against one of several defendants, thus raising the possibility of multiple trials

against different members of the same group). *See also Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

[2] The issue before this Court is whether the trial court erred in its conclusion that the Creek Pointe Homeowner's Association lacked standing to join Kremer as a plaintiff in this action. The pertinent features of the association are as follows: The creation of the association was contemplated by the developer, who stated in the Declaration of Covenants, Conditions, and Restrictions that, upon the sale of 75% of the lots in Creek Pointe, "[t]here shall be created, . . . The Creek Pointe Homeowner's Association." The association was incorporated in November, 1989. Its membership consists of the owners of all lots in Creek Pointe. Its Articles of Incorporation state that "the specific purposes for which it is formed are to provide for maintenance, preservation and architectural control of the residence lots and roads within [Creek Pointe.]" The Articles also state that the association has "any and all powers, rights, and privileges which a corporation organized under the Non-Profit Corporation Law of the State of North Carolina by law may now or hereafter have or exercise."

In North Carolina, homeowners' associations historically have enjoyed the general right to participate in litigation. Our appellate courts have considered suits brought by homeowners' associations on a case-by-case basis, and have permitted such associations, when appropriate, to pursue their claims in court. *See, e.g., Village Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 520 S.E.2d 793 (1999) (property owners' association held to have standing to challenge rezoning of neighboring property); *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 522 S.E.2d 317 (1999) (homeowners' association successfully sues to enforce restrictive covenant requiring property owners to pay annual assessment).

The association asserts standing under the North Carolina Planned Community Act (NCPCA), N.C.G.S. Chapter 47F. Their argument is based primarily upon the following provision of the statute:

> Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein, the [homeowners'] association may: . . .
>
> (4) Institute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community[.]

N.C.G.S. 47F-3-102 (1999), Powers of owners' association, 102(4). The association's argument is that this is a matter "affecting the planned

community," and thus that the statute assures them of standing to bring suit. However, we do not read the NCPCA as conferring an automatic right upon homeowners' associations, but rather as reiterating the common law rule that, when otherwise proper, a homeowners' association may participate in a lawsuit. Moreover, the statute makes no further attempt to resolve questions of jurisdiction or standing. It does not define the phrase "affecting the planned community," or otherwise restrict the potential range of litigation. The statute does not employ the term 'standing' in its recitation of an association's rights; nor does it address issues of standing in any of its other provisions. We conclude that, although the NCPCA clearly authorizes homeowners' associations as a general class to institute, defend, or intervene in litigation, this statute does not diminish our judicial responsibility to evaluate whether the association has standing to bring this suit under the specific fact situation presented. In this regard, we note another relevant provision of NCPCA, N.C.G.S. § 47F-1-108 (1999), "Supplemental general principles of law applicable," which states:

> The principles of law and equity as well as other North Carolina statutes . . . supplement the provisions of this Chapter, except to the extent inconsistent with this Chapter. When these principles or statutes are inconsistent or conflict with this Chapter, the provisions of this Chapter will control.

We find nothing in the NCPCA that is inconsistent with our common and statutory law regarding issues of jurisdiction and standing. Therefore, we hold that the NCPCA does not automatically confer standing upon homeowners' associations in every case, and that questions of standing should be resolved by our courts in the context of the specific factual circumstances presented and with reference to the "principles of law and equity as well as other North Carolina statutes" that supplement the NCPCA. Accordingly, we will examine the case *sub judice* in this manner.

[3] Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy. *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 544 S.E.2d 821 (2001); *Town of Pine Knoll Shores v. Carolina Water Service*, 128 N.C. App. 321, 494 S.E.2d 618 (1998). Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction. *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000); *Transcontinental Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App.

237, 511 S.E.2d 671, *disc. review denied*, 351 N.C. 121, 540 S.E.2d 751 (1999). "Standing" refers to the issue of whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636 (1972). The relationship between standing and the requirement of a justiciable controversy has been expressed as follows: "Judicial intervention in a dispute is normally contingent upon the presence of a justiciable controversy. Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issue he wants adjudicated." *Bremner v. City & County of Honolulu*, 96 Haw. App. 134, 28 P.3d 350 (2001). "The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980).

An association may have standing to bring suit either as a plaintiff, to redress injury to the organization itself, or as a representative of injured members of the organization. The leading case on the authority of an association to bring suit on behalf of its members is *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 53 L. Ed. 2d 383 (1977). In *Hunt*, the United States Supreme Court established three prerequisites for an association to sue in a representative capacity:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 53 L. Ed. 2d at 394. The Court expanded on the third requirement, addressing the significance of the type of relief sought as follows:

> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have

> expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Id. The criteria articulated in *Hunt v. Washington State* have been applied several times by our appellate courts. *See, e.g., River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990) (applying *Hunt* to issue of whether homeowners' association had standing); *Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 545 S.E.2d 768, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 220 (2001) (citizens' association lacked standing to challenge zoning ordinance where not all members had individual standing to sue); *Landfall Group v. Landfall Club, Inc.*, 117 N.C. App. 270, 450 S.E.2d 513 (1994) (association lacked standing to bring suit because one of its members would not have had standing as an individual to bring action). Therefore, this Court will consider the trial court's ruling in the context of the requirements for standing to sue in a representative capacity articulated in *Hunt v. Washington State*, as these criteria have been interpreted by our state courts.

We find that the association meets the first prong of the *Hunt* test, in that the individual members of the Creek Pointe Homeowner's Association would have standing to bring suit as individuals. The suit alleges violation of the "Declaration of Covenants and Restrictions" filed by the developer with the Pamlico County Register of Deeds. The declaration was filed in 1989, and was incorporated by reference as part of the "Articles of Incorporation" of the Creek Pointe Homeowner's Association. The pertinent restriction establishes an easement granting access to subdivision roads in favor of all landowners in Creek Pointe. "[G]enerally, grantees in a subdivision are beneficiaries of any and all restrictive covenants imposed upon the subdivision so as to give them standing to challenge alleged violations of the restrictive covenants." *Taylor v. Kenton*, 105 N.C. App. 396, 401, 413 S.E.2d 576, 579 (1992) (plaintiffs had standing to enforce covenant, although the document setting out covenants did not specifically grant this right). *See also Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 268 S.E.2d 494 (1980) (affirming Court of Appeals' holding that plaintiff landowners in subdivision had standing to enforce restrictive covenant applicable to neighborhood).

This Court finds also that the association meets the second criteria enunciated in *Hunt* for standing: that the alleged injury be "germane to the organization's purpose." The stated purpose of the Creek

Pointe Homeowner's Association is to "provide for maintenance, preservation and architectural control of the residence lots and roads within [Creek Pointe]." Plaintiff's suit seeks to regain access to one of the private roads within Creek Pointe. The controversy over defendant's fence is one that implicates the core functions of the association.

The third prerequisite for representational standing is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." We will evaluate the plaintiffs' claims and the remedies sought, to determine whether any of the association's members are necessary parties to the suit. The complaint seeks "just compensation for their property rights" for Creek Pointe residents, asking specifically for "damages in an amount in excess of [$10,000,]" as well as "punitive damages against Happ in a sum in excess of [$10,000,]" and attorney's fees. Thus, the suit seeks both compensatory and punitive money damages, while *Hunt* contemplated situations in which only injunctive or declarative relief was sought. The calculation of damages would require consideration of the homeowners' individual circumstances. Plaintiff Kremer alleged that the fence actually prevents access to part of his land; another homeowner might assert that the fence reduced the value of his property, spoiled the view from the front porch, or prevented the use of the road itself.

An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof. *Warth v. Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343 (1975). "[W]here an association seeks to recover damages on behalf of its members, the extent of injury to individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citing *Hunt* for its holding that homeowners' association lacked standing where it sought money damages for some of its members). Indeed, "damages claims usually require significant individual participation, which fatally undercuts a request for associational standing." *Pennsylvania Psychiatric Society v. Green Springs Health Services, Inc.*, 280 F.3d 278, 284 (2000). In the case *sub judice*, any monetary damages owed to plaintiffs would call for "individualized proof," and would not necessarily be common to all. The financial impact of the fence upon various members of the

association could vary from significant to minimal. Therefore, we find that the participation of individual homeowners is necessary to the suit.

If plaintiffs had sought only declarative or injunctive relief, the association may have had standing to sue in its representative capacity. The assertion by Creek Pointe homeowners of a right to unfettered access to all roads within the subdivision rests upon their ownership of a lot in Creek Pointe and their membership in the association. Thus, "[t]he interest of [individual homeowners] in the [Creek Pointe roads] is indirect. Any interest the home owners have in [the roads] derives through their membership in the Homeowners' Association. . . . [which can] adequately represen[t] such interest[.]" *River Birch*, 326 N.C. at 128-29, 388 S.E.2d at 554. However, having determined that this suit's pursuit of monetary damages requires the participation of individual homeowners, we necessarily find that the association does not meet the third criteria for standing under *Hunt v. Washington State* to bring suit as the representative of its members. Consequently, we hold that the homeowners' association lacked standing, under the criteria articulated in *Hunt* and followed in subsequent cases, to bring suit as the representative of individual members of the association.

[4] We next consider whether the association has standing to join Kremer as a separate plaintiff, rather than as the representative of homeowners. To bring suit on its own behalf, an association need only meet the "irreducible constitutional minimum" of a sufficient stake in a justiciable case or controversy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351 (1992) (the "irreducible constitutional minimum" of Article III of the U.S. Constitution requires plaintiff who wishes to pursue claim in federal court to demonstrate (1) injury in fact, (2) causal relationship between injury and conduct complained of, and (3) likelihood that injury would be redressed by favorable verdict); *Transcontinental Gas Pipe Line*, 132 N.C. App. 237, 511 S.E.2d 671, (reiterating holding of *Lujan* in concurring opinion).

In the instant case, the Declaration of Covenants, Conditions, and Restrictions, and the By-laws of the association, state that the association has a duty to maintain the private roads within Creek Pointe. Clearly, the presence of a fence across one of the subdivision's roads injures the association in its ability to carry out this duty. The injury is causally connected to the defendant's alleged behavior, and likely

would be redressed by a favorable verdict in this action. Therefore, we hold that on the facts of this case, the association had standing to bring this suit on its own behalf. *See District Council 20, American Federation of State, County and Municipal Employees*, 150 F.Supp.2d 136 (U.S. Dist. Ct., D.C., 2001) (court finds that *Hunt* precludes plaintiff organization from suing in representative capacity, but allows association to remain in suit for purpose of litigating claims for declaratory and injunctive relief). Accordingly, we reverse the trial court's ruling that the Creek Pointe Homeowner's Association lacks standing to participate in this action, and hold that the association has standing to pursue claims alleging injury to the association itself.

[5] The association also argues that the trial court erred in considering the defendant's motion to dismiss the association's claims for lack of standing "after" it had entered an order joining other homeowners as necessary parties. We disagree. Both rulings were part of the orders issued at the conclusion of the hearing on 25 February 2000. Further, the cases cited by plaintiff for the proposition that after ordering necessary parties joined, no actions may be taken that are "determinative of a claim arising in the action," all address situations in which substantive matters were determined in the absence of necessary parties. In the case *sub judice*, the court took no actions affecting the resolution of the issues to be tried.

The parties raise several other issues in their briefs, including arguments about whether it is significant that the appellant is Creek Pointe Homeowner's Association Inc., while the original declaration referred to the Creek Pointe Homeowner's Association (emphasis added). We do not find it necessary to resolve these questions.

For the reasons discussed above, we hold that the trial court erred by dismissing all claims as to the Creek Pointe Homeowner's Association, and hold that the association has standing to pursue claims against this defendant on its own behalf. Accordingly, we reverse its order dismissing all claims of the Creek Pointe Homeowner's Association.

Reversed.

Judge SMITH concurs.

Judge WALKER concurring in part and dissenting in part.

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

I respectfully dissent from that part of the majority opinion which holds that while the North Carolina Planned Community Act (NCPCA) authorizes homeowners' associations as a general class to institute, defend or intervene in litigation, the statute does not abrogate the common law by advancing "a new right upon homeowners' associations" to representative standing. I agree with the position taken by both plaintiffs and third-party defendant Weyerhaeuser Real Estate Company, Inc. (Weyerhaeuser) that the NCPCA confers representative standing upon the Creek Pointe Homeowner's Association (Creek Pointe) to enforce the easement right of lot owners to Deep Creek Road consistent with its declaration, articles of incorporation and bylaws. *See* N.C. Gen. Stat. § 47F-3-102(4) (1999).

The NCPCA provides that homeowners' associations may "[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community." *Id.* This section applies retroactively to homeowners' associations formed prior to the NCPCA's effective date of 1 January 1999. *See* N.C. Gen. Stat. § 47F-3-102(4), commentary (1999); *see also* Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 Campbell L. Rev. 1, 18 (1999). The majority concludes that this language "simply reiterates" the common law rule regarding homeowners' association standing. However, the language of N.C. Gen. Stat. § 47F-3-102(4) must be considered in conjunction with the overall scheme of planned communities and the objectives of the NCPCA. Admittedly, the statute does not automatically confer representative standing upon a homeowners' association in every case.[1] Nevertheless, I construe the NCPCA to allow a homeowners' association, both as a real party in interest and in a representative capacity, to pursue litigation in matters affecting the common areas within the planned community; provided such actions are consistent with its declaration, articles of incorporation and bylaws.

Practically speaking, a homeowners' association assures lot owners that basic needs such as ground care and street maintenance are fulfilled. However, the association also provides its lot owners with common emotional, psychological, and social advantages. *See* Harvey Rishikof and Alexander Wohl, *Private Communities or Public Gov-*

1. For example, a homeowners' association would not have representative standing to initiate litigation on behalf of a lot owner whose sole cause of action is one for the breach of a contract with a builder.

ernments: "The State Will Mark the Call," 30 Val. U. L. Rev. 509, 513 (1996). Agreed to rules regarding the use of common areas and restrictions on what the lot owners are allowed to display or include in their individual units provide a feeling of conformity that many find reassuring. *Id.* The creation of this sense of commonality requires lot owners, in forming a planned community, to make a collective assignment to the homeowners' association of certain interests enabling the lot owners to collectively take action in matters affecting the common areas. I believe that, upon the formation of a planned community, the NCPCA envisions that the lot owners collectively assign to the homeowners' association their real property interests in the common areas. Thus, when a matter arises, as in the case *sub judice*, affecting the use and control of a common area, the homeowners' association, in accordance with N.C. Gen. Stat. § 47F-3-102(4) is conferred with representative standing to institute litigation on behalf of the lot owners.

My reading of N.C. Gen. Stat. § 47F-3-102(4) is compatible with other statutory language dealing with real property interests found elsewhere in the NCPCA. For example, under N.C. Gen. Stat. § 47F-3-112, a homeowners' association, upon approval of eighty percent (80%) of the lot owners, may convey, encumber or otherwise voluntarily transfer portions of any common area within the planned community. *See* N.C. Gen. Stat. § 47F-3-112(a) (1999). Such transfers become "*free and clear* of any interest of any lot owner or the association in or to the common [area] conveyed or encumbered, including the power to execute deeds or other instruments." N.C. Gen. Stat. § 47F-3-112(b) (1999) (emphasis added). The NCPCA's official commentary notes this section was included to "clarify that if conveyance or encumbrance is authorized by the required percentage of owners, common [areas] may be conveyed or encumbered free and clear of any easements, rights of way or claims which might be asserted by individual lot owners in or to that common area by virtue of their ownership of lots." N.C. Gen. Stat. § 47F-3-112, commentary (1999).

Other provisions within the NCPCA demonstrate that upon formation the lot owners assign to the homeowners' association their real property interest in common areas. In an eminent domain proceeding affecting a common area, the NCPCA requires that the portion of an award attributable to the common area taken is to be paid to the association, rather than distributed pro rata to the lot owners. *See* N.C. Gen. Stat. § 47F-1-107 (1999). This statutory requirement

ensures that all the lot owners in a planned community receive compensation for the taking. Consequently, if a body with eminent domain authority seeks to acquire a common area the court would be required to disperse any monetary compensation to the homeowners' association regardless of the disparate impact the eminent domain might have on the individual lot owners. Therefore, in an eminent domain proceeding, only the homeowners' association need be named as a party defendant. In such a case the homeowners' association's evidence establishing the damages may include testimony from individual lot owners.

The same rationale applies to the case *sub judice*. In order to receive compensatory or punitive damages, Creek Pointe would have to present evidence demonstrating how Happ's erection of a fence has damaged the planned community; including all the individual lot owners. Thus, permitting Creek Pointe representative standing ensures the protection of all the lot owners' interests.

The NCPCA's recognition of representative standing is also reflected in the statutory language dealing with the termination of a homeowners' association. In the event the lot owners decide to terminate the planned community, the NCPCA requires that upon termination the remaining common areas vest in the lot owners as tenants in common. *See* N.C. Gen. Stat. § 47F-2-118(e) (1999). This vesting of remaining common areas results in the return to the lot owners of the real property interest assigned to the homeowner's association at its inception.

Based on my analysis of the NCPCA, I must disagree with the majority's conclusion that the third prong of *Hunt* has not been satisfied. I conclude that neither the claim asserted nor the relief requested requires the participation of the individual lot owners in this lawsuit. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 53 L. Ed. 2d 384, 394 (1977). Weyerhaeuser as a third-party defendant supports the position of the plaintiffs in this action. Additionally, Weyerhaeuser created this subdivision and formed the homeowners' association. Obviously, evidence from Weyerhaeuser will be crucial in establishing the common areas within Creek Pointe, including Deep Creek Road. Notwithstanding defendant Happ's contention as to standing, he elected to assert a counterclaim against the homeowners' association alleging a superior right to this road which enables him to close it. Therefore, the individual lot owners are not pursuing a claim or relief for which their participation would be required.

I concur with the majority opinion that the homeowners' association has standing to pursue claims for declaratory and injunctive relief.

CATHY J. STERLING, GUARDIAN AD LITEM FOR CHRISTOPHER T.S. STERLING, AND CATHY J. STERLING, INDIVIDUALLY, PLAINTIFFS/APPELLANTS v. GIL SOUCY TRUCKING, LTD.; GUY CARON; CHARLES DEAN SMITH; AND WALDENSIAN BAKERIES, INC., DEFENDANTS/THIRD-PARTY PLAINTIFFS/APPELLEES v. JENNIFER LEIGH LOWMAN; CLAYTON LEE LOWMAN; AND SARAH ALLYSON WEST, THIRD-PARTY DEFENDANTS

No. COA00-560; COA00-886; COA00-963

(Filed 18 September 2001)

1. Evidence— hearsay—school records—offered for impeachment

The trial court did not err in an automobile accident action by permitting the introduction of the school records of the minor plaintiff where the records were offered to impeach other testimony and not for the truth of the matter asserted.

2. Appeal and Error— invited error–failure to object

Publication of the school records of the minor plaintiff to the jury was invited error where the trial court initially sustained plaintiffs' objection to the records being passed to the jury, plaintiffs implied during redirect that defendants had concealed favorable records from the jury, and the judge then allowed the records to be distributed to the jury. Furthermore, plaintiffs forfeited the right to appeal this issue where they failed to object to publication of the records to the jury.

3. Evidence— pretrial order—school records not included—opportunity to examine

The trial court did not abuse its discretion in an automobile accident action by admitting the school records of the minor defendant even though plaintiffs objected on the grounds that they were not in the pretrial order. The court responded that plaintiffs would be given an opportunity to look at the records, plaintiffs did not argue that they were surprised by the records,

and plaintiffs did not request additional time to investigate and prepare rebuttal evidence.

4. Evidence— scientific article—foundation proper

The trial court did not err in an automobile accident action by admitting an article entitled "Myths of Neuropsychology" where the testimony of a defense expert in neuropsychology established the article as reliable scientific authority.

5. Costs— personal liability action—assignment of costs—court's discretion—not reviewable

There was no error in an automobile accident case involving several collisions where the court assigned all of the costs of two defendants to plaintiffs rather than apportioning those costs to codefendants and third-party defendants. A jury determined that the two defendants were not liable; N.C.G.S. § 6-19 does not allow costs as a matter of course in a personal injury action, so these two defendants made a motion under N.C.G.S. § 6-20; the court specifically stated that their costs were taxed against plaintiffs in the court's discretion; and the trial court's exercise of discretion under N.C.G.S. § 6-20 is not reviewable on appeal.

6. Contribution— standing to object to post-judgment settlements—no payment by objecting party

Defendants in an automobile accident action did not have standing to argue that plaintiffs' post-judgment settlements with third-party defendants were not proper under the Uniform Contribution Among Tortfeasors Act where these defendants had not yet paid their share, had suffered no harm, and cannot yet pursue a contribution claim. A contribution action is separate from the initial liability action and the right to seek contribution arises only when one joint tortfeasor has paid more than its share of the judgment. N.C.G.S. § 1B-1(b).

7. Compromise and Settlement— post-settlement judgments—all parties not included—good faith

The trial court did not abuse its discretion in an automobile accident case by concluding that post-judgment settlements between plaintiffs and third-party defendants constituted a full release given in good faith where transcripts of hearings reveal that the court gave careful consideration to the proposed settlements and to the ramification of settlement should a new trial be ordered. The approved settlements were for the precise amount

of the third-party defendants' pro rata share of the jury verdict and the court's determination appears to have been the result of a reasoned decision.

Judge GREENE concurring in the result.

Appeal by plaintiffs from judgment entered on 10 May 1999 by Judge Robert H. Hobgood in Durham County Superior Court (COA-560). Appeal by third-party plaintiffs from separate but related orders entered on 23 May 2000 (COA-886) and on 6 July 2000 (COA-963) by Judge Donald W. Stephens. This court, by order entered on 29 August 2000, allowed a motion to consolidate all cases for purposes of hearing only. This court on its own motion now orders that COA00-560, C0A00-886, and COA00-963 be consolidated for decision. Heard in the Court of Appeals on 15 May 2001.

Twiggs Abrams Strickland & Trehy, P.A. by Douglas B. Abrams for plaintiffs-appellants.

Kennedy Covington Lobdell & Hickman, L.L.P. by F. Fincher Jarrell for defendants/third-party plaintiffs/appellees Gil Soucy Trucking, Ltd. and Guy Caron.

Cranfill Sumner & Hartzog, L.L.P. by William W. Pollock for defendants/third party-plaintiffs/appellees Charles Dean Smith and Waldensian Bakeries, Inc.

Bryant Patterson Covington & Idol, P.A. by Lee A. Patterson, II for third-party defendants Jennifer Leigh Lowman and Layton Lee Lowman.

Haywood Denny & Miller, L.L.P. by George W. Miller, III for third party-defendant/appellee Sarah Allyson West.

BRYANT, Judge.

The pertinent factual and procedural background is as follows: On 7 June 1996, Christopher Sterling (Christopher), then 13 years old, received serious injuries in a multi-vehicle accident. The accident arose when Jennifer Lowman lost control of her vehicle, the vehicle spun around and then came to a stop blocking both eastbound lanes of Interstate 40 near Valdese, North Carolina. Several vehicles traveling behind Lowman were forced to come to a sudden stop. As Sarah West (West) and her passenger, Christopher, approached the scene, West was unable to stop and her vehicle hit the last vehicle stopped

in the line of traffic. Neither Christopher nor West had any significant injury as a result of the first impact. West's stopped vehicle was then struck in the rear by a tractor trailer driven by Defendant Guy Caron (Caron) and owned by Gil Soucy Trucking, Ltd. (Soucy Trucking). West's vehicle was then pushed forward, causing it to strike the vehicles in front of it before bursting into flames. The tractor trailer driven by Caron was then struck in the rear by a second tractor trailer owned by Waldensian Bakeries, Inc. (Waldensian) and driven by Charles Dean Smith (Smith).

On 14 March 1997, Christopher and his mother, Cathy Sterling, (plaintiffs) filed suit against the four defendants Soucy Trucking, Caron, Waldensian and Smith. Defendants then filed a third-party complaint for contribution against Jennifer and Clayton Lowman and West. The case was tried before Judge Hobgood at the 22 March 1999 session of Durham County Superior Court. On 8 April 1999, the jury returned verdicts finding the following: Defendants/third-party plaintiffs Soucy Trucking and Caron liable; third-party defendants Jennifer and Clayton Lowman and West liable; defendants Waldensian and Smith not liable; that the costs of Waldensian and Smith be taxed against plaintiff; and awarding plaintiffs $62,500 in damages. Plaintiffs moved for a new trial pursuant to N.C. R.C.P., Rule 59. The motion was denied and plaintiffs filed a notice of appeal on 1 July 1999 (COA-560).

In April 2000, third-party defendants Jennifer and Clayton Lowman moved for an order approving a settlement between them and the plaintiffs. Shortly thereafter, third-party defendant West made a similar motion. The settlement between plaintiffs and the Lowmans was approved and entered on 23 May 2000. The settlement between plaintiffs and West was approved and entered on 6 July 2000.[1] Soucy Trucking and Caron gave notice of appeal on 21 June 2000 from the May 23 order approving the settlement between the plaintiffs and the Lowmans. (COA00-886) Soucy Trucking and Caron gave notice of appeal on 17 July 2000 from the July 6 order approving the settlement between the plaintiffs and West. (COA00-963)

In this consolidated decision we review the appeal by plaintiffs in Part I and the appeals by Soucy Trucking and Caron in Part II.

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1. Following the settlements, plaintiffs moved to dismiss the appeals as to the Lowmans and West and this Court allowed the motion on 13 July 2000. Therefore, plaintiffs' appeal from the denial of their motion for new trial is against Soucy Trucking and Caron only.

I. Appeal by plaintiffs Cathy and Christopher Sterling (COA00-560)

The issues on appeal raised by plaintiffs, Cathy and Christopher Sterling, are whether the trial court erred (A) in permitting introduction of Christopher's school records; (B) in permitting the introduction of an article by Carl B. Dodrill, Ph.D; and (C) in assigning all the costs of Defendant Waldensian to Plaintiffs rather than apportioning Waldensian's costs to co-defendants and third-party defendants. For the reasons stated below, we find no error by the trial court.

A.

[1] Plaintiffs argue that the trial court erred in permitting the introduction and publication of Christopher's records from the Emerson Waldorf School. Plaintiffs contend that the records were hearsay offered in violation of Rule 803(6) of the North Carolina Rules of Evidence and that the records were not included in any pre-trial order. We disagree.

A principle tenet of evidence is that "all relevant evidence is admissible." N.C.R. Evid., Rule 402 (2000). Whether or not evidence should be excluded is a matter within the discretion of the trial court. *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d 198, 203 (1998). The trial court's ruling will be reversed only upon a showing that it was so arbitrary that it could not be the result of a reasoned decision. *Id.* at 727, 509 S.E.2d at 203; *Sitton v. Cole*, 135 N.C. App. 625, 626, 521 S.E.2d 739, 740 (1999).

"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." 2 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 192 (5th ed. 1998). If a statement is offered for some purpose other than proving the truth of the matter asserted, it is not inadmissible hearsay. *Southern Ry. v. Biscoe Supply Co.*, 114 N.C. App. 474, 442 S.E.2d 127 (1994) (citations omitted).

Here, Plaintiffs contend that the school records were offered in violation of Rule 803(6), the business records exception. Rule 803(6) allows records to be admitted if: 1) it is a record of acts, events or conditions; 2) it is made at or near the time [of the act, event, condition]; 3) it is made by a person with knowledge; 4) it is kept in the regular course of business; 5) it is the regular practice of that business to

make such a report and 6) it is shown by the testimony of the custodian or other qualified witness. N.C.R. Evid., Rule 803(6) (2000).

Defendants contend that the school records were not offered for the truth, but offered to impeach the testimony of Christopher's mother, Cathy Sterling. The main purpose of impeachment is to discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony. "Any circumstance tending to show a defect in the witness's perception, memory, narration or veracity is relevant to this purpose." *State v. Looney*, 294 N.C. 1, 15, 240 S.E.2d 612, 620 (1978) (quoting Stansbury, *North Carolina Evidence*, Brandis Rev. §§ 38, 42, 44). In the present case, the school records were offered by the defendants to impeach Ms. Sterling's testimony that 1) the only problem Christopher had at the Waldorf School related to difficulties with a single teacher and 2) his most significant problem after the accident, which was not present before, was becoming easily frustrated which sometimes turned to anger. Therefore, we find that the records were offered not for the truth of the matter asserted, but to impeach the testimony of Ms. Sterling and thus they were not inadmissible hearsay. Accordingly, we conclude there was no error by the trial court in permitting the introduction of the school records.

[2] Additionally, we find that the subsequent publication of the school records to the jury was "invited error" by plaintiffs. Invited error is not grounds for a new trial. *See Overton v. Overton*, 260 N.C. 139, 132 S.E.2d 349 (1963); *Brittain v. Blankenship*, 244 N.C. 518, 94 S.E.2d 489 (1956); *Sumner v. Sumner*, 227 N.C. 610, 44 S.E.2d 40 (1947). In the present case, the trial court initially sustained plaintiffs' objection to the records being passed to the jury. However, during redirect of Ms. Sterling, plaintiffs implied that defendants had concealed favorable records from the jury. At that point the judge allowed the distribution of copies of the school records to the jury. Plaintiffs made no further objection to the publication of the records to the jury. N.C.G.S. § 8C-1, Rule 103(a)(1) requires one to make a timely objection to admission of the records into evidence to preserve the alleged error for appellate review. Therefore, by not objecting to their publication to the jury the plaintiffs forfeited the right to appeal the question of the admissibility of the school records.

[3] With respect to items not included in the pre-trial order, whether to admit such evidence is entrusted to the discretion of the trial court. The trial court's decision will not be reviewed unless an abuse of dis-

cretion is shown. *Beam v. Kerlee*, 120 N.C. App. 203, 214, 461 S.E.2d 911, 920 (1995) (*citing Pittman v. Barker*, 117 N.C. App. 580, 588, 452 S.E.2d 326, 331 (1995)). In the present case, plaintiffs also objected to admission of the school records on the grounds that they were not on the pre-trial order. The trial court responded that plaintiffs would be given an opportunity to look at them. However, plaintiffs did not argue that they were surprised by the presentation of the school records, nor did they request additional time to investigate and prepare rebuttal evidence. Therefore, we find that there was no abuse of discretion by the trial court.

B.

[4] Next, plaintiffs argue that the trial court erred in permitting the introduction of an article by Carl B. Dodrill, Ph.D., entitled "Myths of Neuropsychology". Plaintiffs make two contentions in support of their argument: 1) that the article was not qualified as reliable authority by any witness and therefore it was hearsay; and 2) that the article was not included in any pre-trial order. We disagree.

N.C.G.S. § 8C-1, Rule 803(18) Learned Treatises states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (18) To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

"[W]hen no specific precedent exists, scientifically accepted reliability justifies admission of the testimony . . . and such reliability may be found either by judicial notice or from the testimony of scientists who are experts in the subject matter, or a combination of the two." *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (citations omitted).

Dr. Stephen Hooper testified for the defense as an expert in the area of neuropsychology. His testimony established the Dodrill article as reliable scientific authority. Therefore, a proper foundation was

established for the admission into evidence of the Dodrill article pursuant to the requirements of Rule 803(18). Thus, the article was not inadmissable as hearsay and we find no error in the Court's admission of this scientific article.

C.

[5] Finally, plaintiffs contend that the trial court erred in assigning all the costs of defendants Waldensian and Smith to plaintiffs rather than apportioning those costs to co-defendants and third-party defendants. We disagree.

Taxing of costs is governed by Article 6 of the North Carolina General Statutes. The relevant statutes are N.C.G.S. §§ 6-19 and 6-20 (1986). N.C.G.S § 6-19 provides:

> 6-19. *When costs allowed as of course to defendant.*
>
> Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section [6-18][2] unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them.

N.C.G.S. § 6-19 (1986).

The awarding of costs to a defendant in a personal injury suit, like the one at bar, is not covered by N.C.G.S. § 6-19. Costs not allowed as a matter of course to a defendant under N.C.G.S. § 6-19 may be allowed in the court's discretion under N.C.G.S. § 6-20 (1986). The court's discretion under N.C.G.S. § 6-20 is not reviewable on appeal. *See Minton v. Lowe's Food Stores, Inc.*, 121 N.C. App. 675, 468 S.E.2d 513, *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996) (*citing Chriscoe v. Chriscoe*, 268 N.C. 554, 151 S.E.2d 33 (1966)).

Plaintiffs erroneously rely on *Hughes v. Oliver*, 228 N.C. 680, 47 S.E.2d 6 (1948), for the general proposition that costs should be shared equally between cross claimants. *Hughes* was tried on a narrow set of facts: two families were fighting over two disputed pieces

2. N.C.G.S. § 6-18 allows costs as a matter of course to plaintiff in the following cases: actions for recovery of real or personal property, intentional tort actions, actions involving commercial paper, and actions brought for the protection of animals.

of land; the two families filed lawsuits against each other—one for ejectment by heirs of the mortgagor and the other for foreclosure—in which the heirs were defendants; the two actions were consolidated for trial; and the plaintiffs in both cases won at least partial recovery. Based on those specific facts, the Court held that the costs in the two cases should be divided equally between the parties. *Id.* at 688, 47 S.E.2d at 12.

Taxation of costs has been held to be within the trial court's discretion where the reviewing court's decision was partly in favor of three parties and wholly in favor of two more, and all costs could be imposed upon one of the three parties who did not wholly prevail. *Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.*, 256 N.C. 56, 122 S.E.2d 761 (1961).

In the case subjudice, a jury determined that Waldensian and its driver, Smith were not liable in this personal injury case. As stated above, N.C.G.S. § 6-19 does not allow costs as a matter of course to defendants in personal injury action. Therefore, Waldensian and Smith made a motion pursuant to N.C.G.S. § 6-20 to have the costs taxed to plaintiffs. The trial court specifically stated that the costs of Waldensian and Smith were taxed against plaintiffs in the court's discretion. The trial court's exercise of discretion under N.C.G.S. § 6-20 is not reviewable on appeal. *See Minton* at 675, 468 S.E.2d at 513 and *Chriscoe* at 554, 151 S.E.2d at 33.

II. Appeal by Soucy Trucking and Caron (COA00-886 and COA00-963)

Defendants Soucy Trucking and Caron appeal from the post-judgment settlement between the plaintiffs and third-party defendants Jennifer and Clayton Lowman in COA00-886, and from post-judgment settlement between plaintiffs and third-party defendant West in COA00-963. They raise two main assignments of error in each appeal: (A) that the trial court erred in concluding that the post-judgment settlements complied with the Contribution Statute, N.C.G.S., Chapter 1B; and (B) that if the post-judgment settlement orders are allowed to stand and if the judgment is reversed, the case may be tried again and a higher verdict awarded in which case Soucy Trucking and West would be deprived of their right to contribution from the Lowmans and West. Because Soucy Trucking and Caron make the same argument in each appeal, we address the two assignments of error simultaneously.

A.

[6] Soucy Trucking and Caron argue that the trial court erred in approving the post-judgment settlements by the plaintiffs with the third-party defendants, the Lowmans and West. They argue it was error to conclude that the settlements were proper under the contribution statute and that they constituted a full release.

Soucy Trucking and Caron contend that the outcome of their appeal is governed by the holding in *Medical Mutual Ins. Co. of N.C. v. Mauldin*, 137 N.C. App. 690, 695, 529 S.E.2d 697, 700 (2000), *aff'd per curiam*, 353 N.C. 352 (2001). We will not discuss *Medical Mutual* as our Supreme Court has determined it is without precedential value. *Id.* at 353

The Uniform Contribution Among Tortfeasors Act, N.C.G.S. § 1B, Article 1, (the Contribution Statute), which governs the law of contribution in North Carolina, states that "[t]he right to contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability." N.C. Gen. Stat. § 1B-1(b) (1999). Thus, in order to seek contribution, a joint tort-feasor must show it has paid more than its pro-rata share. *See Jones v. Shoji*, 336 N.C. 581, 586, 444 S.E.2d 203, 206 (1994). Therefore, it is clear that a contribution action is separate from the initial liability action, and the right to seek contribution arises *only* when one joint tortfeasor has paid *more* than its share of the judgment. N.C.G.S. § 1B-1(b). Because defendants have not paid their share, have suffered no harm, the issue of contribution by third-party defendants (Jennifer and Clayton Lowman and West) is not ripe for resolution by this Court.

In the present case, the jury returned a verdict in favor of the plaintiffs and against the three defendants (Soucy Trucking and Caron, the Lowmans and West) finding them to be jointly and severally liable in the sum of sixty-two thousand five hundred dollars ($62,500.00). Plaintiffs appealed the verdict on the issue of damages and thereafter entered into post-judgment settlements with the third-party defendants, Jennifer and Clayton Lowman and West. The Lowmans and West paid their full pro-rata share of the total judgment costs and interest. Soucy Trucking and Caron have yet to pay anything.

Based on the foregoing facts, we find that this issue is not ripe for resolution by this Court. Soucy Trucking and Caron have not paid

their share, they have suffered no harm and cannot yet pursue a contribution claim. Thus, the trial court's approval of the post-judgment settlements did not affect defendants, and they cannot attack their joint tort-feasors' attempts to settle with plaintiffs. *See* N.C. Gen. Stat. § 1-57 (1999) (limiting actions to real parties in interest); *Parnell v. Insurance Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965) (noting that a real party in interest is one who is benefitted or injured by the judgment). Defendants' contention that they *might* be forced to pay more than co-defendants *if* plaintiffs successfully appeal the damages issue and *if* a new jury awards plaintiffs more than the original verdict is too tenuous an assumption to support defendants' standing to assign error to the trial court's approval of the post-judgment settlements. Therefore, as this issue is not yet ripe and defendants do not have proper standing, any opinion issued at this juncture would be advisory, in contravention of well-settled case law. See *Funk v. Masten*, 121 N.C. App. 364, 365, 465 S.E.2d 322, 324 (1996). As such, this assignment of error is overruled.

B.

[7] Next, Soucy Trucking and Caron argue that the trial court erred in its 23 May 2000 and 6 July 2000 orders in concluding that the post-judgment settlements between the plaintiff and the third-party defendants (Jennifer and Clayton Lowman and West) constitute a full release given in good faith pursuant to N.C.G.S. § 1B-4 because Soucy Trucking and Caron were not given the same opportunity to settle for a like amount. Appellant counsel's argument on the issue is the same as to each third party defendant, therefore we address the issue collectively.

The Uniform Contribution Among Tort-Feasors Act is silent as to what constitutes "good faith". *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 644, 535 S.E.2d 55, 60 (2000). To determine if a settlement is made in good faith, the *Brooks* court adopted a 'totality of the circumstances' approach "which involves consideration of all available relevant facts,[ ]and 'places [both] the decision of whether or not a settlement is made in good faith,' [ ] and what 'type of proceeding [to] conduct to determine good faith in an individual case,' [ ] in the sound discretion of the trial court." (internal citations omitted). *Id.* at 646, 535 S.E.2d at 62. Accordingly, a finding that a settlement was made in good faith pursuant to N.C.G.S. § 1B-4 may be reversed only if the court's ruling is so arbitrary that it could not be the result of a reasoned decision. *Id.* at 647, 535 S.E.2d at 62. (citations omitted).

In the present case, the trial court held hearings and found that both settlements were made in good faith and in the best interest of the minor Plaintiff. The transcripts of the settlement hearings reveal that the trial court gave careful consideration to the proposed settlements and to the potential ramification of the settlement should a new trial be ordered. The approved settlements were for the precise amount of the third-party defendants' pro rata share of the jury verdict. Soucy Trucking and Caron had the burden of proving that the settlements were not made in good faith. *Wheeler v. Denton*, 9 N.C. App. 167, 170, 175 S.E.2d 769, 772 (1970). However, the trial court by its ruling concluded defendants had not met their burden. "The mere showing that there has been a settlement" between an injured party and a tort-feasor is insufficient to "show that there has been a lack of good faith" in the settlement. *Wheeler* at 171, S.E.2d at 772.

We find that the trial court's determination that the settlements were made in good faith appear to "have been the result of a reasoned decision." *Brooks* at 647, 535 S.E.2d at 62. Accordingly, we hold that the trial court did not abuse its discretion in approving the post-judgment settlements between plaintiffs and third-party defendants and thus we conclude there was no error.

NO ERROR.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs in the result with a separate opinion.

GREENE, Judge, concurring in the result.

I believe: (I) Christopher's records from the Emerson Waldorf School (School) were inadmissible hearsay, and (II) plaintiffs' post-judgment settlements with the Lowmans and West were not sanctioned by Chapter 1B of our General Statutes. Nonetheless, as plaintiffs have not been prejudiced by these errors, I concur in the result.

I

" '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.G.S. § 8C-1, Rule 801(c) (1999).

In this case, one of the defendants, while cross-examining Cathy Sterling (Sterling) about her testimony regarding Christopher's post-accident behavior, read from Christopher's School records. The information contained in these records tended to contradict Sterling's testimony given on direct. Plaintiffs argue on appeal that these School records constitute inadmissible hearsay, even if used for impeachment purposes during the cross-examination of a witness. I agree. Defendants were challenging the veracity of Sterling's testimony using the School records. Defendants, therefore, were offering the School records as the truth of the matter and, thus, these records were properly used for impeachment purposes only if admissible under some exception to the hearsay rule. Defendants, however, made no effort to qualify the records under any recognized hearsay exception, and plaintiffs failed to object at trial to the use of these records on the grounds they were inadmissible hearsay.[3] Accordingly, plaintiffs cannot now do so on appeal. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) ("the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character").

II

Defendants Soucy Trucking and Caron's appeal raises an issue not yet determined by our appellate courts: whether a plaintiff may settle with fewer than all of the defendants after the liability of multiple defendants has been established by the trial court as joint and several. Section 1B-4(2) of the North Carolina General Statutes provides that if the plaintiff gives, in "good faith," a release to one of two or more joint tort-feasors, this release "discharges the tort-feasor . . . from all liability for contribution to any other tort-feasor." N.C.G.S. § 1B-4(2) (1999). On the other hand, section 1B-3(f) provides that once a judgment is entered establishing the joint and several liability

3. When defendants first attempted to cross-examine Sterling about the School records, plaintiffs objected on the grounds they were "not part of discovery and . . . not on the pretrial order." After some extensive examination of Sterling about the School records by defendants, plaintiffs did object to the use of "an unwritten report [contained in the School records] that we've never seen." This objection was overruled and defendants were allowed to read the unwritten report to Sterling. This "unwritten report," however, did not contain any information that had not already been admitted into evidence. I note plaintiffs did, at the beginning of defendants' examination about the School records, object to defendants distributing copies of the School records to the jury, although the objection was sustained by the trial court. Later, defendants again requested permission to pass to the jury the School records and plaintiffs did not object at that time. Thus, plaintiffs cannot, on this record, complain about the use of the School records to cross-examine Sterling or their distribution to the jury.

of multiple defendants, that judgment "shall be binding as among such defendants in determining their right to contribution." N.C.G.S. § 1B-3(f) (1999). If section 1B-4(2) is read to include post-judgment releases, the release of one of the joint tort-feasors in exchange for his pro rata share of the initial judgment could result in the remaining joint tort-feasors being liable for a larger contribution in the event of a new trial. For example: a judgment is entered against three defendants for $100,000.00 based on a joint and several liability jury verdict. The plaintiff appeals the case and on appeal, settles with defendant A for its pro rata share of the $100,000.00 verdict and provides defendant A with a release. Subsequently, the appellate court orders a new trial on the issue of damages and on retrial, the jury awards plaintiff $300,000.00 against defendants B and C. Are defendants B and C entitled to seek contribution from defendant A for $100,000.00, a pro rata share of the new verdict, on the grounds their joint and several liability was established in the first judgment? One reading of section 1B-4(2) would suggest defendants B and C are not entitled to any contribution because the release of defendant A discharges his liability for any contribution to defendants B and C. Such a reading, however, directly conflicts with section 1B-3(f), which sets contribution rights once joint and several liability is established. Accordingly, section 1B-4(2) must be read to apply to only pre-judgment settlements, *see Wheeler v. Denton*, 9 N.C. App. 167, 170-71, 175 S.E.2d 769, 771-72 (1970) (setting out contribution rights of joint and several defendants where plaintiff settled with one defendant prior to trial), as the entry of a judgment against two or more joint tort-feasors necessarily fixes a defendant's right to contribution for any amount paid in excess of his pro rata share, *see* N.C.G.S. § 1B-1(b) (1999). To hold otherwise would permit the injured plaintiff party to "apportion the loss among joint tort[-]feasors as he sees fit," an option inconsistent with Chapter 1B. *See Bishop v. Klein*, 402 N.E.2d 1365, 1372 (Mass. 1980).

In this case, plaintiffs were not authorized to settle post judgment with defendants West and Lowmans and the trial court therefore erred in approving the settlements. Because, however, we have not ordered a new trial in this case, defendants Soucy Trucking and Caron have not been prejudiced by the settlements as they cannot be required to pay an amount in excess of their pro rata share of the judgment.[4]

4. Had we ordered a new trial on damages, because of the likelihood of a new judgment in excess of the $62,500.00 judgment, the settlement would have been null and void and all defendants would have been a party of that new trial.

BEATRICE WOODY, PLAINTIFF v. THOMASVILLE UPHOLSTERY INCORPORATED, EMPLOYER, SELF-INSURED (HELSMAN-MANAGEMENT SERVICES, INC., SERVICING AGENT), DEFENDANT

No. COA00-830

(Filed 18 September 2001)

1. Appeal and Error— appealability—discovery order—documents provided—mootness

An appeal from a discovery order in a workers' compensation action was moot where defendant had produced the documents in question.

2. Appeal and Error— appealability—discovery order—no sanctions at that time

An appeal from a discovery order by a deputy commissioner in a workers' compensation case was interlocutory and not immediately appealable because defendant had not been held in contempt and sanctioned at that time.

3. Workers' Compensation— violation of discovery order—appeal to Full Commission—no automatic stay

Discovery sanctions in a workers' compensation action were not improperly calculated where defendant contended that noncompliance did not begin until its appeal to the full Commission was denied as interlocutory. Rule 703 provides only that a stay may be entered, not that the effect of a challenged order is automatically stayed by appeal from that order.

4. Workers' Compensation— discovery violations—sanctions—notice and opportunity to be heard

There was no violation of defendant's due process rights in a workers' compensation hearing where defendant received sufficient notice of the possibility of the imposition of sanctions for violating a discovery order and sufficient opportunity to be heard. Moreover, the sanctions imposed at this hearing did not constitute a deprivation of property.

5. Workers' Compensation— motion to recuse—denied

A deputy commissioner did not abuse his discretion by denying defendant's motion to recuse in a workers' compensation action, and the Full Commission did not err by affirming the deputy commissioner.

6. Workers' Compensation— depression and fibromyalgia— job related stress—greater risk than general public

The Industrial Commission in a workers' compensation case properly found that plaintiff experienced abnormal job stress and properly concluded that plaintiff's depression and fibromyalgia were compensable occupational diseases where the Commission's findings were supported by the medical testimony that the conditions of plaintiff's employment exposed her to a greater risk than the public and the findings support the conclusion that there was a causal connection between plaintiff's depression and fibromyalgia and her employment. The term "employment" must be interpreted as referring to a particular job rather than to the type of job. N.C.G.S. § 97-53(13).

Judge MARTIN concurring in part and dissenting in part.

Appeal by defendant from Opinion and Award entered 13 January 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 May 2001.

Mary F. Pyron, for plaintiff-appellee.

Morris, York, Williams, Surles & Barringer, L.L.P., by Thomas E. Williams and Stephen Kushner, and Orbock, Bowden, Ruark & Dillard, by Maureen T. Orbock, for defendant-appellant.

HUDSON, Judge.

Thomasville Upholstery (defendant) appeals from the 13 January 2000 "Opinion and Award" of the Full Industrial Commission (the Full Commission), awarding Beatrice Woody (plaintiff) temporary total disability benefits, medical expenses, and attorney's fees, and imposing sanctions upon defendant for violating a discovery order. We affirm.

The Opinion and Award of the Full Commission sets forth twenty-four findings of fact. Because the first nine findings provide a helpful summary of the relevant underlying facts in this case, we set them forth here in substantial part:

1. Plaintiff was a fifty year old female at the time of the hearing before the Deputy Commissioner. Plaintiff began working for defendant in 1988 and worked as a Customer Service Manager prior to the Fall of 1993. In October 1993, plaintiff was transferred to the position of Marketing Assistant. In this position, plaintiff

demonstrated strong administrative skills and won several awards . . . .

2. In the spring of 1993, defendant hired Ms. Sharon Bosworth as General Manager of Marketing and Design. Ms. Bosworth was hired for her ability to design new lines of upholstered furniture. The new designs that Ms. Bosworth produced for defendant resulted in a substantial increase in defendant's income.

3. Shortly after Ms. Bosworth was hired, defendant determined that she did not possess adequate administrative skills and did not demonstrate any desire to develop them. Administrative skills were needed in conjunction with the creative work Ms. Bosworth performed . . . . To resolve this dilemma, defendant assigned plaintiff as Ms. Bosworth's assistant to perform administrative duties.

4. Prior to her reassignment, plaintiff had reported directly to Mr. Bob Walters, the new company president. Mr. Walters assured plaintiff that if the transfer was not successful plaintiff would be moved to another position and that her employment with defendant was secure. Plaintiff was also informed of the importance to defendant's success in the furniture industry of having Ms. Bosworth's designs distributed to the other departments in a timely fashion.

5. In her new position, plaintiff was required to obtain specifications of new designs from Ms. Bosworth after which plaintiff was to distribute them to the necessary departments. Initially plaintiff and Ms. Bosworth worked well together, and plaintiff had no difficulties in obtaining the information she needed from Ms. Bosworth. Subsequently, for reasons unknown to plaintiff, Ms. Bosworth stopped providing her with the information concerning the new designs. Plaintiff unsuccessfully sought to obtain the needed information by leaving memos and telephone messages with Ms. Bosworth.

6. As time progressed, the relationship between Ms. Bosworth and plaintiff deteriorated. In her dealings with plaintiff, Ms. Bosworth's tone was short and harsh. Ms. Bosworth cursed at plaintiff and berated her by calling plaintiff "dumb" and "stupid." Additionally, Ms. Bosworth instructed the employees supposedly supervised by plaintiff to report to her (Ms. Bosworth) rather

than to plaintiff because plaintiff did not know what she was doing.

7. Due to Ms. Bosworth [sic] behavior, plaintiff grew frustrated and worried over the inability to adequately perform the requirements of her job. Plaintiff's job became more stressful and her repeated attempts to resolve the problems with Ms. Bosworth were not successful. In contrast, plaintiff had managed the stress associated with her former position with defendant and was able to resolve prior problems.

8. Ms. Jan Comer, defendants [sic] human resources manager, was informed by plaintiff of the problems with Ms. Bosworth. Ms. Comer was played a tape of a conversation between plaintiff and Ms. Bosworth. Having heard the contents of this taped conversation, Ms. Comer corroborated plaintiff's testimony that Ms. Bosworth cursed at plaintiff, had called her a "bitch," and that Ms. Bosworth was insulting in her tone. Based upon these and other workplace examples, Ms. Comer was of the opinion that Ms. Bosworth was emotionally unstable.

[9]. Ms. Comer played the tape in question for Mr. Walters and discussed with him the need for professional counseling for Ms. Bosworth. Plaintiff also personally informed Mr. Walters of the problems with Ms. Bosworth. Plaintiff was informed by Mr. Walters that any workplace issues or problems would be resolved and that her employment with defendant was not in jeopardy. Mr. Walters further indicated to plaintiff that he would discuss the situation with Ms. Bosworth. However, Mr. Walters' discussions with Ms. Bosworth regarding plaintiff's concerns only worsened the situation, resulting in increased pressure and stress on plaintiff. Additionally, Mr. Walters promoted Ms. Bosworth to vice-president on 27 May 1994 and Ms. Comer was fired after expressing her views concerning Ms. Bosworth's conduct.

As to the merits of plaintiff's claim, the Full Commission entered the following Conclusions of Law:

1. Plaintiff's salary and average weekly wage at the time of her termination on 22 June 1994 yields the maximum compensation rate for 1994, $466.00 per week. N.C. Gen. Stat. § 97-2(5).

2. Plaintiff's employment with defendant caused her depression and exposed her to an increased risk of developing this condition as compared to members of the general public not so employed.

N.C. Gen. Stat. § 97-53(13). Because plaintiff's fibromyalgia was caused or significantly aggravated by her depression, it was also caused by her employment with defendant. *Id.*; N.C. Gen. Stat. § 97-2(6).

3. As the result of her depression and fibromyalgia, plaintiff is entitled [] to be paid by defendant temporary total disability compensation at the rate of $466.00 per week for the period of 23 June 1994 through the present and continuing until such time as she returns to work or further order of the Commission. N.C. Gen. Stat. § 97-29.

4. As the result of her depression and fibromyalgia, plaintiff is entitled to have defendant pay all medical expenses incurred or to be incurred. N.C. Gen. Stat. § 97-2(19); N.C. Gen. Stat. § 97-25.

5. Pursuant to Industrial Commission Rule 802, defendant's failure to comply with Deputy Commissioner Glenn's 5 August 1997 Order Compelling Discovery subjects it to the imposition of sanctions. Accordingly, defendant is assessed an additional attorney's fee in the amount of $2,585.00 for the time and effort expended by counsel for plaintiff on this issue. N.C.R. Civ. P. 37.

Accordingly, the Full Commission awarded plaintiff temporary total disability benefits beginning 23 June 1994, the cost of all medical expenses, attorney's fees of 25% of the compensation due plaintiff, $2,585.00 in sanctions, and costs. Defendant timely appealed to this Court.

On appeal, defendant presents thirty-eight assignments of error condensed into five arguments for our review. The first three arguments pertain to defendant's violation of a discovery order and the procedural history surrounding that issue. The fourth argument pertains to the alleged impartiality of the Deputy Commissioner who first entered an "Opinion and Award" in the case. The fifth and final argument pertains to the sufficiency of the evidence to support plaintiff's claim.

I. DISCOVERY ORDER

A. Procedural History

We first set forth a review of the following additional procedural history occurring prior to entry of the initial Opinion and Award by Deputy Commissioner George T. Glenn, II on 31 August 1998. On 4 October 1996, plaintiff moved the Commission, pursuant to N.C. Gen.

Stat. § 97-80 (1999), to allow plaintiff to request that defendant produce certain documents consisting of notes made by an employee of defendant while interviewing other employees. Plaintiff acknowledged in the motion that the notes she sought were generally protected from discovery by N.C.R. Civ. P. 26(b)(3) (Rule 26(b)(3)), but asserted that she was unable to obtain the substantial equivalent of these materials by other means, and was therefore entitled to receive a copy of these statements pursuant to Rule 26(b)(3). In response to plaintiff's motion, defendant wrote a letter to Deputy Commissioner William Haigh dated 21 January 1997 asserting that the notes were prepared in anticipation of litigation and that, contrary to plaintiff's contention, plaintiff was able to obtain the information contained in the notes by deposing the employees herself or by issuing subpoenas to them directing them to appear at the hearing.

Deputy Commissioner Haigh entered an order on 31 January 1997 granting plaintiff's motion for permission to request documents pursuant to N.C.R. Civ. P. 34. Deputy Commissioner Haigh further ordered defendant to produce the documents upon receipt of plaintiff's request, or to object within 15 days of receipt of plaintiff's request. On 1 April 1997, plaintiff sent defendant a "Request for Documents," requesting defendant to provide plaintiff with copies of "statements of Thomasville Upholstery employees taken by Dave Masters in 1994." In response, defendant filed an "Objection to Request for Documents" on 15 April 1997, again contending that the documents requested were protected from discovery by Rule 26(b)(3). Upon review of defendant's objection, Executive Secretary Tracey H. Weaver entered an order on 24 June 1997 denying plaintiff's request for production of documents.

Plaintiff appealed the order and argued in a "Memorandum of Law" that the interviews were conducted by Dave Masters, and that because Masters is not an attorney, the notes from those interviews did not constitute work product. In response, defendant filed a brief arguing that the interviews were conducted by Masters at the request of defendant's attorneys in anticipation of litigation, and that Masters was an agent of defendant when he took the notes. Deputy Commissioner Glenn heard from the parties on this matter on 28 July 1997 and ordered defendant to turn over the notes in question for *in camera* inspection, which defendant did. After reviewing the documents, Deputy Commissioner Glenn entered an order on 5 August 1997 directing defendant to produce the notes in question to plaintiff by 6 August 1997. Defendant did not comply with the order by 6

August 1997. On 8 August 1997, defendant filed a "Notice of Appeal to the Full Commission—or, in the alternative—Motion for Reconsideration." Defendant purported to appeal the order pursuant to N.C. Gen. Stat. § 97-85 (1999) and Industrial Commission Workers' Compensation Rule 701 (Rule 701).

Plaintiff moved to dismiss the appeal as interlocutory. On 11 August 1997, the Docket Director for the Commission notified defendant that the order from which defendant purported to appeal was interlocutory, that defendant's purported appeal would be treated as an exception to the interlocutory order, and that defendant would be entitled to appeal the order only after a final Opinion and Award had been issued.

On 29 August 1997, plaintiff filed a "Receipt of Witness Statements," acknowledging receipt of the notes in question from defendant. Defendant then filed a "Motion to Recuse and for a New Hearing—And—Alternative Motion to Dispense with Discovery Sanctions Hearing—And—Alternative Motion to Recuse as to the Discovery Sanctions Proceeding." Deputy Commissioner Glenn denied these motions at a hearing on 21 November 1997 and scheduled a hearing for 12 January 1998 to address whether defendant would be held in contempt or subjected to sanctions for failing to comply with the discovery order by 6 August 1997. Defendant then filed an appeal from the denial of these motions, purporting to rely upon Industrial Commission Workers' Compensation Rule 703 (Rule 703), and requesting a hearing. The Chairman of the Commission responded by sending a letter to defendant stating that, although defendant "raised some serious points about the nature of this hearing," such points "should be more properly raised before Deputy Commissioner Glenn at the hearing in order for him to rule on these matters." The Chairman also stated: "Depending on the outcome of the hearing, these matters can certainly be appealed to the Full Commission for its reconsideration." Having set forth this additional procedural history, we now turn to the substance of defendant's arguments.

B. Analysis

[1] In its first argument, defendant contends that the 5 August 1997 order, compelling defendant to produce the notes in question to plaintiff by 6 August 1997, was contrary to law. We believe the issue raised in this argument has been rendered moot. Our Supreme Court has explained the mootness doctrine as follows:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Here, in arguing that the order compelling discovery was contrary to law, defendant essentially seeks a ruling from this Court that defendant should not have been compelled to produce the documents because they were entitled to the protection provided by Rule 26(b)(3). However, because defendant has produced the documents in question, the relief defendant seeks cannot be granted. *See Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976) (stating that compliance with an order compelling discovery renders moot any challenge to the validity of that order). We also note that defendant acknowledges in its brief that "[t]he Court cannot undo the harm that was done," apparently conceding that the relief it seeks in its first argument cannot be provided by this Court.

[2] In its second argument, defendant contends that the 5 August 1997 order entered by the Deputy Commissioner was immediately appealable. It is well-established that, "[a]s a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment." *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). However, where a party is found to be in contempt or is otherwise sanctioned for noncompliance with a discovery order, the party may be entitled to immediate appeal of that order. *See Sharpe v. Worland*, 351 N.C. 159, 163-64, 522 S.E.2d 577, 580 (1999), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000). Here, there is no indication that defendant was adjudged to be in contempt or sanctioned until, at the very earliest, the hearing on 12 August 1997 (at which time it appears, as discussed in more detail below, that the Deputy Commissioner may have intended a single evidentiary ruling to constitute a sanction for failure to comply with the discovery order). Thus, at the time defendant purported to appeal the discovery order, that order was interlocutory and not immediately appealable because defendant had not been adjudged in contempt and no sanctions had been imposed upon defendant.

In sum, we believe that the validity of the discovery order has been rendered moot, and that the discovery order was not immediately appealable. However, even assuming *arguendo* that the order compelling defendant to produce the documents in question was error, and that it should have been immediately appealable, defendant has failed to indicate how production of the documents in question could have prejudiced defendant. Defendant's first five assignments of error (corresponding to arguments one and two) are therefore overruled.

[3] In its third argument (corresponding to assignments of error five, six and seven), defendant contends that the manner in which the Deputy Commissioner imposed sanctions upon defendant was erroneous, and that the Full Commission therefore erred in affirming these sanctions. This argument, in turn, is based upon two contentions. First, defendant contends that the Deputy Commissioner erred in calculating the sanctions against defendant based upon six days of noncompliance with the 5 August 1997 order rather than one day of noncompliance. Statements made by the Deputy Commissioner at the 12 January 1998 hearing do appear to indicate that he viewed defendant's noncompliance to have started on 6 August 1997. Defendant contends, however, that noncompliance did not begin until defendant received the 11 August 1997 letter from the Docket Director informing defendant that its appeal was interlocutory.

Defendant has not cited any authority for the proposition that an appeal to the Full Commission from a discovery order entered by a Deputy Commissioner stays the effect of the order. Here, by letter filed 8 August 1997, defendant purported to appeal from the Deputy Commissioner's 5 August 1997 order (ordering defendant to produce the documents by 6 August 1997). Subdivision (1) of Rule 703 provides that a ruling on a motion to reconsider, if "made in a summary manner, without detailed findings of fact," may be appealed by requesting a hearing within 15 days of receipt of the ruling.[1] Rule 703 does not provide that the effect of a challenged order is automatically stayed by an appeal from that order, but only that a Commissioner or Administrative Officer *may* enter an order staying the effect of an

1. We note that defendant's letter purports to appeal the Deputy Commissioner's order pursuant to Rule 701(1). However, Rule 701(1) addresses appeals taken pursuant to N.C. Gen. Stat. § 97-85 (1999), which section contemplates only reviews of awards, and not reviews of orders. Thus, defendant's purported appeal should have been made pursuant to Rule 703, and not Rule 701.

order. *See* Rule 703(2). Thus, because the discovery order instructed defendant to produce the documents by 6 August 1997, and because the effect of this order was not stayed as a result of defendant's purported appeal, we do not believe the Deputy Commissioner's imposition of sanctions upon defendant for noncompliance based upon a calculation of six days constituted an abuse of discretion.

[4] Defendant also contends that the Deputy Commissioner failed to provide defendant proper notice and an opportunity to be heard before imposing sanctions at the 12 August 1997 hearing. Defendant argues that at the 12 August 1997 hearing, the Deputy Commissioner first determined that sanctions would be addressed at a later hearing, but then proceeded to impose sanctions at the hearing. Upon reviewing the transcript from the 12 August 1997 hearing, it does appear that, despite the Deputy Commissioner's statement that he would hold a hearing to address sanctions at a later date, at least one of his rulings at the outset of the hearing (that Mr. Masters could be called as a witness by plaintiff but not by defendant) was intended to constitute a sanction against defendant for failure to comply with the discovery order. Defendant cites the following proposition in support of its argument:

> Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 17, of the North Carolina Constitution.

McDonald's Corp. v. Dwyer, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). We believe that at the time of the 12 August 1997 hearing, defendant had received sufficient notice of the possibility of the imposition of sanctions for failure to comply with the 5 August 1997 discovery order, and that defendant had received a sufficient opportunity to be heard on the matter. Moreover, any sanctions imposed upon defendant at the 12 August 1997 hearing did not constitute a deprivation of property (such as a monetary fine). Therefore, we find no violation of defendant's due process rights as a result of the Full Commission's ruling affirming the sanctions imposed upon defendant. Assignments of error five, six and seven are overruled.

II. RECUSAL

[5] In its fourth argument (corresponding to assignments of error eight through twelve), defendant contends that the Full Commission

erred in affirming the Deputy Commissioner's denial of defendant's motion to recuse. Industrial Commission Workers' Compensation Rule 615 is entitled "Disqualification of a Commissioner or Deputy Commissioner," and provides as follows:

> In their discretion, Commissioners or Deputy Commissioners may recuse themselves from the hearing of any case before the Industrial Commission. For good cause shown, a majority of the Full Commission may remove a Commissioner or Deputy Commissioner from hearing a case.

Having carefully reviewed the entire record in this case, we hold that Deputy Commissioner Glenn did not abuse his discretion in denying defendant's motion to recuse, and that it was not error for the Full Commission to affirm the Deputy Commissioner's denial of the motion to recuse. Accordingly, assignments of error eight through twelve are overruled.

III. SUFFICIENCY OF THE EVIDENCE

[6] In defendant's fifth and final argument in its brief (corresponding to assignments of error twelve through thirty-eight), defendant contends that the Opinion and Award of the Full Commission is not supported by competent evidence in the record. Specifically, defendant asserts that the evidence was insufficient to establish that plaintiff's fibromyalgia and depression are compensable occupational diseases because it did not show that: (1) these diseases are characteristic of plaintiff's particular trade, occupation or employment; (2) working as a marketing manager in the furniture industry subjected plaintiff to an increased risk of contracting these diseases; and (3) there is a causal connection between the diseases and plaintiff's employment.

"For a disability to be compensable under our Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an 'occupational disease.' " *Hansel v. Sherman Textiles*, 304 N.C. 44, 51, 283 S.E.2d 101, 105 (1981). By the express language of N.C. Gen. Stat. § 97-53 (1999), only the diseases and conditions enumerated therein shall be deemed to be occupational diseases within the meaning of the Act. Because neither fibromyalgia nor depression is specifically mentioned in N.C.G.S. § 97-53, the issue is whether these two diseases fall within subsection (13) of the statute, which defines an "occupational disease" as

> [a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular

> trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C.G.S. § 97-53(13). Our Supreme Court has interpreted this language as requiring three elements in order to prove that a disease is an "occupational disease": (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation or employment; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of causation (proof of a causal connection between the disease and the employment). *See Hansel*, 304 N.C. at 52, 283 S.E.2d at 105-06 (citing *Booker v. Medical Center*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979)). Furthermore, in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), our Supreme Court explained what is required to establish the first two elements:

> To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation.

Id. at 93-94, 301 S.E.2d at 365 (citations and internal quotation marks omitted).

Here, the trial court made the following pertinent findings of fact:

> 14. As the result of the situation at work and her relationship with Ms. Bosworth, plaintiff began to experience symptoms of depression in the spring of 1994. Plaintiff felt as though she was losing her mind and informed others, including management, that "this situation was killing her." Plaintiff felt demeaned, embarrassed, humiliated, worthless and believed that Ms. Bosworth was attempting to get rid of her. Prior to her assignment with Ms. Bosworth, plaintiff had not experienced these types of psychological symptoms.

15. Additionally, as the result of the situation at work and her relationship with Ms. Bosworth, plaintiff began to experience adverse physical ailments in the spring of 1994. Plaintiff experienced chronic pain and fatigue, severe headaches, extreme joint and muscle pain, chemical allergies and problems with sleeping. Prior to her assignment with Ms. Bosworth, plaintiff had not experienced these types of adverse physical ailments.

16. As the result of her physical problems, plaintiff sought treatment on 18 May 1994 from Dr. Wodecki, a specialist in internal medicine and rheumatology. Dr. Wodecki examined plaintiff and diagnosed her as having fibromyalgia.

17. Following her initial examination by Dr. Wodecki, plaintiff continued working for defendant until 22 June 1994, when she was fired. On 24 June 1994, plaintiff returned to Dr. Wodecki who hospitalized plaintiff due to a severe flare-up of her fibromyalgia and severe depression. Dr. Wodecki also referred plaintiff to Dr. Patricia Hill, a psychiatrist.

18. Dr. Wodecki opined that depression can cause or significantly aggravate fibromyalgia. As for plaintiff's condition, Dr. Wodecki opined that her depression was caused by her employment related stress and that her fibromyalgia was significantly aggravated by her depression.

19. Dr. Patricia Hill first examined plaintiff on 30 June 1994. Following her examination of plaintiff, Dr. Hill found that plaintiff was grossly impaired by major depression. Dr. Hill opined that plaintiff's depression was related to severe workplace stress associated with her relationship with Ms. Bosworth and to her termination by defendant. Dr. Hill further opined that plaintiff's employment with defendant exposed her to an increased risk of developing major depression as compared to members of the general public not so employed. . . .

20. The employment related stress experienced by plaintiff as Ms. Bosworth's assistant was not the normal type of stress that an employee would experience in a position with defendant or any other employer. Plaintiff's employment with defendant caused the development of her depression and exposed her to an increased risk of developing severe depression as compared to the general public not so employed.

The Full Commission also entered the following Conclusion of Law:

> 2. Plaintiff's employment with defendant caused her depression and exposed her to an increased risk of developing this condition as compared to members of the general public not so employed. . . . Because plaintiff's fibromyalgia was caused or significantly aggravated by her depression, it was also caused by her employment with defendant.

On appeal from an opinion and award of the Industrial Commission, findings of fact are conclusive if they are supported by any competent evidence in the record, even if there is evidence that would support findings to the contrary. *See 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). "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.* Having carefully reviewed the evidence in the record, we hold that there is competent evidence to support the Full Commission's findings of fact.

Specifically, the testimony of Dr. Wodecki (plaintiff's treating physician) and the testimony of Dr. Hill (a psychiatrist who treated plaintiff) supports finding of fact number 20 that "Plaintiff's employment with defendant caused the development of her depression and exposed her to an increased risk of developing severe depression as compared to the general public not so employed." During his deposition, Dr. Wodecki responded in the affirmative to a lengthy hypothetical question posed by plaintiff's counsel, indicating that the conditions of plaintiff's employment exposed her to a greater risk of developing depression and fibromyalgia than members of the public not exposed to such conditions. Similarly, Dr. Hill testified that plaintiff's employment exposed her to a greater risk of developing depression than the general public.

Having determined that the findings of fact are supported by the evidence, we turn to the Full Commission's conclusions of law, which we review *de novo*. *See Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 335, 499 S.E.2d 470, 472, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). As to the first two elements required for an occupational disease, we hold that the findings support the conclusion that plaintiff's employment exposed her to a greater risk of contracting depression and, as a result, fibromyalgia than the public

generally. Moreover, we disagree with defendant that plaintiff's "employment" may accurately be characterized as simply "working as a marketing manager in the furniture industry." Plaintiff's employment, as an assistant to the general manager of marketing and design for a furniture upholstery company, involved: (1) an extremely stressful and verbally abusive relationship with her emotionally unstable supervisor, which caused plaintiff to feel demeaned, embarrassed, humiliated, and worthless; and (2) a workplace environment in which plaintiff justifiably felt powerless over the situation and betrayed by her employer because her employer appeared to care more about the supervisor's financial value to the company than her abusive treatment of employees. In drawing this conclusion, we are mindful that the Supreme Court has stated on numerous occasions that the Workers' Compensation Act is to be construed liberally in favor of awarding benefits. *See Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985); *Barnhardt v. Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966). Based upon this fundamental principle, we conclude that the term "employment" in *Booker, Hansel,* and *Rutledge* must be interpreted as referring to a plaintiff's particular job, rather than to the type of job.

We further hold that the findings support the conclusion that there was a causal connection between plaintiff's depression (and the resulting fibromyalgia) and her employment, the third element required for an occupational disease. Therefore, we affirm the opinion and award of the Full Commission, concluding that plaintiff's depression and fibromyalgia are compensable occupational diseases.

Affirmed.

Judge HUNTER concurs.

Judge MARTIN concurs in part and dissents in part.

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

I must respectfully dissent from that portion of the majority opinion which holds that the evidence and the Commission's findings support its conclusions that plaintiff's employment exposed her to a greater risk of contracting depression and fibromyalgia than the public generally and that her depression and fibromyalgia are compensable occupational diseases.

Although the majority correctly cites the definition of an occupational disease, as contained in G.S. § 97-53(13), and our Supreme Court's interpretation of the statute, as contained in *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979) and further explained in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), I do not believe the majority or the Commission has correctly applied the law to the facts as found by the Commission. Notwithstanding the fact that plaintiff's job-related stress caused her depression and aggravated her fibromyalgia, such facts cannot support the conclusion that plaintiff's mental and physical conditions were occupational diseases as defined by the statute. The findings indicate merely that plaintiff suffered from depression and fibromyalgia after being placed in the unfortunate position of working for an abusive supervisor, which can occur with any employee in any industry or profession, or indeed, in similar abusive relationships outside the workplace. Therefore, I do not believe plaintiff's conditions can be construed as "characteristic of and peculiar to" her particular employment; they are ordinary diseases, to which the general public is equally exposed outside the workplace in everyday life. *See Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365 ("Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.") In my view, to hold these conditions to be occupational diseases compensable under G.S. § 97-53(13), under the facts of this case, stretches beyond the intent of the Workers' Compensation Act. Thus, I would reverse the award of compensation.

I concur with the majority with respect to the results reached as to defendant's remaining assignments of error.

CHRIS T. PHILLIPS, PLAINTIFF v. RESTAURANT MANAGEMENT OF CAROLINA, L.P., A DELAWARE LIMITED PARTNERSHIP, TACO BELL CORP., A CALIFORNIA CORPORATION, AND JASON PAUL JONES, DEFENDANTS

No. COA00-411

(Filed 18 September 2001)

1. Employer and Employee— vicarious liability—restaurant employee spat in trooper's food—summary judgment

The trial court erred by granting summary judgment in favor of defendant Restaurant Management on the issue of vicarious liability based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because: (1) there is a genuine issue of material fact as to whether the employee's acts were within the scope of his employment and in furtherance of Restaurant Management's business; and (2) the employee's concealed act of spitting into food while preparing it related directly to the manner in which the employee carried out his job duty of preparing the food for consumption by the customer.

2. Employer and Employee— ratification—restaurant employee spat in trooper's food—summary judgment

The trial court did not err by granting summary judgment in favor of defendant Restaurant Management on the issue of ratification based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because: (1) the employee did not communicate his act to any of his co-employees at the moment he contaminated the trooper's food; (2) there was no evidence that any of the co-employees witnessed the employee spitting in the food; (3) there was no evidence tending to show that Restaurant Management had any reason to suspect the employee would contaminate a customer's food or that a member of management had direct knowledge that the employee had contaminated the food; (4) immediately after the incident occurred, the employee denied any involvement in contaminating the trooper's food; and (5) evidence that Restaurant Management failed to contact the trooper after the employee admitted his involvement does not establish ratification when a supervisor confronted the em-

ployee on his next scheduled shift following the incident and accepted the employee's resignation, and Restaurant Management investigated the incident further and found the employee had acted alone.

3. Warranties— breach of implied warranty of merchantability—restaurant employee spat in trooper's food—summary judgment

The trial court erred by granting summary judgment in favor of defendant Restaurant Management on the issue of breach of implied warranty of merchantability based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because: (1) a food patron's ingestion of a food preparer's saliva constitutes an injury unto itself that is sufficient to satisfy the injury required to sustain a claim of breach of implied warranty of merchantability; and (2) there is no binding authority requiring a physical injury, or even a physical manifestation of a mental injury, to support a claim for breach of an implied warranty of merchantability.

4. Emotional Distress— intentional infliction—restaurant employee spat in trooper's food—summary judgment

The trial court erred by granting summary judgment in favor of defendant Restaurant Management on the issue of intentional infliction of emotional distress based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because: (1) it cannot be said as a matter of law that a food preparer spitting in food intended for a patron's consumption does not rise to the level of "extreme and outrageous;" and (2) the trooper alleged that he suffered severe emotional distress as a result of the consumption of the saliva-covered nachos.

5. Negligence— gross—restaurant employee spat in trooper's food—summary judgment

The trial court erred by granting summary judgment in favor of defendant Restaurant Management on the issue of gross negligence based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because there is a genuine issue of material

fact as to whether the employee's acts were within the scope of his employment and in furtherance of Restaurant Management's business.

6. Damages and Remedies— punitives—restaurant employee spat in trooper's food—summary judgment

The trial court did not err by granting summary judgment in favor of defendant Restaurant Management on the issue of punitive damages under N.C.G.S. § 1D-15 based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because the trooper failed to forecast any credible evidence that any officer, director, or manager of defendant Restaurant Management participated in or conducted any fraudulent, malicious, or willful or wanton act that might provide the basis for punitive damages.

7. Agency— actual—apparent—vicarious liability—restaurant employee spat in trooper's food—summary judgment

The trial court did not err by granting summary judgment in favor of defendant Taco Bell on the issue of vicarious liability under theories of agency or apparent agency based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because: (1) no evidence establishes the existence of an actual agency relationship between Taco Bell and the employee; (2) there is no evidence showing that the trooper relied or acted upon any representation or assertion of Taco Bell; and (3) there is no evidence that the trooper would have chosen to eat elsewhere or done anything differently had he known that the pertinent restaurant was not owned and operated by Taco Bell.

8. Employer and Employee— ratification—restaurant employee spat in trooper's food—summary judgment

The trial court did not err by granting summary judgment in favor of defendant Taco Bell on the issue of ratification based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because the fact that Taco Bell made no attempt to contact the trooper after the employee admitted spitting in the trooper's food does not establish ratification by Taco Bell.

9. Warranties— breach of implied warranty of merchantability—products liability—restaurant employee spat in trooper's food—summary judgment

The trial court did not err by granting summary judgment in favor of defendant Taco Bell on the issue of breach of implied warranty of merchantability under a products liability theory based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper because even if Taco Bell manufactured the food that was purchased and consumed by the trooper, plaintiff's claim fails because the food purchased was altered in a manner not originally intended by Taco Bell at a time after it left Taco Bell's control and without Taco Bell's express consent. N.C.G.S. § 99B-3(a).

10. Employer and Employee— vicarious liability—intentional infliction of emotional distress—gross negligence—punitive damages—restaurant employee spat in trooper's food—summary judgment

The trial court did not err by granting summary judgment in favor of defendant Taco Bell on the issues of intentional infliction of emotional distress, gross negligence, and punitive damages under the theory of vicarious liability based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper, because the Court of Appeals already held that the trial court did not err in granting summary judgment to Taco Bell on the issue of vicarious liability.

Appeal by plaintiff from order entered 26 January 2000 by Judge Charles C. Lamm, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 6 February 2001.

Long, Parker, Warren & Jones, P.A., by Steve Warren, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Robert R. Marcus, for defendants-appellees.

WYNN, Judge.

While on duty for the North Carolina Highway Patrol, Trooper Chris T. Phillips stopped to order food from the drive-through win-

dow of a Taco Bell restaurant in Black Mountain, North Carolina. Restaurant Management of Carolina, L.P. owned and operated the restaurant under a franchise agreement with Taco Bell Corp. Apparently recognizing that the trooper had ordered food, an employee of the restaurant, Jason Paul Jones, spat in the trooper's food before serving it to him. Shortly thereafter, while consuming the food, the trooper noticed a substance on the food that appeared to be human saliva. He returned immediately to the restaurant and spoke to the shift manager, who denied any knowledge of the incident. Nonetheless, the trooper reported the incident to the local police department and to his supervisor. A State Bureau of Investigation laboratory report later confirmed the presence of human saliva in the food. Two days later, Jones revealed to his shift supervisor that he spat in the trooper's food because he had been "harassed" by local police officers for skateboarding and thought the trooper-customer could have been one of those officers.

The trooper brought actions against Jones, Restaurant Management and Taco Bell for: (1) Breach of implied warranty of merchantability; (2) Intentional infliction of emotional distress; (3) Gross negligence; and (4) Punitive damages. Following responsive pleadings and discovery, the trial court granted summary judgment in favor of Restaurant Management and Taco Bell. The trooper now appeals to us.

Conspicuously, the summary judgment order in this case disposed of fewer than all claims brought by the trooper—the claims against Jones remain; ordinarily, such an order is interlocutory and not immediately appealable. *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). However, pertinent to this appeal, N.C. Gen. Stat. § 7A-27(d) (1999) permits an appeal from an interlocutory order that affects "a substantial right which may be lost or prejudiced if not reviewed prior to final judgment." *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 710, 440 S.E.2d 585, 588 (1994). On appeal, the trooper contends that his claims against Restaurant Management and Taco Bell involve issues of fact common to his claims against Jones and that if this appeal is dismissed as interlocutory, separate trials will be required to determine the same factual issues. We agree with him. *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) ("[T]he right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right" that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims) (internal

citations omitted). Accordingly, we address the merits of the trooper's claims against both Restaurant Management and Taco Bell.

I. Restaurant Management

A. Vicarious Liability

[1] The trooper first argues that the record shows a genuine issue of fact as to the vicarious liability of Restaurant Management for the acts of its employee, Jones. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999) (Summary judgment is inappropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show a genuine issue as to any material fact). We agree.

The parties in this appeal contend that the following language from our Supreme Court's decision in *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E.2d 804 (1967), controls the outcome of this issue:

> If the servant was engaged in performing the duties of his employment at the time he did the wrongful act which caused the injury, the employer is not absolved from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, or even by the fact that the employer had expressly forbidden him to commit such act.

Id. at 66, 153 S.E.2d at 807-08. In *Wegner*, the food patron sat down and asked the restaurant's bus boy to remove some dirty dishes from the table. The bus boy, whose "job was to collect and remove dishes, carry trays, and the like," removed the dirty dishes as well as a clean glass from the table, prompting the food patron to ask for a clean, fresh glass. *Id.* at 68, 153 S.E.2d at 809. Minutes later, the bus boy returned and slammed a clean glass onto the table. Following a verbal exchange, the bus boy "asked the [food patron] if he wanted his eyes cut out," to which the food patron did not respond. *Id.* at 64, 153 S.E.2d at 806. Later, when the food patron started to leave the restaurant, the bus boy punched and kicked him.

In reviewing the trial court's judgment of nonsuit in favor of the restaurant, our Supreme Court in *Wegner* held that "[w]hatever the source of his animosity toward the [food patron] may have been, he did not strike the [food patron] as a means or method of performing his duties as bus boy." *Id.* at 68, 153 S.E.2d at 809. The Court concluded that the bus boy's assault of the food patron could not "be

deemed an act of his employer[.]" *Id.* Moreover, pertinent to the outcome of this appeal, the Court instructively stated that:

> A different situation would be presented if the glass which he "slammed down" upon the table had shattered and injured the plaintiff, for there the employee would have been performing an act which he was employed to do and his negligent or improper method of doing it would have been the act of his employer in the contemplation of the law.

Id. Cf. Medlin v. Bass, 327 N.C. 587, 593, 398 S.E.2d 460, 463 (1990) ("Where the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury"); *Edwards v. Akion*, 52 N.C. App. 688, 698, 279 S.E.2d 894, 900, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981) ("When there is a dispute as to what the employee was actually doing at the time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury.")

In the instant case, we hold that there is at least a genuine issue of material fact as to whether Jones's acts were within the scope of his employment and in furtherance of Restaurant Management's business. The record shows that when he spat into the trooper's food, he was in the act of performing his job of preparing that food for the trooper. His concealed act of spitting into food while preparing it related directly to the manner in which he carried out his job duty of preparing the food for consumption by the customer. Indeed a jury *could* determine that his act of spitting in the trooper's food was done within the scope of his employment. We see no distinction between the instant case and the situation envisioned by our Supreme Court in *Wegner*, where a bus boy slams down a glass, such that the glass shatters and injures a customer. In such a situation, as here, "the employee would have been performing an act which he was employed to do and his negligent or improper method of doing it would have been the act of his employer in the contemplation of the law." *Wegner*, 270 N.C. at 68, 153 S.E.2d at 809. Accordingly, we conclude that the trial court erred in granting summary judgment as to the issue of Restaurant Management's vicarious liability for Jones's conduct.

B. Ratification

[2] The trooper next argues that Restaurant Management ratified Jones's acts and therefore the trial court erred in granting summary judgment in its favor. We disagree.

In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 492, 340 S.E.2d 116, 122, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986), this Court held that:

> In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act.

In addition, "[t]he jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts." *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232, 236, (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990) (citation omitted). "Such course of conduct may involve an omission to act." *Id.* Moreover, although the employer must have knowledge of all material facts relative to its employee's acts in order to effect ratification,

> [i]f the purported principal is shown to have knowledge of facts which would lead a person of ordinary prudence to investigate further, and he fails to make such investigation, his affirmance without qualification is evidence that he is willing to ratify upon the knowledge which he has.

Restatement (Second) of Agency § 91, Comment e, p. 235 (1958). *Accord Equipment Co. v. Anders*, 265 N.C. 393, 401, 144 S.E.2d 252, 258 (1965) (citation omitted) ("[W]hen [a principal] has such information that a person of ordinary intelligence would infer the existence of the facts in question, the triers of fact ordinarily would find that he had knowledge of such fact").

In this case, the trooper argues that the evidence presents an issue of fact as to whether Restaurant Management ratified the acts of Jones because (1) a co-employee knowingly delivered the contaminated food to the trooper, (2) the shift manager had knowledge of the incident after Jones's confession and failed to make efforts to contact the trooper, and (3) Restaurant Management failed to make an appropriate investigation. However, the record shows that Jones did not communicate his act to any of his co-employees at the moment he contaminated the trooper's food. Even viewed in the light most favorable to the trooper, there was no evidence showing that any of Jones's co-employees witnessed him spitting in the food. In addition, there is

no evidence in the record that tends to show Restaurant Management had any reason to suspect that Jones would contaminate a customer's food or that a member of management had direct knowledge that Jones had contaminated the food. Immediately after the incident occurred, Jones denied any involvement in contaminating the trooper's food. Significantly, the record shows no forecast of any credible evidence that a co-employee knew of Jones's act against the trooper and knowingly failed to intercede by taking the contaminated food out of the chain of delivery to the trooper.

Furthermore, we hold that evidence showing that Restaurant Management failed to contact the trooper after Jones admitted his involvement does not establish ratification by Restaurant Management. According to an affidavit of a police officer investigating the incident, Jones and Restaurant Management cooperated with the police investigation. A supervisor confronted Jones on his next scheduled shift following the incident; thereafter, Jones immediately resigned and Restaurant Management accepted his resignation. The record also shows that Restaurant Management investigated whether there was any other employee involvement and found that Jones had acted alone. Since the record fails to forecast evidence that Restaurant Management ratified the actions of Jones, the trial court properly granted summary judgment on this issue.

C. Breach of Implied Warranty of Merchantability

[3] The trooper next argues that the trial court erred in granting summary judgment to Restaurant Management as to his claim for breach of the implied warranty of merchantability. We agree.

The nature of a claim for breach of an implied warranty of merchantability is contractual. *See Tedder v. Bottling Co.*, 270 N.C. 301, 304, 154 S.E.2d 337, 339 (1967) (holding bottling company liable for breach of implied warranty of merchantability for presence of deleterious substance in product that resulted in consumer's illness). In general, a retailer impliedly warrants that the goods sold to a consumer are fit, and when that warranty is breached the injured consumer may recover. *Id.* at 305, 154 S.E.2d at 339. Additionally, "[a]uthorities generally hold that the manufacturer, processor and packager of foods . . . intended for human consumption are held to a high degree of responsibility to the ultimate consumer to see to it that the food and drink are not injurious to health." *Terry v. Bottling Co.*, 263 N.C. 1, 2, 138 S.E.2d 753, 754 (1964).

To recover for breach of the implied warranty of merchantability, a plaintiff must establish each of the following elements:

> (1) a merchant sold goods, (2) the goods were not 'merchantable' at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Ismael v. Goodman Toyota, 106 N.C. App. 421, 430, 417 S.E.2d 290, 295 (1992) (citations omitted). If evidence is lacking as to any one of these elements, summary judgment is appropriate. *See Cockerman v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 262 S.E. 2d 651, *disc. review denied*, 300 N.C. 195, 269 S.E.2d 622 (1980).

In the instant case, Restaurant Management does not contest elements (1), (2) and (5); rather, it contends that the evidence fails to support the injury and causation requirements of a claim for breach of implied warranty of merchantability. However, the trooper's verified complaint alleges that he suffered injury from the food preparer's saliva as a proximate result of his ingestion of the saliva-covered nacho chips. His amended complaint alleges that he suffered the following specifically-enumerated injuries: "severe emotional distress, anxiety and fear of contraction of communicable diseases, such as AIDS, HIV, Hepatitis C or other infectious diseases." Thus, we must address the first-impression issue for North Carolina law of whether a food patron's ingestion of a food preparer's saliva constitutes an injury unto itself, sufficient to satisfy the injury required to sustain a claim of breach of implied warranty of merchantability.

Our deliberative process in deciding this novel issue is guided by court decisions in other jurisdictions which hold that spitting upon a person may constitute a criminal assault or battery. *See People v. Terry*, 553 N.W.2d 23, 25 (Mich. Ct. App. 1996) ("spitting upon a person is a battery, which is a consummated assault"); *Ray v. United States*, 575 A.2d 1196 (D.C. 1990) (spitting in an officer's face constitutes assault); *see also People v. Boyd*, 300 N.W.2d 760 (Mich. Ct. App. 1980) (throwing urine on guard constitutes violence). *But see State v. Bailey*, 615 N.E.2d 322 (Ohio Ct. App. 1992) (spitting on victim's arm does not constitute assault). We discern from this guidance that if the simple act of spitting on a person may be considered assault or battery despite no physical manifestation of harm, then it appears mani-

fest that there exists a basis for finding that introducing one's saliva into another person's internal system would be highly offensive and, as such, constitute a harm or injury. We are aware of no binding authority requiring a physical injury, or even a physical manifestation of a mental injury, to support a claim for breach of an implied warranty of merchantability, and we decline to impose such a requirement. We conclude that the trooper's claim for breach of implied warranty of merchantability does not fail as a matter of law for failure to state an injury as against Restaurant Management; accordingly, we hold that the trial court erred in granting summary judgment to Restaurant Management on this issue.

D. Intentional Infliction of Emotional Distress

[4] The trooper next argues that the trial court erred in granting summary judgment to Restaurant Management on his claim for intentional infliction of emotional distress. We agree.

"The elements of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress.' " *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 412, 473 S.E.2d 38, 40-41 (1996) (quoting *Hogan*, 79 N.C. App. at 487-88, 340 S.E.2d at 119). As to the first element, a determination at summary judgment of whether "alleged acts may be reasonably regarded as extreme and outrageous is initially a question of law." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 359 (1987) (citations omitted). "Conduct is extreme and outrageous when it exceeds all bounds usually tolerated by a decent society." *Id.* (citations omitted).

Indeed, the State of Pennsylvania has made it a felony for a prisoner to "intentionally cause or knowingly cause another to come in contact with blood, semen, *saliva*, urine or feces." 19 Pa. C.S.A. § 2703.1 (emphasis added). Criminal activity is normally considered more than merely reprehensible. Additionally, the Oregon Court of Appeals has found that contamination of a prisoner's food with saliva or other body fluids could be a violation of the 8th Amendment to the United States Constitution. *See Fort v. Palmateer*, 10 P.3d 291 (Or. Ct. App. 2000). Having considered the reprehensible nature of defendant Jones's act in this context, and viewing the facts before us, we cannot say, as a matter of law, that a food preparer surreptitiously spitting in food intended for a patron's consumption does not rise to the level of "extreme and outrageous."

Furthermore, in his sworn complaint, the trooper stated that he suffered severe emotional distress as a result of the consumption of the saliva-covered nachos. The trooper received counseling twice from the medical staff employed by the North Carolina State Highway Patrol, even though he was not prescribed any medication. Additionally, in support of his allegation that he suffered severe emotional distress from this incident, the trooper offered an affidavit from Dr. Tom Griggs, the highway patrol physician, stating that, based on his observation, the trooper "experienced emotional distress associated with the spitting incident, [sic] and his fear of contamination or contraction of communicable diseases as a result of the incident."[1]

" '[S]evere emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 583 (1998) (quoting *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)). Summary judgment may be proper on an intentional infliction of emotional distress claim "[w]here the plaintiff fail[s] to forecast evidence of medical documentation to substantiate alleged ' "severe emotional distress" ' or ' "severe and disabling" psychological problems[.]' " *Dobson v. Harris*, 134 N.C. App. 573, 579, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000) (quoting *Waddle v. Sparks*, 331 N.C. 73, 85, 414 S.E.2d 22, 28 (1992)). "To have a jury trial . . . plaintiff only had to

1. Courts in other jurisdictions have held that fear of contamination or contraction of communicable diseases may support recovery by a plaintiff, even though the plaintiff does not show *actual* exposure to any communicable disease. *See Marchica v. Long Island R.R. Co.*, 31 F.3d 1197, 1204 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1079, 130 L. Ed. 2d 631 (1995) (holding that where plaintiff's "emotional distress was the direct result of documented physical injury and was reasonably foreseeable in light of the fact that [the plaintiff] may have been exposed to HIV, he was not required to prove actual exposure to the disease in order to state a viable cause of action"); *see also Madrid v. Lincoln County Med. Ctr.*, 923 P.2d 1154, 1159-60 (N.M. 1996) (allowing plaintiff to recover for emotional distress during "window of anxiety" period, which exists between initial exposure to possible HIV contaminated source and the indication that HIV test results are negative, even without evidence of actual exposure to HIV); *South Regional Medical Center v. Pickering*, 749 So.2d 95 (Miss. 1999) (permitting plaintiff to recover for emotional distress during "window of anxiety" period despite absence of evidence of actual exposure to HIV when the defendant allowed or caused the evidence that would allow the determination of the HIV exposure to be destroyed). *But see Burk v. Sage Prods., Inc.*, 747 F.Supp. 285 (E.D.Pa.1990) (holding that absent any proof that the plaintiff was in fact exposed to HIV, he could not recover damages for his fear of contracting AIDS).

present competent evidence that he suffered emotional distress and that it resulted from defendant's conduct." *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 454, 358 S.E.2d 107, 109 (1987) (holding that the plaintiff's contention that she was "shocked" and "upset" after her unexpected termination was sufficient to survive motion to dismiss claim for intentional infliction of emotional distress; nonetheless, claim was dismissed for failure to show that conduct was outrageous).

In the instant case, the trooper alleged that he suffered severe emotional distress as a result of consuming the saliva-covered nachos, and offered competent evidence in the form of an affidavit from a physician in support thereof. In his complaint, the trooper asserted that the alleged actions were "intended to cause severe emotional distress to Plaintiff or occurred with reckless indifference to the likelihood that said conduct would cause such distress."

We hold that whether the trooper's suffering rose to the level of severe emotional distress required for intentional infliction of emotional distress is a question for the jury. *See id.* Accordingly, we conclude that the trial court erred in granting summary judgment to Restaurant Management on this issue.

E. Gross Negligence

[5] The trooper further asserts that the evidence raised a genuine issue of material fact for a jury to determine whether Restaurant Management acted in a grossly negligent manner. In *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979), our Supreme Court "emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Id.* at 402, 250 S.E.2d at 257 (citations omitted). For the reasons set forth above in our reversal of the trial court's grant of summary judgment as to Restaurant Management's vicarious liability, we conclude further that the trial court erred in granting summary judgment to defendant Restaurant Management on the issue of gross negligence.

F. Punitive Damages

[6] Lastly, the trooper asserts that his complaint states a claim against Restaurant Management for punitive damages under N.C. Gen. Stat. § 1D-15 (1999). G.S. § 1D-15 provides that, to be awarded punitive damages, a claimant must prove, by clear and convincing evi-

dence, the existence of an aggravating factor (including fraud, malice, or willful or wanton conduct) related to the injury for which compensatory damages are to be awarded. *See* G.S. § 1D-15(a), (b). Relevant to the trooper's claim against Restaurant Management, G.S. § 1D-15(c) provides:

> Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

G.S. § 1D-15(c). As the trooper failed to forecast any credible evidence that any officer, director, or manager of defendant Restaurant Management participated in or condoned any fraudulent, malicious, or willful or wanton act that might provide the basis for punitive damages, his claim for punitive damages against Restaurant Management fails as a matter of law. We therefore affirm the trial court's grant of summary judgment in favor of Restaurant Management on the trooper's claim for punitive damages.

II. Taco Bell

A. Vicarious Liability

[7] As to Taco Bell, the trooper argues that issues of fact exist as to his claim of Taco Bell's vicarious liability for Jones's actions under theories of agency or apparent agency. An agency relationship "arises when parties manifest consent that one shall act on behalf of the other and subject to his control." *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 524, 528 S.E.2d 923, 926, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 782 (2000) (citing *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 357 S.E.2d 394, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987)).

> Under the doctrine of *respondeat superior*, a principal is liable for the torts of its agent which are committed within the scope of the agent's authority, when the principal retains the right to control and direct the manner in which the agent works. Of course, *respondeat superior* does not apply unless an agency relationship of this nature exists.

Daniels v. Reel, 133 N.C. App. 1, 10, 515 S.E.2d 22, 28, *disc. review denied*, 350 N.C. 827, 537 S.E.2d 817, 818 (1999) (internal citations omitted). Moreover, in establishing the existence of an actual agency relationship, the evidence must show that a principal actually consents to an agent acting on its behalf. *Knight Publishing Co. v. Chase Manhattan Bank*, 125 N.C. App. 1, 14, 479 S.E.2d 478, 486, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997). In contrast, "[a]n 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." *Id.* at 15, 479 S.E.2d at 487 (quoting *Hayman*, 86 N.C. App. at 278, 357 S.E.2d at 397). Apparent agency, however, "may not be relied upon to assert that a principal authorized a certain transaction between its purported agent and a third party unless the third party *actually relied* upon the assertions of the principal regarding the purported agent's power at the time of the transaction." *Id.*

Under the facts of this case, no evidence establishes the existence of an actual agency relationship between Taco Bell and Jones. Further, there is no evidence showing that the trooper relied or acted upon any representation or assertion of Taco Bell. Indeed, there is no evidence that the trooper would have chosen to eat elsewhere or done anything differently had he known that the restaurant at issue herein was not owned and operated by Taco Bell. Finding no actual or apparent agency relationship between defendant Taco Bell and Jones, we conclude that the trial court did not err in granting summary judgment to Taco Bell on the issue of vicarious liability.

B. Ratification

[8] As with defendant Restaurant Management, the trooper presented no evidence of ratification by Taco Bell of defendant Jones's actions. The fact that Taco Bell made no attempt to contact the trooper after Jones admitted spitting in the trooper's food does not establish ratification by Taco Bell. Since the record fails to forecast any evidence that Taco Bell ratified the actions of Jones, the trial court properly granted summary judgment to Taco Bell on this issue. In addition, having determined that the trial court did not err in granting summary judgment to Restaurant Management on the issue of ratification (section I.B., above), we need not address the trooper's assertion of apparent agency between Restaurant Management and Taco Bell.

C. Breach of Implied Warranty of Merchantability

[9] The trooper correctly states in his brief that "the nature of a claim for breach of the implied warranty of merchantability is grounded in contract, not tort[.]" *See Tedder*. As such, traditionally the contract of implied warranty "extends no further than the parties to [the contract] and [] privity to the contract is the basis of liability." *Id.* at 304, 154 S.E.2d at 339; *see Terry*, 263 S.E.2d at 2-3, 138 S.E.2d at 754 (the implied warranty of fitness "extends no further than the parties to the contract of sale"). Nonetheless, over the years our courts have "relaxed the privity rule in certain cases involving food and drink because of their importance to health." *Id.*

The trooper in this case relies upon our Supreme Court's decision in *Tedder*, and similar cases, to support his claim that there is no privity requirement as to his claim for breach of the implied warranty of merchantability against Taco Bell. In *Tedder*, our Supreme Court upheld the application of a claim for implied warranty of merchantability against a soda bottler who sold a soda to the retailer that sold the soda to the plaintiff. However, unlike Taco Bell in this case, the Supreme Court pointed out in *Tedder* that "[o]nly the bottler and the plaintiff actually handled the drink," *id.* at 305, 154 S.E.2d at 340, and that the defective soda was contaminated when it was provided by the bottler to the retailer (i.e. when it left the control of the bottler).

Nonetheless, the trooper contends that he may maintain an action against Taco Bell, regardless of privity, under the North Carolina Products Liability Act, N.C. Gen. Stat. § 99B-1 *et seq.* (1999). *See Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (holding that "an action for breach of implied warranty of merchantability under the Uniform Commercial Code is a 'product liability action' within the meaning of the Products Liability Act if, as here, the action is for injury to person or property resulting from a sale of a product"). However, G.S. § 99B-3 generally abolishes such liability of a manufacturer or seller of a product "where a proximate cause of the personal injury . . . was either an alteration or modification of the product . . . occurr[ing] after the product left the control of such manufacturer or seller[.]" G.S. § 99B-3(a). Such alteration or modification of the product may include "changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer." G.S. § 99B-3(b). Thus, even assuming, *arguendo*, that Taco Bell manufactured the food that was

purchased and consumed by the trooper, his claim against Taco Bell fails because the food purchased was altered in a manner not originally intended by Taco Bell, at a time *after* it left Taco Bell's control and without Taco Bell's express consent. *See Rich v. Shaw*, 98 N.C. App. 489, 391 S.E.2d 220, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 689 (1990). Accordingly, the trial court properly granted summary judgment to Taco Bell on this issue.

D. Trooper's Remaining Claims

[10] The trooper's remaining claims of intentional infliction of emotional distress, gross negligence, and punitive damages against Taco Bell are based upon a theory of Taco Bell's vicarious liability for Jones's actions (or the actions of alleged "Doe Employees," whom the trooper alleges knew or should have known that the nacho chips were contaminated by Jones's spit). Based on our finding in section II.A., above, that the trial court did not err in granting summary judgment to Taco Bell on the issue of vicarious liability, we conclude that summary judgment in favor of Taco Bell was proper on the issues of intentional infliction of emotional distress, gross negligence, and punitive damages. *See* G.S. § 1D-15(a) (punitive damages may not be awarded against a defendant absent liability for compensatory damages).

In summation, the trial court's grant of summary judgment in favor of Restaurant Management is vacated and remanded as to the trooper's claims for intentional infliction of emotional distress and gross negligence (on the basis of vicarious liability), and breach of the implied warranty of merchantability. However, the trial court's grant of summary judgment in favor of Restaurant Management is affirmed as to the trooper's claim for punitive damages, as well as his claims for intentional infliction of emotional distress and gross negligence insofar as those claims are based upon a theory of ratification by defendant Restaurant Management of the acts of defendant Jones. Finally, the trial court's grant of summary judgment in favor of Taco Bell is affirmed as to all of the trooper's claims.

Affirmed in part, reversed in part as to Restaurant Management.

Affirmed as to Taco Bell.

Judges McGEE and BIGGS concur.

STATE OF NORTH CAROLINA v. TIMOTHY LANE BEANE

No. COA00-421

(Filed 18 September 2001)

1. Witnesses— child—failure to administer oath

The trial court did not commit plain error in a taking indecent liberties and attempted first-degree statutory sexual offense case by failing to administer the oath to a four-year-old minor victim prior to taking her testimony, because the trial court determined that the minor victim did not understand the meaning of placing her hand on the bible and concluded that requiring her to do so would have been futile, but that the minor child did understand the importance of telling the truth.

2. Constitutional Law— right of confrontation—opportunity to cross-examine witness

The trial court did not violate defendant's rights under the Sixth Amendment Confrontation Clause in a taking indecent liberties and attempted first-degree statutory sexual offense case by denying defendant an opportunity to cross-examine a four-year-old minor victim during her competency voir dire, because: (1) as long as the victim's preliminary testimony supports a conclusion that she understood her duty to tell the truth, then the court's failure to grant a voir dire examination by defendant's counsel is harmless error; (2) where the trial court limits defendant's ability to confront witnesses at a competency hearing but allows defendant full cross-examination rights at trial, defendant's rights to confrontation under the Sixth Amendment are not violated; and (3) defendant was not excluded from the hearing, his attorney was present, and presumably he was allowed to confer with his attorney during and after the hearing.

3. Evidence— hearsay—corroboration

The trial court did not err in a taking indecent liberties and attempted first-degree statutory sexual offense case by admitting testimony by a four-year-old minor victim's family members and by a detective concerning the victim's out-of-court statements, because: (1) the testimony was used as corroboration and tended to add weight and credibility to the victim's testimony; (2) it is not necessary that corroborative evidence mirror the declarant's testimony and may include new or additional information as long as the new information tends to strengthen or add credibility to the

testimony it corroborates; and (3) there is no evidence indicating the statements were introduced as substantive evidence.

4. Appeal and Error— preservation of issues—failure to present argument or authority

The trial court did not abuse its discretion in a taking indecent liberties and attempted first-degree statutory sexual offense case by allegedly denying defendant an opportunity to meaningfully cross-examine witnesses and present a defense, because: (1) defendant failed to present an argument or authority demonstrating that the trial court's ruling concerning his cross-examination improperly influenced the jury's verdict; and (2) defendant failed to argue how not allowing the questions listed in his brief violated any rule or statutory provision, and a review of the specific questions reveals that they were leading, called for speculative answers, or solicited marginal relevant evidence.

5. Indecent Liberties; Sexual Offenses— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of taking indecent liberties and attempted first-degree statutory sexual offense at the close of all evidence, because there was ample evidence to support defendant's convictions.

Appeal by defendant from judgment entered 18 November 1999 by Judge James C. Davis in Union County Superior Court. Heard in the Court of Appeals 28 March 2001.

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

Lisa Miles for defendant appellant.

TIMMONS-GOODSON, Judge.

Timothy Lane Beane ("defendant") was convicted of one count of taking indecent liberties with a minor and one count of attempted first-degree statutory sexual offense. The trial court sentenced defendant to a term of 157 to 198 months' imprisonment. Defendant now appeals.

The evidence presented at trial tended to show that defendant was married to Lisa, the prosecuting witness' ("C.R.") aunt. C.R., who

was four years old at the time of trial, testified that while she was visiting defendant, he gave her a "bad touch" by "pull[ing] [her] legs up" and "kiss[ing] [her] down there" on her "no-no" which she "[p]ee[d] with." According to C.R., defendant also "put cold stuff on his finger and rubbed it down there and it hurted [sic]." C.R. further stated that at the time of the alleged incident, she was not wearing any clothing, because defendant had removed it. C.R. used anatomically correct dolls to demonstrate how defendant touched her. According to C.R., she related the above-noted incident to her stepgrandmother, her natural mother, her father, her stepmother, and the detective investigating the allegations, Robert L. Rollins ("Detective Rollins"), all of whom testified at trial.

C.R.'s stepgrandmother testified that in May 1998, she learned that C.R. disliked "Tim," her "mommy's sister's husband," because he was "mean to her" and "hurt her." Upon further inquiry by her stepgrandmother, C.R. told her that defendant had touched and kissed her "down there." Based upon her discussions with C.R., the stepgrandmother informed C.R.'s stepmother that the stepmother and C.R. needed to talk.

C.R.'s stepmother testified that defendant babysat for C.R. in May 1998. After being questioned by her stepmother, C.R., upset and crying, related that defendant had touched and kissed her "down there," pointing to her vaginal area. C.R. likewise told her father of the incident, and he testified to the same at trial. The father further recalled that when he and his wife took C.R. to visit defendant and Lisa, C.R. would "get really scared and start crying hysterically[,]" stating, "I don't want to be here. I don't want to see Tim." The father also testified that around the same time as the alleged incident, he and his wife noticed that C.R.'s vaginal area was red and swollen.

Upon learning of the alleged incident, C.R.'s father alerted local law enforcement authorities. A uniformed officer was dispatched to C.R.'s home, and shortly thereafter, Detective Rollins began his investigation. The detective testified at trial that in his first interview with C.R., the two discussed "good touches" and "bad touches," at which time, C.R. pointed to her vaginal area and stated, "Tim touched me down there." When Detective Rollins inquired as to Tim's identity, C.R. responded, "Lisa's Tim." In their second interview, C.R. used anatomically correct dolls to demonstrate the incident. It was Detective Rollins' opinion that C.R.'s behavior was consistent with that of other child victims of sexual assault.

Defendant called C.R.'s natural mother to testify on his behalf. The mother stated that C.R. informed her that "Tim had hurt her on her privates" only after the interview with Detective Rollins. Testifying on his own behalf, defendant denied ever inappropriately touching C.R.

Defendant raises ninety-eight assignments of error on appeal, but presents only six arguments in his appellate brief. As a preliminary issue, we note that all assignments of error for which no argument appears in defendant's brief are deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (2001).

Defendant assigns as error the following issues for review: the trial court erred (I) in failing to give the oath to C.R. prior to the admission of her testimony; (II) in not allowing defendant to cross-examine C.R. during her competency *voir dire*; (III) in admitting hearsay testimony as substantive evidence; (IV) in denying defendant a right to meaningfully cross-examine witnesses and present a defense; (V) in denying his motion to dismiss based upon the insufficiency of the evidence. Furthermore, defendant contends that the cumulative effect of the above-alleged errors was so prejudicial that he did not receive a fair trial.

(I)

[1] By his first assignment of error, defendant contends the trial court committed plain error in failing to administer the oath to C.R. prior to taking her testimony. We disagree.

Prior to the presentation of evidence, the trial court conducted a *voir dire* of C.R. to determine her competency to testify. The court first excused both the jury and others in attendance, except for the parties, C.R., C.R.'s father, and C.R.'s mother and stepmother. The court then proceeded with the *voir dire*, allowing the State to question C.R. C.R. answered standard background questions, after which time the following exchange took place:

Q: [the State]: And if I told you that this shirt was pink, would that be the truth or a lie?

A: [C.R.]: A lie.

Q: And what is a lie . . . ?

A: Something where you tell a thing that's not the right answer.

Q: And what happens when you tell a lie?

A: You get in trouble.

. . .

Q: What were you here to tell us today?

A: What Tim done [sic] to me.

Q: Okay. And when you tell us what Tim did to you, are you going to tell us the truth or tell us a lie?

A: The truth.

Q: And why were you going to tell us the truth?

A: Because it really happened.

. . .

Q: And do you understand that it's important to tell the truth?

A: Yes.

Q: Okay. And that's what you're going to promise to tell today, is the truth?

A: Yes.

The trial court further inquired of C.R. whether she attended church or studied the Bible, and whether she knew "what it mean[t] to put [her] hand on the Bible and raise [her] right hand and . . . take an oath to tell the truth." C.R. responded simply, "I do know to tell the truth." Based upon its inquiry, the court concluded that C.R. did not understand the significance of taking an oath and should not be required to do so. Defendant did not object to the court's ruling. Pursuant to C.R.'s *voir dire* testimony, the court subsequently concluded that she was competent to testify.

"[I]n a criminal prosecution, the defendant is entitled to have the testimony offered against him given under the sanction of an oath. This is a part of his constitutional right of confrontation." *State v. Robinson*, 310 N.C. 530, 539, 313 S.E.2d 571, 577 (1984). Therefore, "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." N.C. Gen. Stat. § 8C-1, Rule 603 (1999).

Despite the constitutional nature of the oath requirement, our appellate courts have consistently held that where the trial court fails to administer the oath to a witness, the defendant's failure to object waives appellate review of the court's error. *See Robinson*, 310 N.C. at 539-40, 313 S.E.2d at 577-78; *State v. Hendricks*, 138 N.C. App. 668, 671, 531 S.E.2d 896, 899 (2000); *State v. Sessoms*, 119 N.C. App. 1, 4, 458 S.E.2d 200, 202 (1995), *affirmed*, 342 N.C. 892, 467 S.E.2d 243, *cert. denied*, 519 U.S. 873, 136 L. Ed. 2d 129 (1996); *In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222-23 (1995). The rationale supporting the waiver of appellate review in the above-referenced cases is that "[i]f an objection had been made, the trial court could have corrected the oversight by putting the witness under oath and allowing him to redeliver his testimony, if necessary." *Robinson*, 310 N.C. at 540, 313 S.E.2d at 578.

Defendant acknowledges his failure to object, but argues that his omission should not entirely bar our review because, unlike in the above-cited cases, his objection would not have prompted the trial court to take corrective action. Given that the court's decision not to administer the oath was a deliberate one, we agree that defendant's failure to object does not absolutely bar our review in accordance with the aforementioned cases. The objection's futility notwithstanding, defendant should have objected to properly preserve the error. *See* N.C.R. App. P. 10(b)(1) (2001). Because defendant failed to comply with our Appellate Rules, he is entitled to relief only if he can demonstrate plain error. *See State v. Roseboro*, 351 N.C. 536, 552, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000).

Plain error is fundamental error amounting to a denial of the accused's basic rights. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To demonstrate plain error, the defendant must prove "(1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

We cannot say the trial court's failure to administer the oath to C.R. constituted a fundamental error having a probable impact on the jury's verdict. The court determined that C.R. did not understand the meaning of placing her hand on a Bible, and concluded that requiring her to do so would have been an exercise in futility. *See* N.C. Gen. Stat. § 8C-1, Rule 603 official commentary (1999) (stating that " '[t]he rule [concerning the oath] is designed to afford the flexibility

required in dealing with religious adults . . . and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.' ") (quoting Fed. R. Civ. P. 603, commentary); *State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269 (1992) (noting that "it is not necessary for a witness to understand the obligation to tell the truth from a religious point of view"), *cert. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). The trial court did conclude, however, that C.R. understood the importance of telling the truth and found her competent to testify. We determine that any error in the court's failure to administer the oath to C.R. was not plain error. *See Robinson*, 310 N.C. at 540, 313 S.E.2d at 578 (holding that trial court's failure to give oath to child witness did not amount to plain error). Accordingly, defendant's first assignment of error is overruled.

(II)

[2] By his second assignment of error, defendant argues the trial court erred in denying him an opportunity to cross-examine C.R. during her competency *voir dire* in violation of his rights under the Confrontation Clause. We disagree.

The Sixth Amendment's Confrontation Clause states, in pertinent part, "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *accord* N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with a crime has the right . . . to confront the accusers and witnesses with other testimony . . . ."). "The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736, 96 L. Ed. 2d 631, 641 (1987).

In concluding that defendant should not be allowed to cross-examine C.R. during her competency *voir dire*, the trial court ruled as follows:

> [Defendant] will be allowed latitude in [the] cross examination to try to discredit, so to speak, her ability to testify and know the difference between right and wrong. But you're not entitled in the qualifications of the witness to cross examine. Most of the time the Court itself will determine whether or not somebody is qualified to testify. I have chosen to put that burden on the State by requiring [it] to ask the questions of the child, in that I had no earthly idea with her being the age that she was whether she

would know anything at all, that she would be able to say. The qualification is not a matter of cross examination.

Under N.C. Gen. Stat. § 8C-1, Rule 601, "[e]very person is competent to be a witness" unless "the court determines that he is . . . incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601 (a)(b) (1999). Accordingly, all persons, regardless of age, are qualified to testify, unless they lack the capacity to understand the difference between telling the truth and lying. *See Davis*, 106 N.C. App. at 605, 418 S.E.2d at 269; *see also State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986) (stating that, as a matter of law, there is no age below which one is incompetent to testify), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987). Whether a witness is qualified to testify is a determination within the sound discretion of the trial court based on its observation of the witness. *See State v. Fields*, 315 N.C. 191, 204, 337 S.E.2d 518, 526 (1985). "Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987); *see also State v. Rael*, 321 N.C. 528, 532, 364 S.E.2d 125, 128 (1988) (upholding the trial court's finding that four-year-old victim of sexual abuse was competent to testify).

In the instant case, the trial court found C.R. competent to testify. Our review of the record supports the trial court's decision. C.R. demonstrated an adequate understanding of the truth and its importance, stating, "[y]ou get in trouble [if you lie]." Our Supreme Court has found similar evidence sufficient to support a conclusion that a child witness was competent. *See State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984) (upholding the trial court's determination that a child witness was competent where she testified that she would get a spanking if she did not tell the truth). Thus, the trial court did not abuse its discretion in finding C.R. competent to testify.

In *State v. Huntley*, 104 N.C. App. 732, 737, 411 S.E.2d 155, 158 (1991), *disc. review denied*, 331 N.C. 288, 417 S.E.2d 258 (1992), this Court upheld the trial court's refusal to allow defense counsel an opportunity to conduct a *voir dire* examination of the child witness before the trial court qualified the child as a competent witness. In *Huntley*, defendant objected to the child victim being sworn as a witness and requested a *voir dire* examination to determine her competency. The trial court denied defendant's request, and the State elicited the following information from the child witness:

[MR. WILLIAMS]: And do you know the difference between telling the truth and not telling the truth?

[PROSECUTRIX]: Tell the truth.

Q: Do you know what a lie is?

A: [No answer.]

Q: If I said you were a boy, would that be the truth or not the truth?

A: Not the truth?

Q: And what happens—what does your mother do when you don't tell the truth?

A: [No answer.]

Q: Do you know what happens if you don't tell the truth?

A: No.

Q: Is it good to tell the truth?

A: Yeah.

Q: Are you going to tell the truth today?

A: Yeah.

Q: Do you promise to tell the truth about what happened, about what [defendant] did?

A: Yeah.

Huntley, 104 N.C. App. at 735-36, 411 S.E.2d at 157. In rejecting defendant's argument that defense counsel should have been allowed to conduct a *voir dire* examination of the child before she was qualified as a competent witness, we stated that, "as long as the victim's preliminary testimony supported a conclusion that she understood her duty to tell the truth, then the court's failure to grant a [*voir dire*] examination by defendant's counsel is harmless error." *Id.* at 737, 411 S.E.2d at 158. Because the "testimony recited demonstrate[d] the child's understanding of her obligation to tell the truth and indicate[d] her promise to tell the court what occurred[,]" any error to the defendant was harmless. *Id.*

In *Kentucky v. Stincer*, 482 U.S. 730, 96 L. Ed. 2d 631 (1987), the U.S. Supreme Court held that the defendant's rights under the

Confrontation Clause were not violated where the defendant was physically excluded from the competency hearing of the child witnesses because the defendant was given an opportunity to cross-examine the witnesses at trial. *Stincer*, 482 U.S. at 744, 96 L. Ed. 2d at 647. The Court concluded that "the critical tool of cross-examination was available to counsel as a means of establishing that the witnesses were not competent to testify, as well as a means of undermining the credibility of their testimony." *Id.* at 744, 96 L. Ed. 2d at 646-47. The Court further held that because the questions posed at the competency hearing were easily repeated in the defendant's presence at trial, the character of the hearing itself militates against finding a violation of the defendant's Confrontation Clause rights. *Id.* at 739-41, 96 L. Ed. 2d at 643-44.

Stincer indicates that where the trial court limits defendant's ability to confront witnesses at a competency hearing but allows defendant full cross-examination rights at trial, defendant's rights to confrontation under the Sixth Amendment are not violated. Furthermore, any prejudice suffered by the defendant may be further mitigated by the circumstances surrounding the competency hearing and the character of questions posed therein.

Applying *Huntley* and *Stincer* to the case *sub judice*, we determine that the trial court's decision to disallow defense counsel to cross-examine the child witness at the competency hearing was harmless error. Because defendant was given an opportunity to cross-examine C.R. at trial, his right to confrontation was not violated, nor was he prejudiced by the court's initial ruling regarding C.R.'s competency to testify. C.R.'s testimony revealed that she understood the import of her statements to the court, as well as the distinction between the truth and a lie. C.R. further repeated the substance of her *voir dire* testimony for the jury.

Moreover, the nature of the questions posed during the competency *voir dire*, as well as the circumstances therein, mitigated any interference with defendant's constitutional rights. Defendant was not excluded from the hearing, his attorney was present, and, presumably, he was allowed to confer with his attorney during and after the hearing. The State's inquiry was clearly intended to establish C.R.'s qualifications to testify. Although there were questions concerning the substance of C.R.'s testimony, including inquiry as to why she was there and what defendant was wearing, these questions were limited and asked for the sole purpose of establishing C.R.'s understanding of the issues and her qualifications to testify.

Finally, the State repeated the substance of its inquiry during C.R.'s direct examination.

Defendant acknowledges that he was given an opportunity to cross-examine C.R. at trial, but argues that his cross-examination was ineffective. Defendant lists at least seventeen objections made by the State during his cross-examination and sustained by the court. Defendant notes that the State never stated the basis for its objections, nor did the court explain why it sustained the objections. Based upon these objections, defendant contends that the error in excluding him from participating in the competency hearing was prejudicial.

Our review of the evidence does not support defendant's contention. For example, many of the objections concerned defense counsel's inadvertent references to C.R.'s family members by the wrong name. Likewise, the court sustained an objection where defense counsel apparently referred to Detective Rollins by the prosecutor's name. Following at least three of the objections, defendant requested a bench conference. Although the court granted defendant's requests, the substance of those conferences do not appear on the record, nor does it appear that defendant insisted the conference appear on the record. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) (noting that it is the appellant's responsibility to compile a complete and accurate record on appeal). At other times, defendant failed to rephrase obviously improper questions in light of an objection.

More importantly, defendant's questions similar to those posed by the State at the competency hearing were not challenged, with the exception of a request for clarification. The court did sustain objections to defendant's inquiring of C.R. as to whether Defendant Rollins recorded any of her statement. However, the court ruled that defendant could recall C.R. for questioning following Detective Rollins' testimony. Also, the court allowed defendant to view Detective Rollins' notes from his interviews with C.R. and to use the notes during defense counsel's cross-examination of the detective.

Defendant fails to recognize that the Sixth Amendment protects only " 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Stincer*, at 739, 96 L. Ed. 2d at 643 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (*per curiam*)). We further note that the trial court has wide discretion in controlling the scope of cross-examination. *See* N.C.

Gen. Stat. § 8C-1, Rule 611 (1999); *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990) (stating that, "although cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court"). The trial court's discretion over cross-examination is especially appropriate where, as here, the witness is very young.

Contrary to defendant's contentions, we conclude that defendant's opportunity to effectively cross-examine C.R. at trial cured any prejudice he may have suffered in not being allowed to question the witness during the competency *voir dire*. Accordingly, defendant's second assignment of error is overruled.

(III)

[3] Defendant further argues that the trial court erred in admitting certain testimony by C.R.'s family members and by Detective Rollins concerning C.R.'s out-of-court statements. Defendant argues that the testimony was hearsay, improperly admitted as substantive evidence.

At trial, defendant objected to the admission of C.R.'s out-of-court statements during the testimony of her stepmother and stepgrandmother. Defendant did not object, however, to similar testimony by Detective Rollins and C.R.'s father concerning C.R.'s out-of-court statements. The State contends on appeal that the failure of defendant to challenge the admission of the statements during the testimony of Detective Rollins and C.F.'s father waives our review of this assignment of error. We are not so persuaded.

During the testimony of C.R.'s stepgrandmother, defendant objected to the admission of C.R.'s out-of-court statements on the basis of hearsay and further stated, "I'm going to object to the whole line of question and answers by the witness." Contrary to the State's assertion, we find that the foregoing objection preserved defendant's challenge to the line of questioning at issue in this assignment of error.

An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible at trial. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c), 802 (1999). However,

> [i]t is well-settled that a witness' prior consistent statements are admissible to corroborate the witness' sworn trial testimony. Corroborative evidence by definition tends to "strengthen, con-

> firm, or make more certain the testimony of another witness." Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates.

State v. McGraw, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497, *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000) (citations omitted).

In the present case, C.R.'s out-of-court statements, as testified to by her family and Detective Rollins, tended to add weight and credibility to her testimony. As stated previously, the fact that C.R.'s testimony was unsworn does not constitute plain error. Furthermore, the only evidence that did not directly corroborate C.R.'s testimony was the testimony given by her father. C.R.'s father testified that C.R. expressed discontent when he took her to visit defendant and his wife. As stated *supra*, it is not necessary that corroborative evidence mirror C.R.'s testimony and "may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates." *Id.*

Defendant further argues that the out-of-court statements were not introduced to corroborate C.R.'s testimony, but as "substantive evidence much more compelling than the unsworn ramblings of a child who needed to be constantly led." We disagree.

Despite defendant's arguments to the contrary, there is no evidence in the transcript indicating that the statements were introduced as substantive evidence. The better practice would have been for the State to specify the purpose for which the statements were offered. Defendant did not challenge the State's failure to specify the purpose for which the evidence was being offered, however, and there was no requirement for the State to do so. *Id.* at 730, 529 S.E.2d at 497. We conclude that the testimony of family members and Detective Rollins corroborated C.R.'s statements at trial and were admissible for that purpose. We therefore overrule defendant's third assignment of error.

(IV)

[4] We next address defendant's argument that the trial court denied him an opportunity to meaningfully cross-examine witnesses and present a defense. To support his argument that he was denied meaningful cross-examination, defendant presents a list of the trial

court's rulings against him. Defendant does not, however, point to a single ruling by the trial court that violates a particular rule of evidence or procedure. Instead, defendant simply urges this Court to "read the 328-page transcript."

"In the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice . . . are within the trial judge's discretion." *State v. Young*, 312 N.C. 669, 678, 325 S.E.2d 181, 187 (1985). Because the scope of cross-examination is within the court's discretion, the court's rulings "will not be held to be error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Barber*, 317 N.C. 502, 506-07, 346 S.E.2d 441, 444 (1986).

Our review of the transcript reveals no general bias for the State on the part of the trial court, nor an abuse of discretion concerning the defendant's opportunity to cross-examine witnesses. Furthermore, defendant fails to present argument or authority demonstrating that the court's ruling concerning his cross-examination improperly influenced the jury's verdict. Nor do we find that the sustaining of objections to defendant's cross-examination improperly prejudiced defendant's case. We therefore conclude that the court's rulings did not impede defendant's opportunity to meaningfully cross-examine witnesses.

Regarding his argument that he was not allowed to present a defense, defendant contends that during his own testimony, "the trial court denied [him] the opportunity to answer the most basic questions, questions designed to establish his credibility and to allow him the opportunity to deny the very allegations against him." Defendant cites a list of several objections to specific questions, which he claims attempted to solicit important background information, demonstrate his character and the biases of other witnesses, allow him to deny allegations, and rebut the State's case. We disagree.

Again, defendant fails to argue that not allowing the questions listed in his brief violated any rule or statutory provision. Furthermore, our review of the specific questions cited reveals that the questions were leading, called for speculative answers, or solicited marginally relevant evidence at best. *See State v. Satterfield*, 300 N.C. 621, 627, 268 S.E.2d 510, 515 (1980) (noting that the trial court may bar repetitious, argumentative or irrelevant questioning). We hold the court did not abuse its discretion in sustaining objections

to the questions cited by defendant, and we thus conclude that defendant was not denied the opportunity to present a defense.

(V)

[5] Defendant next assigns error to the trial court's denial of his motion to dismiss made at the close of all of the evidence. Having thoroughly reviewed defendant's argument supporting this assignment of error and the record on appeal, we determine there was ample evidence to support defendant's conviction for both attempted first-degree sexual offense and taking indecent liberties with a minor. *See* N.C. Gen. Stat. §§ 14-27.4(a)(1) and 14-202.1(a) (1999). Accordingly, this assignment of error is overruled.

Given our resolution of the foregoing issues, we find no merit in defendant's final argument that he was prejudiced by the cumulative effect of the trial court's alleged errors.

For the reasons contained herein, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. RONNIE LANE STANCIL

No. COA00-581

(Filed 18 September 2001)

1. Evidence— expert testimony—sexual assault—credibility

The trial court did not commit plain error in a first-degree sexual offense case by allowing the State's expert witnesses to state opinions about whether the seven-year-old child victim had been sexually assaulted and about the child's credibility, because: (1) a physical exam was given within hours after the incident and interview, and the nature of the sex act was not likely to leave forensic evidence particularly after the child used the bathroom; (2) the child was consistent in relating facts during each interview and exhibited physical symptoms of trauma; (3) the expert testimony was based on the overall examination of the child dur-

ing the course of treatment rather than solely on the child's statements; and (4) each opinion was given by an expert in the field of child abuse or child investigation and interviews who had observed the child, noted her symptoms and manifestations, conducted at least one interview with her, and was aware of her account of the incidents to others.

2. Evidence— testimony—sexual assault—child's allegations did not vary—prior consistent statements—corroboration

The trial court did not err in a first-degree sexual offense case by allowing the State's witnesses to testify that the seven-year-old child victim's allegations did not vary, because: (1) the witnesses first related to the jury what the victim had told them and then testified that she had not changed her story; and (2) the child's prior consistent statements are admissible to corroborate the testimony of the witnesses.

3. Evidence— hearsay—medical diagnosis or treatment exception

The trial court did not err in a first-degree sexual offense case by allegedly allowing hearsay statements of the seven-year-old child victim because the interviews occurred in the hospital almost immediately after the incident, showing that the victim made the statements for purposes of medical diagnosis and treatment.

4. Evidence— lay witness—observations of child sexual assault victim—relevancy

The trial court did not err in a first-degree sexual offense case by allowing a lay witness to testify regarding her personal observations of the seven-year-old child victim, because: (1) the witness testified as to her observations of the child when she was in her presence before and after the assault, and she did not testify about the child's character; and (2) observations by a lay witness as to the behavior of an alleged victim before and after an incident are relevant as to whether the incident occurred.

5. Evidence— testimony—post-traumatic stress disorder—sexual assault—general behavioral and psychological characteristics

The trial court did not err in a first-degree sexual offense case by allegedly allowing testimony regarding post-traumatic stress disorder without giving a limiting instruction, because the State's

expert witnesses did not testify that the child victim was suffering from post-traumatic stress syndrome but merely testified as to the general behavioral and psychological characteristics of sexually abused children and described their personal observations of the child.

6. Evidence— testimony—sexual abuse—no physical findings—lifelong problems of victim—victim developed fear of men

The trial court did not err in a first-degree sexual offense case by allowing testimony that sixty to eighty percent of similar sexual abuse cases do not have any physical findings, that seventy percent of children who are sexually abused have lifelong problems, and that the victim apparently developed a fear of men, because: (1) the testimony concerning the percentages was based on the experts' knowledge and experience in the area of child sexual abuse; and (2) the testimony about the victim's fear of men was based on the witness's personal observations.

7. Sexual Offenses— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense under N.C.G.S. § 14-27.4(a)(1) at the close of all evidence, because our courts have consistently held that an alleged victim's testimony is sufficient to establish that the accused committed a completed act of cunnilingus by placing his tongue on her pubic area.

Judge BIGGS dissenting.

Appeal by defendant from judgment entered 16 September 1999 by Judge Dennis J. Winner in Cabarrus County Superior Court. Heard in the Court of Appeals 19 April 2001.

Attorney General Michael F. Easley by Special Deputy Attorney General Lorinzo L. Joyner & Assistant Attorney General Anne M. Middleton for the State.

Grace & Clifton by Michael A. Grace & Christopher R. Clifton for defendant-appellant.

THOMAS, Judge.

Defendant, Ronnie Lane Stancil, was found guilty in a jury trial of first-degree sexual offense. He was sentenced to a minimum of 192 months and a maximum of 240 months in prison. From this conviction and sentence, defendant appeals and sets forth eight assignments of error.

The State's evidence tended to show the following: The child, a seven year-old female, went to a friend's home to play with her on 4 June 1998. Defendant, the friend's uncle, was the only one there at the time. The child had met defendant during earlier visits and, following his invitation, went inside to await her friend's return. She colored in a book and eventually, after going outside with defendant several times and returning, began falling asleep on the couch. She then felt something "wet and yucky." The child looked down and saw defendant licking her "privacy," which she identified as her vaginal area. She told defendant she had to leave and he responded by saying "you're not going to tell anybody, are you?" She crossed her fingers behind her back, agreed not to tell and ran home. She immediately told her father what defendant had done to her.

The child's father referred to her as being hysterical, crying and shaking badly as she told him about the incident. As soon as she finished describing the event, he telephoned the police.

When Concord Police Officer Audrey Bridges (Bridges) arrived at their home, the child was sitting on a couch sobbing. After calming down, the child told Bridges she went to a friend's house to play but her friend was not there; that a man was there and told her she could wait; while she was inside the house, the man pulled up her shirt and licked her on the chest; and that he pulled her panties to the side and licked her "spot." When asked what her "spot" was, she pointed to her vagina.

Officer Brandon Eggleston (Eggleston) instructed the family not to change the child's clothes until after she was examined at the hospital and not to allow her to use the bathroom because of the possibility of wiping away evidence of the assault. Nevertheless, the child did use the bathroom prior to an examination.

After she was interviewed by the police, the child's parents took her to Northeast Medical Center for treatment. She was interviewed by Chris Ragsdale (Ragsdale), a psychologist with the Child Advocacy Center located in the hospital; Dr. Henant Prakash (Prakash), a pedi-

atrician who also performed a physical examination on the child; and Donna Ezzell (Ezzell), a certified sexual assault nurse. Ragsdale was qualified at trial, without objection, as an expert in child investigation and interviews. Prakash was qualified at trial, without objection, as an expert in pediatric medicine specializing in child abuse.

According to Ragsdale, the child related facts consistent with what she had told police and her father. She exhibited "a great deal of anxiety," compressed speech and hand-wringing throughout the interview. Based on his observations of the child, his interview with her and the consistency of her account to others, Ragsdale opined that it was all "consistent with exposure to child maltreatment."

According to Prakash, the child related essentially the same facts to her that she had previously told her parents, the police, Ragsdale and Ezzell. Prakash noted that the child was "very intelligent, very articulate." The physical examination itself revealed no abnormalities. However, Prakash testified that in sixty to eighty percent of cases with similar facts, the physical examinations were normal. She added that, in her opinion, the child's history, demeanor, and exam were consistent with sexual abuse.

Five days after first examining her, Prakash saw the child again, this time for abdominal pains and headaches. No physical causes were found. Prakash attributed the symptoms to anxiety from the June 4th events. When asked if they were symptoms of "someone who had been abused," she responded, "Yes, it can be."

Prakash's overall conclusion was that the child "was sexually assaulted and [that there was] maltreatment, emotionally, physically and sexually."

Officer Eggleston, meanwhile, had collected the rape kit from the hospital, the clothing the child had been wearing, a pair of sunglasses and a Yak-Bak toy she had taken to her friend's home. The items were sent to the State Bureau of Investigation laboratory for analysis but the test results were inconclusive.

Defendant's evidence tended to show the following: Kathy Pressley, defendant's sister, testified the Pressleys had a standing rule that no other children were allowed to visit there unless the Pressley parents were present. She said the child had previously violated the rule and would sometimes come to their home and try to force herself in. She also related that six months prior to this incident, the child had a temper tantrum during a birthday party there.

Robin Fuller also testified regarding the child's temper tantrum at the birthday party. William Carter testified about the child wandering the neighborhood during daytime hours.

Defendant did not testify.

[1] By his first and second assignments of error, defendant argues the trial court erred in allowing expert witnesses for the State to testify about: (1) whether the child had been sexually assaulted; and (2) the credibility of the child.

Defendant did not object at trial to the questions which resulted in Ragsdale saying the child's anxiety, compressed speech, handwringing, the interview itself and the consistency of the child's account to others all were "consistent with exposure to child maltreatment." Likewise, there was no objection when questions were asked on direct examination which led to Prakash saying the child's history, demeanor and exam were consistent with sexual abuse and then saying the child "was sexually assaulted and [that there was] also maltreatment, emotionally, physically and sexually."

We note that in these assignments of error, defendant fails to properly present the issues pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 10. Specifically, defendant argues plain error in his brief, yet neglects to assert plain error as a basis for appeal in the corresponding assignments of error. He is therefore deemed to have waived his right for this Court to conduct a plain error review. *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995). However, under Rule 2, this Court exercises its discretionary power to review defendant's appeal on the merits, pursuant to a "plain error" standard of review. N.C.R. App. P. 2.

Our Supreme Court has held a doctor's opinion is properly excluded if it is based on speculation or conjecture, without adequate underpinning. *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989). Nonetheless, Rule 704 states that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. R. Evid. 704. This Court held an expert opinion to be admissible as to whether a child had been abused in *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988), where the opinion testimony of a social worker and pediatrician was based upon each witness's examination of the victim and expert knowledge concerning the abuse of children. *See also State v. Figured*, 116 N.C. App. 1, 446 S.E. 2d 838 (1994), *rev. denied*, 339 N.C. 617, 454 S.E.2d 261 (1995).

Notwithstanding these cases, this Court held in *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *rev. allowed*, 353 N.C. 454, 548 S.E.2d 164 (2001), that in the absence of physical evidence of abuse, an expert cannot base his conclusions *solely* on the children's statements that they had been abused. In *Grover*, the physical exam was given more than a month after the alleged incident and after an interview with a social worker. The nature of the alleged abuse (anal and vaginal penetration) was such that physical findings were likely. There were no clinical findings of anxiety, depression, anger or fear.

The facts in *Grover* are distinguishable from those in the instant case. Here, the physical exam was given within hours after the incident and interview, the nature of the sexual act (cunnilingus) was not likely to leave forensic evidence, particularly after the child used the bathroom. The child not only was consistent in relating facts during each interview but also exhibited physical symptoms of trauma such as compressed speech, hand-wringing, shaking, nervousness and anxiety. The expert testimony in the instant case was based on the overall examination of the child during the course of treatment, rather than solely on the statements. Each opinion was given by an expert in the field of child abuse or child investigation and interviews who had observed the child, noted her symptoms and manifestations, conducted at least one interview with her (and, as to Prakash, conducted two physical exams) and was aware of her account of the incident to others. Thus, the testimony at issue was not based *solely* on the child's statements.

Additionally, we note plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. *State v. Parker*, 350 N.C. 411, 516 S.E.2d 106 (1999). In the instant case, the jury had before it: (1) the testimony of the child; (2) evidence of her intense and immediate emotional trauma after the incident; (3) the consistency of her accounts; (4) her demeanor and physical manifestations during the interviews and first physical exam; (5) evidence of her symptoms and exam by Prakash five days later; and (6) the conclusions of two experts that her actions and statements were consistent with child maltreatment or abuse. There was overwhelming evidence against defendant. Moreover, the only evidence defendant presented in contravention went strictly to the credibility of the child and her behavior in the neighborhood, not the facts of the incident. Defendant has not shown any fundamental error

that resulted in a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. Accordingly, we reject these assignments of error.

[2] By his third assignment of error, defendant argues the trial court erred by allowing witnesses for the State to testify that the victim's allegations did not vary. Again, we disagree.

Defendant cites *State v. Norman*, 76 N.C. App. 623, 334 S.E.2d 247, *rev. denied*, 315 N.C. 188, 337 S.E.2d 863 (1985), to argue expert testimony offered to bolster the victim's credibility was error. In *Norman*, this Court found prejudicial error because the police officer was not asked to relate to the jury what the victim told him before being asked whether the statements were consistent with the victim's trial testimony. By contrast, in the instant case, the witnesses first related to the jury what the victim told them and then testified that she had not changed her story. This Court held in *State v. Stallings* that:

> Prior consistent statements of a witness are admissible to corroborate the testimony of that witness if the statements in fact corroborate the testimony. *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). "The fact that a witness made a prior consistent statement is admissible as evidence tending to strengthen the witness' credibility." *State v. Cox*, 303 N.C. 75, 83, 277 S.E.2d 376, 381 (1981). Prior consistent statements are admissible even when there has been no impeachment. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983).

State v. Stallings, 107 N.C. App. 241, 247, 419 S.E.2d 586, 590 (1992), *rev. improv. allowed*, 333 N.C. 784, 429 S.E.2d 717 (1993). We find that the child's prior consistent statements are therefore admissible and reject this assignment of error.

[3] By his fourth assignment of error, defendant contends the trial court allowed hearsay statements of the victim not made for the purpose of medical diagnosis or treatment.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c). Hearsay statements are inadmissible at trial unless allowed by statute or an applicable exception. N.C. R. Evid. 802. Under the North Carolina Rules of Evidence, statements for the purposes of medical

diagnosis fall within an exception to the hearsay rule. N.C. R. Evid. 803(4). These include "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.*

Our Supreme Court in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), set forth a two-prong test for testimony to be admitted under this rule. First, the trial court must determine whether the declarant intended to make the statements to obtain medical diagnosis or treatment. Second, the trial court must determine whether the declarant's statements were reasonably pertinent to medical diagnosis or treatment. Defendant contends there was insufficient evidence of the child's motive in making the statements and insufficient evidence the child comprehended the interview was for the purpose of providing medical treatment. We disagree.

In the instant case, the interviews complained of occurred in the hospital almost immediately after the incident. The child had run home and told her father about the assault. The father quickly called police. Within hours and while still emotionally upset, she was taken to the hospital. While at the hospital, the child was interviewed by a social worker, a nurse and a physician in order to determine the child's diagnosis. Moreover, the child testified at trial that she went to the hospital because defendant "hurt her privacy." The child then returned to see Prakash five days later due to abdominal pain and headaches.

These facts are analogous to those of *In re Clapp*, 137 N.C. App. 14, 526 S.E.2d 689 (2000), where the defendant made the child disrobe and licked her privates. Immediately after the incident, the child in *Clapp* told her mother, who at once called police and took her to the hospital. The child told the examining physician the same facts. The *Clapp* Court held that the statements to the child's mother and physician were admissible under the medical diagnosis and treatment exception of Rule 803(4). Likewise, in the instant case, the evidence presented at trial is sufficient to support the trial court's conclusion that the victim made the statements for purposes of medical diagnosis and treatment. Accordingly, we reject this assignment of error.

[4] By his fifth assignment of error, defendant argues the trial court erred by allowing a lay witness to testify regarding her personal observations of the child. We disagree.

Tessie Hendricks (Hendricks), a family friend, testified the child had "always been a wonderful child" and "got along well with everybody up until just here, when this happened." Defendant contends this was impermissible general character evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b).

Such testimony is admissible so long as it satisfies the test of relevancy in Rules 401 and 402 of the North Carolina Rules of Evidence. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. The witness merely testified as to her observations of the child when she was in her presence before and after the assault. She did not testify about the child's character. Observations by a lay witness as to the behavior of an alleged victim before and after an incident are relevant as to whether the incident occurred. Defendant cites no authority for the exclusion of such evidence. Thus, we reject defendant's fifth assignment of error.

[5] By his sixth assignment of error, defendant argues the trial court erred in allowing testimony regarding post-traumatic stress disorder without giving a limiting instruction. We disagree.

Defendant cites *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992) in support of his position. In *Hall*, our Supreme Court addressed the admissibility of expert testimony that the prosecuting witness was suffering from post-traumatic stress syndrome. The *Hall* Court held, in part, that where an expert testifies the victim is suffering from post-traumatic stress syndrome, the testimony must be limited to corroboration of the victim. However, *Hall* is not applicable here since no witness testified the child was suffering from post-traumatic stress syndrome. Further, this Court, in *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), *rev. denied*, 335 N.C. 563, 441 S.E.2d 132 (1994), held that expert testimony regarding the nature of child sexual abuse, the general characteristics of sexually abused children and the psychological symptoms of being molested did not constitute evidence of post-traumatic stress disorder.

In the instant case, defendant improperly characterizes the testimony of Ragsdale and Prakash as opinion evidence that the victim suffered from post-traumatic stress syndrome. The witnesses merely testified as to the general behavioral and psychological characteristics of sexually abused children and described their

personal observations of the child. As such, their testimony was admissible without a limiting instruction and we reject this assignment of error.

[6] By his seventh assignment of error, defendant argues the trial court erred by allowing irrelevant and prejudicial testimony. We disagree.

Again, relevant evidence is any evidence having a tendency to make the existence of any fact in controversy more probable than it would be without the evidence. N.C. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403.

Defendant cites as examples of such improper evidence: (1) testimony from Prakash that sixty to eighty percent of similar sexual abuse cases do not have any physical findings; (2) Ragsdale's testimony that seventy percent of children who are sexually abused have lifelong problems; and (3) Hendricks's testimony that the victim had apparently developed a fear of men.

The examples cited by defendant were both relevant and admissible. The testimony of Prakash and Ragsdale was based on their knowledge and experience in the area of child sexual abuse. The testimony of Hendricks was based on her personal observations. There was no danger of the concerns set forth in Rule 403, such that the evidence should have been excluded. Accordingly, this assignment of error is rejected.

[7] By his eighth and final assignment of error, defendant argues the trial court erred in denying his motion to dismiss at the close of all the evidence. We disagree.

In reviewing a motion to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Defendant was convicted of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1), the elements of which are: (1) engaging in a sexual act; (2) with a child under the age of thirteen; (3) the defendant at least age twelve; and (4) the defendant at least four years older than the victim. *See* N.C. Gen. Stat. § 14-27.4(a)(1) (1999).

Defendant challenges only the sufficiency of the evidence as to the sexual act. The State presented evidence that defendant licked the child's "privacy." By use of an anatomical doll, she identified her privacy as her vaginal area. Medical evidence is not required to support a conviction of first-degree sexual offense. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Our courts have consistently held an alleged victim's testimony is sufficient to establish that the accused committed a completed act of cunnilingus by placing his tongue on her pubic area. *See State v. Weathers*, 322 N.C. 97, 366 S.E.2d 471 (1988); *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981). The State presented substantial evidence of each element of the offense charged. Accordingly, this assignment of error is rejected.

NO ERROR.

Judge MARTIN concurs.

Judge Biggs dissents.

BIGGS, Judge Dissenting.

I respectfully dissent from the majority's finding of no error by the trial court. It was error to permit Dr. Prakash to testify, without a proper foundation, that the child "was sexually assaulted and [that there was] also maltreatment, emotionally, physically and sexually." Moreover, on the facts of this case, the testimony was sufficiently prejudicial to constitute plain error, entitling defendant to a new trial.

A qualified expert may testify, like any other witness, to his or her own observations. *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979). Further, a medical expert offering testimony in a case involving sexual abuse may testify as to whether these observations are "consistent with" sexual abuse. *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988) (holding that doctor's testimony that physical examination was 'consistent with' victim's earlier statements is "vastly different

from" comments on victim's credibility); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). However, it is well settled that an expert may not testify that a child "was sexually abused" if the expert's conclusion is based solely on the child's account of events. *State v. Parker*, 350 N.C. 411, 516 S.E.2d 106 (1999); *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987); *State v. Dick*, 126 N.C. App. 312, 485 S.E.2d 88, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Before an expert may testify unequivocally that abuse did occur, "[t]he State [is] required to lay a sufficient foundation to show that the opinion expressed by [the expert] was really based upon [the expert's] special expertise, or stated differently, that [the expert] was in a better position than the jury to have an opinion on the subject." *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465. Absent this foundation, the expert's testimony is reduced to a validation of the honesty of the child; such testimony is inadmissible as an improper comment on a witness's credibility.

The testimony offered by the State in this case is similar to testimony offered in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705, in which the Court found the opinions inadmissible because the State failed to lay sufficient foundation. A proper foundation must include information other than the child's statements; such evidence may be emotional, *see State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794 (2000) (psychologist who treated victim for psychological disorders properly permitted to state that in her opinion child had been abused), or physical, *see State v. Dick*, 126 N.C. App. 312, 485 S.E.2d 88, (abnormality of child's hymen supported her statements to doctor).

In the instant case, Dr. Prakash testified that she had reviewed an interview between the child and a social worker, Mr. Ragsdale, in which the child repeated her account of the alleged incident, and had conducted a thorough physical examination. Prakash then testified as follows:

> Q: Was Stephanie's history and demeanor consistent with some of the other patients you've seen?
>
> A: Well, every case is different. Every history is different.
>
> Q: Stephanie was, did she become tearful or cry or—
>
> A: She was scared, she was scared.
>
> Q: Again, was that unusual or anything different from what you normally see with a child?

A: No. I would be scared too to get examination done at eight years of age.

Q: Would you say that Stephanie's history, demeanor and exam was consistent with sexual abuse?

A: Yes.

Q: And why do you say that?

A: Because of this history that I took from her and because of physical examination, too, that is consistent with the history.

Q: You mean she did not allege something where you would expect to find something; is that correct? She didn't allege a penetration then you don't find it.

A: I don't find it.

Q: Dr. Prakash, after discussing the medical history that you received from Mr. Ragsdale and then examining Stephanie, did you reach a medical conclusion?

A: Yes I did.

Q: And what was that conclusion?

A: She was sexually assaulted and also maltreatment, emotionally, physically and sexually.

(emphasis added)

Dr. Prakash's opinion testimony lacked any real basis beyond her belief in the child's credibility. On cross-examination, Dr. Prakash testified that the lack of physical findings was consistent with either abuse or with the absence of any abuse. Prakash testified that the child's demeanor during the examination was essentially normal. The physical examination did not reveal any supporting findings. The child made only one additional visit to Dr. Prakash, for treatment of headaches and abdominal pain. No psychological tests were administered; nor was the child-witness being treated for any ongoing physical or emotional disorders. In sum, the doctor's testimony that sexual abuse had occurred, "vastly different from" more appropriate testimony about the consistency of her findings with other evidence, lacked a proper foundation and should not have been admitted.

Further, on the facts of this case, the admission of this testimony constituted plain error. There were no witnesses to the alleged inci-

dent other than the child and the defendant. No other witnesses testified to any inappropriate behavior by defendant. No physical injuries were inflicted, and no physical corroboration was presented. Most of the witnesses were "interested;" e.g., the child, her family, and the defendant's sister. The evidence provided little basis, other than the child's testimony, for the jury to determine whether the defendant had committed the charged offense. Against this backdrop, Dr. Prakash's unequivocal and dramatic testimony that the child "was sexually assaulted and also maltreatment, emotionally, physically and sexually" likely "tipped the scales" and determined the outcome of the trial. While there are few more serious crimes than sexual abuse of a child, we must be careful not to disregard the rights of one to protect the rights of another.

The defendant is entitled to a new trial.

TRAVIS CLAY PINNEY, WILLIAM H. DICK, PLAINTIFFS v. STATE FARM MUTUAL INSURANCE COMPANY, EUGENE DAVIS AND DAVID HARLING, DEFENDANTS

No. COA00-1007

(Filed 18 September 2001)

1. Civil Procedure— submission of additional documents— failure to convert motion to dismiss into motion for summary judgment

The trial court did not err by failing to convert defendants' motion to dismiss into a motion for summary judgment in an action arising out of the alleged failure of defendant insurance company and its agents to explain the extent of insurance coverage and the difference between uninsured motorist coverage versus underinsured motorist coverage, because: (1) the trial court clearly stated that none of the additional documents and a cassette tape submitted by plaintiffs were considered by the court in its order of dismissal; and (2) our Court of Appeals has previously held that the trial court was not required to convert a motion to dismiss into one for summary judgment simply because additional documents were submitted.

2. Civil Procedure— consideration of supplemental materials—local rules

The trial court did not err by considering defendants' objection to plaintiffs' submission of supplemental materials in an action arising out of the alleged failure of defendant insurance company and its agents to explain the extent of insurance coverage and the difference between uninsured motorist coverage versus underinsured motorist coverage, because: (1) even if defendant's objection fell under Local Rule 11.7 concerning timeliness of filing, the trial court has wide discretion in the application of local rules; and (2) plaintiffs have not shown the trial court abused its discretion in considering defendants' objection.

3. Insurance— automobile—UIM coverage—motion to dismiss—sufficiency of evidence

The trial court did not err by granting the motion of defendant insurance company and its agents to dismiss plaintiffs' complaint for failure to state a claim for underinsured motorist (UIM) coverage, because: (1) there was no genuine issue of material fact as to whether plaintiff had UIM coverage under N.C.G.S. § 20-279.21(b)(4) since the insurance policy only provided the minimum coverage required by statute, and UIM coverage is to be provided to policies with limits exceeding the minimum limits unless rejected; and (2) plaintiffs are not entitled to any benefits from defendants since plaintiffs only have uninsured motorist coverage, and the driver and other passenger in the car were insured.

4. Insurance— automobile—UIM coverage—breach of fiduciary duty—misrepresentation—unfair and deceptive trade practices

The trial court did not err by granting the motion of defendant insurance company and its agents to dismiss plaintiffs' complaint for failure to state a claim for breach of fiduciary duty, misrepresentation, and unfair and deceptive practices arising out of defendants' alleged failure to explain the extent of insurance coverage and the difference between uninsured motorist (UM) coverage versus underinsured motorist (UIM) coverage, because: (1) defendants had no duty to advise plaintiff policyholder about his eligibility for UIM, nor did defendants have a duty to increase plaintiff's underlying liability coverage so that he could obtain UIM coverage absent plaintiff's request that defendants do so; (2) whether plaintiff would have increased the liability limits above

the statutory minimum if so advised is entirely speculative and not grounds for overcoming a motion to dismiss; (3) the complaint does not allege that plaintiff was denied the opportunity to investigate or that he could not have learned the requirements of UIM coverage or the extent of plaintiff's existing coverage by exercise of reasonable diligence; and (4) the providing of UM coverage without UIM coverage cannot be construed as an unfair act where N.C.G.S. § 20-279.21(b)(4) specifically authorizes eligible drivers to obtain UM coverage alone or combined with UIM coverage.

Appeal by plaintiffs from order entered 10 May 2000 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 August 2001.

Seth M. Bernanke for plaintiff-appellants.

Young Moore and Henderson, P.A., by R. Michael Strickland and Glenn C. Raynor, for defendant-appellees.

HUNTER, Judge.

Plaintiffs Travis Clay Pinney ("Pinney") and William H. Dick ("Dick") (collectively "plaintiffs") appeal the trial court's order dismissing their complaint for failure to state a claim against defendant State Farm Mutual Automobile Insurance Company ("State Farm"), and its agents, Eugene Davis and David Harling (collectively "defendants"). For the reasons set forth below, we affirm.

Plaintiffs filed a complaint against defendants on 28 January 2000, asserting negligence and/or breach of contract and unfair and deceptive practices. In pertinent part, the complaint alleged the following facts. Dick, Pinney's stepfather, had maintained automobile insurance coverage through defendants continuously since 1980. Dick maintained only the statutory minimum amounts of liability coverage under his automobile policy. In 1991, Dick received a mailing from defendants stating that he was entitled to receive $1,000,000.00 of additional coverage on his automobile policy. The mailing included a rejection form, and indicated that the additional coverage would be added to Dick's policy if he failed to return the rejection form. Dick did not return the rejection form.

On 9 February 1997, Pinney was injured in an automobile accident while a passenger in an automobile driven by Kevin Lee

Simmons and owned by Pinney's wife, Teresa Pinney. Both Simmons and Teresa Pinney maintained automobile liability coverage, the limits of which were tendered to Pinney. At the time of the accident, Pinney was residing with his mother and Dick.

The complaint further alleged that it was Dick's "expectation, intent and belief" that the additional $1,000,000.00 of coverage which Dick accepted in 1991 would cover the types of injuries sustained by Pinney. However, the additional coverage, as alleged in the complaint, provided $1,000,000.00 of liability coverage for uninsured motorists ("UM"), and no coverage for underinsured motorists ("UIM"). Plaintiffs alleged that defendants had a fiduciary duty to explain to Dick the extent of the coverage and the difference between UM and UIM coverage.

On 27 March 2000, defendants filed a motion to dismiss plaintiffs' complaint for its failure to state a claim for relief under Rule 12(b)(6) of the Rules of Civil Procedure. The trial court heard the motion on 3 May 2000, and entered an order dismissing the complaint on 10 May 2000. Plaintiffs appeal.

On appeal, plaintiffs argue that the trial court erred by (1) failing to convert defendants' motion to dismiss into a motion for summary judgment; (2) failing to consider a cassette tape exhibit submitted by plaintiffs in response to defendants' motion to dismiss; (3) considering defendants' objection to supplemental materials submitted by plaintiffs; (4) granting defendants' motion to dismiss; and (5) failing to grant summary judgment in favor of plaintiffs.

[1] Plaintiffs first argue that the trial court erred in failing to convert defendants' motion to dismiss into a motion for summary judgment. On a motion to dismiss under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b) (1999); *see also, Schnitzlein v. Hardee's Food Sys., Inc.*, 134 N.C. App. 153, 157, 516 S.E.2d 891, 893, *disc. review denied*, 351 N.C. 109, 540 S.E.2d 365 (1999) (motion to dismiss must be converted into motion for summary judgment where matters outside pleadings presented to and considered by court).

In the present case, plaintiffs submitted to the trial court a memorandum of law including documentary and other exhibits in opposition to defendants' 12(b)(6) motion to dismiss. On 3 May 2000,

defendants submitted an objection to the trial court's consideration of any materials outside the pleadings. The trial court sustained the objection as to a cassette tape submitted by plaintiffs; however, the order sustaining the objection did not address or mention the additional documents submitted by plaintiffs. Plaintiffs argue that there "is no reasonable interpretation" of the order other than the trial court only excluded the cassette tape and considered the additional documents, requiring conversion to a motion for summary judgment.

Although the order sustaining defendants' objection to consideration of the cassette tape is ambiguous as to the additional documents, the trial court's order dismissing the complaint is not ambiguous. That order clearly states that in considering defendants' motion to dismiss, the trial court considered only "the allegations of the Complaint" and "the arguments of counsel." Moreover, in its order settling the record on appeal, the trial court clearly stated that "none of the [additional] documents and cassette tape were considered by the Court in its order of dismissal dated May 8, 2000."

In *Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989), this Court held that the trial court was not required to convert a motion to dismiss into one for summary judgment simply because additional documents were submitted:

> While matters outside the pleadings were introduced, the record is clear the trial court did not consider these affidavits in ruling on the Rule 12 motion. The trial court specifically stated in its order that for the purposes of the Rule 12 motion, it considered only the amended complaint, memoranda submitted on behalf of the parties and arguments of counsel.

Id. The record is equally clear in the present case that the trial court did not consider plaintiffs' additional documents. The trial court was not required to convert defendants' motion into one for summary judgment. We therefore need not address whether the trial court erred in failing to consider the cassette tape submitted by plaintiffs.

[2] Plaintiffs further argue that the trial court erred in considering defendants' objection to plaintiffs' submission of supplemental materials because the motion was "untimely filed" under Local Rule 11.7 ("[a]ll briefs and supporting cases, or any other materials intended to be used in argument or submitted to the Court, are to be

delivered . . . for filing forty-eight hours prior to the hearing on the motion"). Even if defendants' objection fell within the scope of Rule 11.7, the trial court has wide discretion in the application of local rules. *See Young v. Young*, 133 N.C. App. 332, 333, 515 S.E.2d 478, 479 (1999) (quoting *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991)). Plaintiffs have failed to show that the trial court abused its discretion in considering defendants' motion. These assignments of error are overruled.

[3] Plaintiffs next argue that the trial court erred in granting defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted. Plaintiffs argue that the complaint establishes that Dick was entitled to UIM coverage, and in the alternative, that defendants breached a duty in failing to inform Dick that he did not have UIM coverage. We disagree.

"In reviewing the grant of a 12(b)(6) motion to dismiss, we assess the legal sufficiency of the complaint, taking all factual allegations as true." *Lane v. City of Kinston*, 142 N.C. App. 622, 624, 544 S.E.2d 810, 813 (2001) (citing *Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 846, *disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000)). " 'A complaint cannot withstand a motion to dismiss where an insurmountable bar to recovery appears on its face.' " *Id.* (citation omitted). An insurmountable bar to recovery may include the absence of law to support a claim, the absence of facts sufficient to state a good claim, or the disclosure of some fact that necessarily defeats a claim. *Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997).

Issues of UIM coverage are governed by N.C. Gen. Stat. § 20-279.21(b)(4). This statute provides that automobile liability insurance policies "[s]hall . . . provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section." N.C. Gen. Stat. § 20-279.21(b)(4) (1999). Subdivision 2 of the section sets forth the statutory minimum limits for an automobile insurance policy. The plain language of this statute has been interpreted to require a policyholder to maintain liability coverage that is above the statutory minimum in order to be eligible for UIM coverage. *See Morgan v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 200, 204, 497 S.E.2d 834, 836, *affirmed*, 349 N.C. 288, 507 S.E.2d 38 (1998) ("pursuant to subdivision (b)(4), UIM coverage may be obtained only if the policyholder has liability insurance in excess of the minimum statutory requirement").

In *Morgan*, we held that there existed no genuine issue of material fact as to whether plaintiff had UIM coverage under a State Farm policy at the time of the accident "since the policy in question only provided the minimum statutory-required coverage" and thus "the policy was not required to provide UIM coverage under section 20-279.21(b)(4)." *Morgan*, 129 N.C. App. at 205, 497 S.E.2d at 837. This Court recently reaffirmed this principle in *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 544 S.E.2d 807 (2001). We held that "Section 20-279.21(b)(4) clearly states UIM coverage is to be provided to policies with limits exceeding the minimum limits unless rejected." *Id.* at 682, 544 S.E.2d at 809. Since the plaintiff in *McNally* did not purchase a policy that exceeded the minimum limits, "UIM coverage was not actually available." *Id.* We stated: "[p]laintiff was not eligible for UIM coverage at the time the rejection was signed, and the clear textual interpretation of the statute is that the policy at issue was simply not subject to the provisions of N.C. Gen. Stat. § 20-279.21(b)(4)." *Id.*

In the present case, the face of plaintiffs' complaint reveals that Dick was not entitled to UIM coverage. The complaint clearly avers that Dick "maintained minimum liability limits on the policy." Under G.S. § 20-279.21(b)(4), defendants were prohibited from providing Dick UIM coverage. Nor are plaintiffs entitled to any benefits at all from defendants since plaintiffs only have UM coverage, and both Simmons and Teresa Pinney were insured. Thus, an insurmountable bar to recovery of UIM or UM coverage benefits appears on the face of plaintiffs' complaint.

[4] Plaintiffs further argue that even if the complaint fails to state a claim for UIM coverage, the complaint states claims for breach of fiduciary duty, misrepresentation, and unfair and deceptive practices. Plaintiffs argue that defendants breached a fiduciary duty to Dick by failing to inform him regarding the extent of his coverage and explain the requirements of UIM coverage. This Court has addressed and rejected an identical argument.

In *Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327, *disc. review denied*, 348 N.C. 500, 510 S.E.2d 653 (1998), this Court addressed the extent of an insurer's duty to inform a minimum limits policyholder of the nature of UIM coverage and that the policyholder must increase the underlying coverage above the statutory minimum limits in order to be eligible for such coverage. We noted that "an insurance agent has a duty to procure additional insurance for a policyholder at the request of the policy-

holder." *Id.* (citing *Johnson v. Tenuta & Co.*, 13 N.C. App. 375, 381, 185 S.E.2d 732, 736 (1972)). "The duty does not, however, obligate the insurer or its agent to procure a policy for the insured which had not been requested." *Id.* (citing *Baldwin v. Lititz Mutual Ins. Co.*, 99 N.C. App. 559, 561, 393 S.E.2d 306, 308 (1990)). In holding that the trial court correctly dismissed the plaintiff's action, we stated:

> At all times relevant herein, a policyholder could only obtain UIM coverage when the policyholder purchased a policy of automobile liability insurance in excess of the minimum statutory requirement. N.C. Gen. Stat. § 20-279.21(b)(4) (1993 & Cum. Supp. 1997); *Hollar v. Hawkins*, 119 N.C. App. 795, 797, 460 S.E.2d 337, 338 (1995). In this case, plaintiff had minimum liability coverage at all times in question. We hold that, under these circumstances, defendants had *no duty to advise plaintiff* that, if he increased his liability coverage limits, he would be eligible for UIM coverage. *We note that even had plaintiff been so notified, it is entirely speculative whether he would have incurred the additional expense of increasing his liability limits above the statutory minimum limits in order to avail himself of the opportunity to purchase UIM coverage.*

Id. (emphasis added).

Defendants had no duty to advise Dick about his eligibility for UIM, nor did they have a duty to increase his underlying liability coverage so that he could obtain UIM coverage absent Dick's request that they do so. Plaintiffs argue in their brief that "[t]he reasonable inference from this evidence is that Plaintiff Dick would have done what was required in order to obtain the insurance" had defendants appropriately advised him of the requirements for UIM coverage. However, this Court in *Phillips* clearly stated that under these circumstances, whether the plaintiff would have increased the liability limits above the statutory minimum if so advised is "entirely speculative" and not grounds for overcoming a motion to dismiss. *Id.* The complaint fails to state a claim for breach of fiduciary duty.

Plaintiffs' claims for misrepresentation and unfair and deceptive practices likewise fail to withstand a motion to dismiss. Plaintiffs base their claim for misrepresentation on the allegation in the complaint that Dick discussed the $1,000,000.00 policy with an assistant in defendants' office, and that she told him "that the coverage would protect [Dick] and his family up to $1,000,000.00 for injuries caused by some other person," and that she "did not explain what uninsured

or underinsured motorist coverage was or that there was a difference in coverages." However, as discussed above, defendants were not obligated to advise Dick regarding UIM coverage and that he would be eligible for UIM coverage if he increased his liability coverage limits. The assistant had no duty as a matter of law to undertake to explain the requirements of UIM coverage to Dick, absent an allegation that Dick requested such information.

Moreover, " '[t]he tort of negligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information.' " *Ausley v. Bishop*, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) (emphasis added) (quoting *Fulton v. Vickery*, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (citation omitted), *disc. review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985)); *see also Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 525, 430 S.E.2d 476, 480 (1993) (emphasis omitted) ("[i]n this State, we have adopted the Restatement 2d definition of negligent misrepresentation and have held that the action lies where pecuniary loss results from the supplying of false information to others for the purpose of guiding them in their business transactions"). The statement by defendants' office assistant that the coverage would protect for up to $1,000,000.00 is in no way false. Plaintiffs have not alleged that the assistant represented that Dick was covered for this amount of UIM, or any amount other than what appeared on his policy.

It has also been held that when a party relying on a "misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999). Plaintiffs' complaint does not allege that Dick was denied the opportunity to investigate or that he could not have learned the requirements of UIM coverage or the extent of his existing coverage by exercise of reasonable diligence. Indeed, the complaint does not allege that Dick ever requested any information regarding UIM coverage.

Plaintiffs' claim for unfair and deceptive practices must also fail. The basis of the claim, as alleged in the complaint, is that the sale of $1,000,000.00 UM coverage with zero UIM coverage, by itself, and in

conjunction with the "default" method of choice by failure to return the rejection form, constitutes an unfair and deceptive practice in violation of Chapter 75 of the North Carolina General Statutes.

The providing of UM coverage without UIM coverage cannot be construed as an unfair act where N.C. Gen. Stat. § 20-279.21(b)(4) specifically authorizes eligible drivers to obtain UM coverage alone, or combined with UIM coverage. The statute requires that only UM coverage be offered to insureds whose policies reflect only the minimum statutory liability coverage. Defendants were prohibited by law from providing Dick with UIM coverage until he increased his underlying liability coverage. Therefore, the providing of UM coverage without UIM coverage cannot be construed as "unfair" within the meaning of Chapter 75.

Moreover, in order to prove an unfair and deceptive practice, the plaintiff must show that the defendant committed an unfair or deceptive act or practice, in or affecting commerce, and that the plaintiff sustained an actual injury as a result. *Vazquez v. Allstate Ins. Co.*, 137 N.C. App. 741, 744, 529 S.E.2d 480, 481-82 (2000) (citing *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 13, 472 S.E.2d 358, 365 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997)).

Here, the allegations of plaintiffs' complaint fail to show that plaintiffs sustained actual injury as a result of the "default" method of choice. Through the default mailing, Dick received $1,000,000.00 of UM coverage. As noted previously, Dick was not entitled to UIM benefits; therefore, the nature of the mailing or whether Dick returned the rejection form has no bearing on plaintiffs' ability to recover UIM benefits in this action, and thus, cannot be construed as injuring plaintiffs as a result. To the extent plaintiffs' argument is based on the theory that defendants did not adequately inform Dick about UIM coverage, *Phillips* is controlling.

The trial court did not err in dismissing plaintiffs' complaint. We need not address plaintiffs' remaining argument that the trial court should have granted summary judgment in favor of plaintiffs.

Affirmed.

Judges WYNN and TYSON concur.

IN RE: DENIAL OF REQUEST FOR FULL ADMINISTRATIVE HEARING AS TO COMPLAINT NO. 97025-1-1 AND APPEAL OF CONSENT AGREEMENT

IN RE: DENIAL OF REQUEST FOR FULL ADMINISTRATIVE HEARING AS TO COMPLAINT NO. 98009-1-1

No. COA00-977

(Filed 18 September 2001)

1. Administrative Law— full administrative hearing denied— petitioner not a person aggrieved

The trial court correctly denied petitions for judicial review of petitioner's requests for a full administrative hearing concerning disciplinary actions taken by the North Carolina Veterinary Medical Board against a veterinarian who mistreated petitioner's bird. Any "person aggrieved" is entitled to an administrative hearing under the North Carolina Administrative Procedure Act (NCAPA), but petitioner is not a "person aggrieved" because the Board's actions against the veterinarian, or lack thereof, have not directly or indirectly affected petitioner's personal, property or employment interests in any manner. Procedural injury alone cannot form the basis for aggrieved status under the NCAPA.

2. Veterinarians— licensing board—authority—emergencies—full administrative hearings

The North Carolina Veterinary Medical Board is not required by N.C.G.S. § 90-186 (3) to conduct a full administrative hearing whenever charges are brought against a licensee; rather, the Board is allowed in its discretion to take necessary steps in emergency situations to minimize public risk without the delay presented by an administrative hearing. The Board must hold an administrative hearing after it takes emergency action, but in this case, the Board never issued any summary emergency orders and N.C.G.S. § 90-186(3) does not apply.

Appeal by petitioner from order entered 24 May 2000 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 27 August 2001.

Hunton & Williams, by Jason S. Thomas and Charles D. Case, for petitioner appellant.

Johnson, Hearn, Vinegar & Gee, P.L.L.C., by George G. Hearn and Shawn D. Mercer, for North Carolina Veterinary Medical Board respondent appellee.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, for North Carolina Licensing Board for General Contractors and North Carolina Board of Pharmacy, amici curiae.

Allen and Pinnix, P.A., by Noel L. Allen, for North Carolina State Board of Certified Public Accountant Examiners, North Carolina Board of Architecture, and North Carolina State Board of Examiners of Nursing Home Administrators, amici curiae.

TIMMONS-GOODSON, Judge.

In June 1997, Karen D. Keltz ("petitioner") filed a written complaint with the North Carolina Veterinary Medical Board ("the Board") against one of its licensees, veterinarian Dr. Richard Burkett ("Dr. Burkett"). In her complaint to the Board, petitioner alleged that Dr. Burkett failed to render appropriate medical treatment to petitioner's African Gray Parrot, which died while under Dr. Burkett's care. The Board investigated petitioner's complaint by conducting interviews with petitioner and Dr. Burkett, hearing testimony, consulting an avian specialist, and reviewing materials submitted by petitioner, including medical records and x-rays, a fifty-five page letter by petitioner, forty-four documentary attachments, a videotape, and a photo album. Upon completing its investigation and finding probable cause as to several of petitioner's charges, the Board decided to discipline Dr. Burkett, sending him a letter of caution, two letters of reprimand, and fining him a civil monetary penalty of $3000.00. During its investigation of Dr. Burkett, the Board also discovered he had been practicing veterinary medicine in unlicensed facilities. By consent order entered 15 July 1998, the Board suspended Dr. Burkett's license for six months and fined him $5000.00 for his failure to obtain facility inspections. The Board found it unnecessary, however, to hold a full administrative hearing on the matter, and Dr. Burkett did not request such hearing.

Dissatisfied with the Board's disciplinary actions, petitioner submitted additional materials, asking the Board to reconsider its decision and to "issue appropriate disciplinary actions." The Board considered, but denied petitioner's request. The Board further denied petitioner's request for a full administrative hearing. On 7 August 1998, petitioner filed her first petition for judicial review.

While the Board investigated petitioner's first complaint, petitioner filed a second complaint against Dr. Burkett with the Board

raising additional issues regarding Dr. Burkett's alleged mistreatment of petitioner's bird. The Board investigated petitioner's new complaint, but found no probable cause as to any of the allegations and dismissed it accordingly. Petitioner again requested an administrative hearing for her second complaint, which the Board again denied. On 26 February 1999, petitioner filed another petition for judicial review with respect to the second complaint.

The consolidated petitions for judicial review came before the trial court on 22 May 2000. By order entered 24 May 2000, the trial court granted the Board's motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Petitioner now appeals the trial court's dismissal of her petitions.

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[1] The dispositive issue for review is whether petitioner is entitled under the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1 to 150B-52 (1999), and the North Carolina Veterinary Practice Act, N.C. Gen. Stat. §§ 90-179 to 90-187.14 (1999), to seek judicial review of the North Carolina Veterinary Medical Board's denial of petitioner's request for an administrative hearing. Because we conclude petitioner is not a "person aggrieved" within the meaning of N.C. Gen. Stat. §§ 150B-2(6) and 150B-43, we hold she lacks standing to seek judicial review, and we thus affirm the trial court's dismissal of her petitions.

The North Carolina Veterinary Medical Board is an occupational licensing board responsible for licensing veterinarians in North Carolina and overseeing the licensees' conduct as prescribed by the North Carolina Veterinary Practice Act ("NCVPA"). *See* N.C. Gen. Stat. §§ 90-185, 90-186 (1999). As an occupational licensing agency, final decisions by the Board in a contested case are subject to judicial review under the North Carolina Administrative Procedure Act ("NCAPA"). *See* N.C. Gen. Stat. §§ 150B-1, 150B-43 (1999); *Bryant v. State Bd. of Examiners of Electrical Contractors*, 338 N.C. 288, 291, 449 S.E.2d 188, 190 (1994). The NCAPA "confers procedural rights and imposes procedural duties, including the right to commence an administrative hearing to resolve disputes between an agency and a person involving the person's rights, duties, or privileges[,]" unless that person is not a "person aggrieved" by a decision of the agency. *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 583, 588, 447 S.E.2d 768, 776, 779 (1994). A person's rights, duties or privileges arise under the relevant organic statute. *See id.* at 583, 447 S.E.2d at

776-77. In other words, "any 'person aggrieved' within the meaning of the [controlling] organic statute is entitled to an administrative hearing to determine the person's rights, duties, or privileges." *Id.* at 588, 447 S.E.2d at 779. A "person aggrieved" is defined by the NCAPA as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (1999); *see Empire Power Co.*, 337 N.C. at 588, 447 S.E.2d at 779. One who is adversely affected in respect of legal rights, or is suffering from an infringement or denial of legal rights may be a "person aggrieved." *See Carter v. N.C. State Bd. for Professional Engineers*, 86 N.C. App. 308, 313, 357 S.E.2d 705, 708 (1987).

Petitioner asserts that she is a "person aggrieved" within the meaning of the NCAPA, and therefore is entitled to an administrative hearing to determine her rights, duties, or privileges. Petitioner argues her aggrieved status arises under the language of the NCVPA, which was created "[i]n order to promote the public health, safety, and welfare by safeguarding the people of [North Carolina] against unqualified or incompetent practitioners of veterinary medicine." N.C. Gen. Stat. § 90-179 (1999). Petitioner contends that, as a person whose pet was allegedly injured by a negligent veterinarian, she belongs within the "zone of interest" created by the NCVPA, and as such, is a "person aggrieved" under the NCAPA when the Board fails to properly discharge its duty to safeguard the public and its pets. Petitioner further argues she has suffered an infringement of her procedural legal rights, in that the Board denied her requests for administrative hearings regarding her complaints. We disagree.

In order for petitioner to prevail on her claim to status as a "person aggrieved" under the NCAPA, petitioner must first demonstrate that her personal, property, employment or other legal rights have been in some way impaired. *See In re Rulemaking Petition of Wheeler*, 85 N.C. App. 150, 154, 354 S.E.2d 374, 377 (1987). Petitioner has failed to show such impairment. The Board's actions against Dr. Burkett, or lack thereof, have not directly or indirectly affected petitioner's personal, property or employment interests in any manner. Petitioner is free to choose another veterinarian for future services. Nor has the Board's decision prevented petitioner from pursuing her negligence claims by civil action in the proper forum, as demonstrated by petitioner's pending civil suit against Dr. Burkett. Moreover, we determine the Board properly fulfilled its duties to safeguard the public from veterinarians who violate the NCVPA by thor-

oughly investigating and disciplining the offending licensee for those violations for which the Board found probable cause.

Petitioner's argument that, because her legal right to a hearing was denied, such denial confers upon her the necessary aggrieved status to demand an administrative hearing, is both circular and without merit. Procedural injury, standing alone, cannot form the basis for aggrieved status under the NCAPA. *See, e.g., Empire Power Co.*, 337 N.C. at 590, 447 S.E.2d at 780-81 (reviewing case law and determining that procedural injury must be accompanied by actual injury, such as an infringement upon personal or property rights, to qualify as "injury in fact").

[2] Moreover, petitioner's reliance upon *Bryant* is misplaced. In *Bryant*, the issue before our Supreme Court was whether the plaintiff was entitled to a hearing and decision before an administrative law judge where the plaintiff was denied a hearing and decision before the agency in question. *See Bryant*, 338 N.C. at 289, 449 S.E.2d at 189. The *Bryant* Court noted that, "[w]hether plaintiff has standing to seek judicial review of an administrative decision . . . is a distinct issue from whether he has a right to a hearing and decision on the charges he has brought before the Board," and accordingly did not address the issue of plaintiff's standing to seek judicial review. *Id.* at 290, 449 S.E.2d at 190. Further, the *Bryant* Court determined petitioner's right to a hearing before the agency arose from the language of the relevant organic statute governing electrical contractors, which stated:

> The Board shall, in accordance with Chapter 150B of the General Statutes, formulate rules of procedure governing the *hearings of charges* against applicants, qualified individuals and licensees. Any person may prefer charges against any applicant, qualified individual, or licensee, and such charges must be sworn to by the complainant and submitted in writing to the Board. In conducting *hearings of charges*, the Board may remove the hearings to any county in which the offense, or any part thereof, was committed if in the opinion of the Board the ends of justice or the convenience of witnesses require such removal.

Id. at 290-91, 449 S.E.2d at 190 (quoting N.C. Gen. Stat. § 87-47(a3) (1989)) (alteration in original). Because the organic statute governing the jurisdiction of the Board in *Bryant* made explicit reference to "hearings of charges" against licensees, the Court held the plaintiff was entitled to a hearing and decision from the Board on his charges. In contrast to the statute in *Bryant*, the NCVPA refers only once to hearings, and never in the context of a hearing of charges. N.C. Gen.

Stat. § 90-186, entitled "Special Powers of the Board," states in pertinent part that

> [u]pon complaint or information received by the Board, [the Board may] prohibit through summary emergency order of the Board, prior to a hearing, the operation of any veterinary practice facility that the Board determines is endangering, or may endanger, the public health or safety or the welfare and safety of animals, and suspend the license of the veterinarian operating the veterinary practice facility, provided that upon the issuance of any summary emergency order, the Board shall initiate, within 10 days, a notice of hearing under the administrative rules issued pursuant to this Article and Chapter 150B of the General Statutes for an administrative hearing on the alleged violation[.]

N.C. Gen. Stat. § 90-186 (3) (1999). We determine the above-stated language does not require the Board to conduct a full administrative hearing whenever charges are brought against a licensee. Rather, N.C. Gen. Stat. § 90-186(3) allows the Board, in its discretion, to take necessary steps in emergency situations to minimize public risk without the delay presented by an administrative hearing. Once the Board takes such emergency action, however, it must then hold an administrative hearing on the alleged violations. In the instant case, the Board never issued any summary emergency orders against Dr. Burkett. Thus, N.C. Gen. Stat. § 90-186(3) does not apply and cannot provide petitioner the necessary status to demand an administrative hearing.

Petitioner's reliance upon *Empire Power Co.* is similarly misplaced. In that case, our Supreme Court held the petitioner was entitled to an administrative hearing before the North Carolina Department of Environment, Health and Natural Resources because he was directly and substantially affected by the agency's decision approving the construction and operation of sixteen combustion turbine generating units adjacent to petitioner's property. Because the resulting increase in air pollution generated by the combustion turbine units would injure petitioner's health, property value, and quality of life, the Court concluded that the petitioner "alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the [relevant organic] statute" to qualify as a "person aggrieved" under the NCAPA. *Empire Power Co.*, 337 N.C. at 589, 447 S.E.2d at 780. Unlike the petitioner in *Empire Power Co.*, present petitioner has suffered no injury to her legal rights to justify her demand to an administrative hearing.

In conclusion, petitioner has failed to demonstrate that her rights have been impaired by the Board's refusal to hold an administrative hearing. As such, she is not a "person aggrieved" within the meaning of the NCAPA and accordingly lacks standing to seek judicial review. "Whether one has standing to obtain judicial review of administrative decisions is a question of subject matter jurisdiction." *In re Rulemaking*, 85 N.C. App. at 152, 354 S.E.2d at 376; *see Yates v. N.C. Dept. of Human Resources*, 98 N.C. App. 402, 404, 390 S.E.2d 761, 762 (1990). As petitioner lacked standing, the trial court did not have jurisdiction to entertain her petition and thus properly dismissed petitioner's claim. Petitioner may seek alternate redress for her claims by proceeding directly with a civil action against Dr. Burkett, which indeed she has done. Petitioner may not, however, seek to substitute her judgment for that of the Board's. The fact that petitioner dislikes the Board's disposition of her complaint does not transmute her claim into a viable one. We have no doubt that petitioner is "aggrieved" over the Board's refusal of her request for an administrative hearing; she is not, however, a "person aggrieved" as defined by the NCAPA or the NCVPA.

Because we hold the trial court correctly denied the petitions for judicial review, we hereby affirm the decision of the trial court.

Affirmed.

Chief Judge EAGLES and Judge THOMAS concur.

J. CLIFF LASSITER AND WIFE EVA C. LASSITER, PLAINTIFFS V. BANK OF NORTH CAROLINA, DEFENDANT

No. COA00-1065

(Filed 18 September 2001)

Construction Claims— construction loan—residential dwelling house—no duty of lender to inspect—parol evidence rule

The trial court did not err in an action arising out of a contract for a construction loan for a residential dwelling house by granting summary judgment in favor of defendant bank even though plaintiffs contend the purpose statement contained in the

loan agreement gives rise to an affirmative duty on behalf of defendant to make property inspections before paying plaintiffs' contractor, because: (1) purpose statements in loan agreements are permissive and do not create an affirmative duty on behalf of the lender; (2) even when a loan agreement indicates the lender will only disburse loan proceeds in proportion to the amount of construction completed, it does not require the lender to inspect the construction progress for the borrowers' benefit; (3) the purpose statement in this loan agreement was permissively inserted to clarify that defendant may make property inspections of the loan collateral for its own benefit; and (4) alleged statements by defendant's agent that he would personally look after plaintiffs, that he knew about building, and that he would make sure their contractor had done it right are effectively barred from evidence by the parol evidence rule or are not sufficiently definite and certain so as to give rise to an enforceable contract.

Appeal by plaintiffs from judgment entered 3 July 2000 by Judge Sanford L. Steelman, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 6 June 2001.

Smith, James, Rowlett & Cohen, by Norman B. Smith for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Reid L. Phillips and Jennifer T. Harrod for defendant-appellee.

THOMAS, Judge.

Plaintiffs, J. Cliff Lassiter and wife, Eva C. Lassiter, appeal from a grant of summary judgment in favor of defendant, Bank of North Carolina. They complain that defendant violated an agreement to make construction inspections prior to any disbursement of funds.

For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Plaintiffs entered into discussions with defendant concerning a construction loan for a residential dwelling house. Plaintiffs allege defendant's agent, Rick Callicutt (Callicutt), assured them he would "personally look after" them, that he "knew about building," and that he would make sure their contractor "has done it right."

The parties entered into a contract, with defendant to provide $150,000.00 financing. Under the terms of the contract, plaintiffs were

to initially pay defendant $26,000.00, which would be disbursed to plaintiffs' contractor. Defendant was to then begin drawing down payments from the $150,000.00 loan proceeds as the work progressed. These payments were to be made only upon express draw requests by plaintiffs. The loan agreement also contained a purpose clause which stated defendant was to make no more than one draw per month from the loan proceeds, and such draws were to be made only on the basis of plaintiffs' draw requests and property inspections by defendant's inspector, "to insure that the loan is not drawn down below the point of construction completion."

Defendant eventually disbursed plaintiffs' initial deposit of $26,000.00, plus $105,524.34 of the $150,000.00 loan proceeds in a total of eight payments. Plaintiffs contend defendant disbursed these funds directly to the contractor, while defendant contends it made the loan disbursements to plaintiffs, who controlled the money and directed it to their contractor. Defendant presented an affidavit to the trial court at the summary judgment hearing, which stated plaintiffs ordinarily deposited their construction loan advances into their interest-bearing savings account. They would then purchase cashier's checks and draw from the savings account to pay the contractor.

Throughout the period the payments were made, defendant never inspected the construction project. Some time after the eighth draw, plaintiffs became aware that the loan proceeds had been drawn down below the point of construction completion. They contend this was a direct result of defendant's failure to make property inspections.

Plaintiffs also claim defendant altered the construction inspection and disbursement schedules to show the construction 61% completed, when the form in its unaltered state showed construction only 36% completed. At no point, plaintiffs argue, was the construction on their dwelling house more than one-third completed, with the construction itself containing numerous defects which would have been noticed upon reasonable inspection.

On 2 June 1999, plaintiffs filed a complaint against defendant alleging breach of contract, negligence, and unfair and deceptive trade practices. They claim they were injured by the amounts defendant disbursed to their contractor, the amounts necessary to remedy the construction defects, and the amount now required to complete the project.

By their only assignment of error, plaintiffs argue the trial court committed reversible error by granting defendant's motion for summary judgment. We disagree.

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. Gen. Stat. § 1A-1, Rule 56(c) (2000).

We first note defendant filed a Rule 12(b)(6) motion to dismiss, but because the court considered the affidavit, which was outside of the pleadings, the motion was converted to a summary judgment motion. In considering a summary judgment motion, the trial court must view all evidence in the light most favorable to the non-movant, accepting its alleged facts as true. *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 525 S.E.2d 471, *disc. rev. denied*, 352 N.C. 356, 544 S.E.2d 546 (2000). However, Rule 56(e) provides

> When a motion for summary judgment is made and supported [by an affidavit], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2000). Thus, once the moving party demonstrates the claimant cannot show essential evidence to support an element of his claim, the burden shifts to the non-movant to establish a genuine issue of material fact. *Fisher v. Carolina Southern Railroad*, 141 N.C. App. 73, 539 S.E.2d 337 (2000). In the instant case, plaintiffs filed no response to defendant's affidavit. Because plaintiffs cannot merely rely upon what was stated in their initial pleadings, we accept defendant's description of the disbursements.

Proceeding with our review accordingly, we affirm on the bases of the terms of the contract, the parol evidence rule and the vagueness of the conversations giving rise to the alleged duty.

Plaintiffs contend that the purpose statement contained in the loan agreement, which said in part that property inspections were to be made "to insure that the loan is not drawn down below the point of construction completion," gives rise to an affirmative duty on

behalf of defendant to make property inspections before paying plaintiffs' contractor.

"A lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party." *Camp v. Leonard*, 133 N.C. App. 554, 560, 515 S.E.2d 909, 913 (1999). The loan agreement between plaintiffs and defendant contained no language obligating defendant to make property inspections before making or allowing a draw. Defendant was to make disbursements based on plaintiffs' requests, but these payments were not contingent upon a property inspection. Purpose statements in loan agreements are permissive and do not create an affirmative duty on behalf of the lender. *Cartwood Const. Co. v. Wachovia Bank & Trust Co.*, 84 N.C. App. 245, 352 S.E.2d 241, *aff'd*, 320 N.C. 164, 357 S.E.2d 373 (1987). Even when a loan agreement indicates the lender will only disburse loan proceeds in proportion to the amount of construction completed, it does not require the lender to inspect the construction progress for the borrowers' benefit. *Camp*, 133 N.C. App. at 561, 515 S.E.2d at 914.

Here, the purpose statement was permissively inserted into the loan agreement to clarify that defendant *may* make property inspections of the loan collateral, for its own benefit. Under *Cartwood* and *Camp*, defendant incurred no duty to inspect the construction progress by agreeing to the terms of the contract.

This Court stated in *Camp* that liability " 'will be imposed on construction lenders *only* where contractual provisions or lender assurances justify purchaser reliance on inspections *for purchaser's benefit.*' " *Camp*, 133 N.C. App. at 559, 515 S.E.2d at 913 (quoting Jeffrey T. Walter, Financing Agency's Liability to Purchaser of New Home or Structure for Consequences of Construction Defects, 20 A.L.R. 5th 499, 508 (1994)) (emphasis added). In the instant case, the plain language of the purpose clause demonstrates the inspections were to be made, if at all, for the benefit of the *lender*. Under *Camp*, plaintiffs cannot justifiably rely on the purpose clause to argue that defendant should make property inspections for *their* benefit.

Plaintiffs instead rely on *Rudolph v. First Southern Federal Sav. & Loan Ass'n.*, 414 So.2d 64 (Ala. 1982), an Alabama case which held that even though a lender's inspection ordinarily is for the lender's benefit, additional assurances made by the lender gives rise to an enforceable duty on the borrower's part with respect to inspections. Plaintiffs, however, cite no comparable North Carolina authority and we decline to vary from the holding of *Camp*.

We next address plaintiffs' contention that the statements made by Callicutt give rise to an affirmative duty. The alleged statements that he would personally look after plaintiffs, that he "knew about building," and that he would make sure their contractor "has done it right" are effectively barred from evidence by the parol evidence rule:

> The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction. In the event that a particular writing is only a partial integration of the agreement, "it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing.

Hall v. Hotel L'Europe, Inc., 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984) (citations omitted) (quoting *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953)). Plaintiffs do not contend the loan agreement was not meant to be the final integration of the transaction between defendant and themselves. Therefore, parol evidence may not be considered.

Even if Callicutt's statements were not effectively barred by the parol evidence rule, however, they are too vague to give rise to an affirmative duty on behalf of defendant.

"As a general matter, a contract must be sufficiently definite in order that a court may enforce it." *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991). "Furthermore, to be binding, the terms of a contract must be definite and certain or capable of being made so; the minds of the parties must meet upon a definite proposition." *Elliott v. Duke University, Inc.*, 66 N.C. App. 590, 596, 311 S.E.2d 632, 636, *disc. rev. denied*, 311 N.C. 754, 321 S.E.2d 132 (1984).

First, when Callicutt stated he would personally look after plaintiffs he did not say that he would take any specific action in doing so. His promise to "look after" plaintiffs is too vague to be enforceable as a matter of law. Second, Callicutt's statement that he "knew about building" is not a promise to do anything and therefore can not give rise to a duty on his behalf. Third, when Callicutt said he would make sure the contractor "has done it right," he did not explain that he would take any specific action. Therefore, taken both individually and as a whole, the statements are not sufficiently definite and certain so as to give rise to an enforceable contract. *See also Marvel*

Lamp Co. v. Capel, 45 N.C. App. 105, 262 S.E.2d 368, *disc. review denied*, 300 N.C. 197, 269 S.E.2d 617 (1980) (affirming summary judgment where language of defendant's letter was too vague to be enforced as a promise); *Miller v. Rose*, 138 N.C. App. 582, 532 S.E.2d 228 (2000) (affirming summary judgment for defendant where parties never had a concrete understanding concerning the financing of a partnership agreement).

Plaintiffs also made claims of negligence and unfair and deceptive trade practices. However, arguments and assignments of error are deemed abandoned unless legal authority is cited in the text. N.C.R. App. P. 28(b)(5); *Joyner v. Adams*, 97 N.C. App. 65, 387 S.E.2d 235 (1990). In the instant case, plaintiffs failed to cite any authority in their brief concerning that part of the assignment of error related to their claims based on negligence and unfair and deceptive trade practices. Therefore, those issues are not considered by this Court.

Defendant, meanwhile, included as an affirmative defense and argued in its brief that plaintiffs had agreed to release all claims against defendant. Because we otherwise hold in defendant's favor, we do not reach that argument.

For the reasons discussed herein, we affirm the trial court's order granting summary judgment in favor of defendant.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER DALE BOWERS

No. COA00—1081

(Filed 18 September 2001)

1. Appeal and Error— preservation of issues—failure to argue

A defendant convicted both of taking indecent liberties with a child and aiding and abetting taking indecent liberties with a child abandoned his assignment of error to the indecent liberties conviction by failing to argue that the trial court erred in denying his motion to dismiss that charge.

2. Aiding and Abetting— indecent liberties—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of aiding and abetting taking indecent liberties with a child where defendant accompanied Christopher Smith to purchase alcohol for two sisters; the group later went to a secluded beach where Smith and the sisters drank the alcohol; defendant (age 25) and the older sister (age 14) had intercourse outside the car while Smith (age 23) had intercourse with the younger sister (13) inside the car; defendant had every reason to be aware of what was happening inside the car, but assured the younger sister that "it was nothing"; when the older child heard her sister crying, defendant went to the car and turned up the radio; and, when the older sister attempted to help her sister, defendant restrained her.

3. Appeal and Error— preservation of issues—no objection at trial—plain error not contended in assignment of error

A defendant's contention that the trial court erred in its handling of questions from the jury was not preserved for appeal where defendant did not object at trial and waived plain error review by not specifically and distinctly contending plain error in his assignments of error as required by N.C. R. App. P. 10(c)(4) (2001). N.C. R. App. P. 10(b)(1).

4. Sentencing–indecent liberties— nonstatutory aggravating factor—use of "children"—immaterial

In a prosecution for taking indecent liberties with a child and aiding and abetting taking indecent liberties with a child, the nonstatutory aggravating factor that defendant had provided alcohol to the "children" who were the victims was not improper even though the charged offenses required proof that the victims were "children" under the age of sixteen because the use of the term "children" was immaterial. The gravamen of the aggravating factor was that defendant provided alcohol to the sisters and then victimized them. N.C.G.S. § 15A-1340.16(d).

5. Sentencing–indecent liberties— nonstatutory aggravating factor—furnishing alcohol—transactionally related

The trial court did not err by enhancing sentences for taking indecent liberties with a child and aiding and abetting taking indecent liberties based upon the nonstatutory aggravating factor that defendant furnished alcohol to the victims. Despite defend-

ant's argument to the contrary, for which he cited no authority, the act of providing alcohol to the victims was transactionally related to the offenses for which he was being sentenced.

6. Sentencing— nonstatutory aggravating factor—statutory purpose

A nonstatutory aggravating factor that defendant furnished alcohol to indecent liberties victims served the statutory purposes outlined in N.C.G.S. § 15A-1340.12.

7. Sentencing— indecent liberties—nonstatutory aggravating factor—provision of alcohol—sufficiency of evidence

In an indecent liberties prosecution, the State proved by a preponderance of the evidence the nonstatutory aggravating factor that defendant furnished alcohol to the victims where there was testimony that defendant and another man (Smith) went into a store and emerged after purchasing alcohol, the sisters consumed the alcohol, and defendant victimized the 14-year-old sister while Smith victimized the 13-year-old. Whether defendant independently conceived the idea to purchase the alcohol, personally paid for it, or physically and personally provided it to the sisters for their consumption is immaterial.

Appeal by defendant from judgments entered 16 December 1999 by Judge F. Fetzer Mills in Superior Court, Brunswick County. Heard in the Court of Appeals 22 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Norman D. Bullard and Bruce A. Mason, for the defendant-appellant.

WYNN, Judge.

Defendant Christopher Dale Bowers appeals from convictions of taking indecent liberties with a child, and aiding and abetting taking indecent liberties with a child. We find no error.

The evidence presented at trial tends to show the following. In July 1998, defendant and Christopher Smith—ages 25 and 23—met two sisters—ages 13 and 14—who were on vacation with their family at Ocean Isle Beach. The four rode to a liquor store where the men purchased alcohol. Thereafter, the men dropped the sisters off but

met them again later that evening and drove to a secluded area of the beach, where Smith and the sisters drank the alcohol.

After some time, the older sister noticed that her younger sister appeared intoxicated; so, she helped her younger sister into the front passenger seat of the vehicle beside Smith. The older sister then continued drinking and talking to defendant near the back of the car. Defendant kissed the older sister and urged her to have sex with him. She eventually relented, and the two engaged in vaginal intercourse. Afterward, the older sister heard her younger sister crying and asked defendant to check on her. Defendant walked to the car, turned up the car radio, and returned to the older sister who then tried to go to the car but defendant grabbed her by the arm. However, she pulled away; went to the car; found her younger sister in the car naked and engaged in intercourse on top of Smith; and pulled her younger sister out of the car.

Defendant presented no evidence at trial and his motions to dismiss the charges were denied. Upon the jury's verdict, the trial court sentenced defendant on each charge to consecutive minimum terms of 31 months and maximum terms of 38 months, finding as an aggravating factor that the "offenses in part involved the furnishing of alcoholic beverages to the child[ren] who are the victims of these crimes and this aggrav[a]ting factor has been proven by all the evidence and by any reasonable doubt." Defendant appealed.

[1] In his first assignment of error, defendant contends that the trial court erred "in denying [his] motions at the end of the State's evidence to dismiss the charges of Indecent Liberties and Aid and Abet Indecent Liberties." In his brief, however, defendant argues only that "[t]he trial court erred in denying [his] motion to dismiss the charge of aiding and abetting indecent liberties with a child." Therefore, to the extent defendant failed to argue error in denying his motion to dismiss the charge of taking indecent liberties, this assignment of error is deemed abandoned. *See* N.C.R. App. P. 28(a) (2001).

[2] In reviewing a defendant's motion to dismiss for insufficient evidence:

> the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *See State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998).

State v. Grooms, 353 N.C. 50, 78, 540 S.E.2d 713, 731 (2000).

"A person who aids or abets another in the commission of a crime is equally guilty with that other person as principal." *State v. Noffsinger*, 137 N.C. App. 418, 425, 528 S.E.2d 605, 610 (2000). To sustain a conviction on a theory of aiding and abetting,

> the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators.

State v. Sanders, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976).

In the case at bar, when viewed in the light most favorable to the State, the evidence tends to show that defendant accompanied Smith to purchase alcohol for the sisters. While at the beach, defendant had every reason to be aware of what was happening between Smith and the younger sister in the car, but assured the older sister that "it was nothing." At the further urging of the older sister, who heard her sister crying, defendant went to the car and turned up the radio, and then returned to the older sister. When the older sister attempted to go help her sister, defendant grabbed her by the arm and temporarily restrained her. This evidence was sufficient to permit the jury to find that defendant, based on defendant's relation to Smith and his actions, "was present at the scene of the offense for the purpose of aiding [Smith] and that [Smith was] aware of such purpose." *Sanders*, 288 N.C. at 291, 218 S.E.2d at 357. We therefore find no error in the trial court's denial of defendant's motion to dismiss the charge of aiding and abetting taking indecent liberties with a child.

[3] Defendant next assigns error to the trial court's handling of two written questions presented by the jury to the court in the midst of its deliberations. During deliberations, the jury submitted a note to the court that read *in toto*:

> —Is aiding and abetting only during the actual event or does it include events that occur earlier in the day?
>
> —Define aiding and abetting.

In response, the trial judge provided the jury with what he termed "a generic definition of aiding and abetting," which correctly stated the doctrine. Defendant contends that the trial court erred by not specifically relating the definition of aiding and abetting to the particular

evidence in this case. Defendant did not raise this issue at trial, and argues in his brief on appeal that the trial court committed plain error; we disagree.

> N.C.R. App. P. 10(b)(1) (2001) provides, in pertinent part:
>
> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

Having failed to raise such an objection at trial, defendant has not preserved this issue for appeal. *See State v. Moore*, 132 N.C. App. 197, 200, 511 S.E.2d 22, 25, *disc. review denied and appeal dismissed*, 350 N.C. 103, 525 S.E.2d 469 (1999). Furthermore, by failing to "specifically and distinctly" contend plain error in his assignments of error as required by N.C.R. App. P. 10(c)(4) (2001), defendant has waived even plain error review. *See id.* Moreover, as our Supreme Court in *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998) held,

> Even assuming *arguendo* that defendant properly preserved plain error review and that the trial court committed some error in [taking the action] cited in [defendant's] assignments of error, we conclude that the alleged errors do not rise to the level of plain error. To prevail on plain error review, defendant must show that (i) a different result probably would have been reached but for the error or (ii) the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Id. at 518, 501 S.E.2d at 63. Because defendant failed to make the required showing, this assignment of error is without merit.

[4] Defendant's remaining arguments concern his final assignment of error, which states: "The court erred in [] finding [the] non-statutory aggravating factor and erred in using this factor to sentence the defendant in the aggravated range on each count." Defendant first argues that the trial court erred in finding as a non-statutory aggravating factor that he provided alcohol to the "child[ren]" who were the victims. The basis of defendant's argument is that an element of the offense of taking indecent liberties under N.C. Gen. Stat. § 14-202.1 (1999) is that the victim must be a "child" under the age of sixteen. Defendant reasons that the trial court's finding and use

of this non-statutory aggravating factor contravened N.C. Gen. Stat. § 15A-1340.16(d) (1999), which provides that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" We find no error.

Defendant argues that the trial court's specific use of the term "child" in its non-statutory aggravating factor renders that aggravating factor improper, since the State was obligated to prove that the victims were "children" under the age of sixteen to convict defendant of the charged offenses. In his brief, defendant states that

> it is important to note that the court chose to use the term, "child" consistently in its sentencing order. The court never used the term "minor" which is defined by several statutes as one under the age of eighteen.

Thus, defendant would apparently argue that the trial court *could* have used this non-statutory aggravating factor if instead of "child" it had used the term "minor," or perhaps defined the aggravating factor as having provided alcohol to persons under the age of twenty-one. This contention is merely one of semantics.

The gravamen of the non-statutory aggravating factor found by the trial court was that defendant provided alcohol to the sisters and subsequently victimized them; implicit is that defendant's illicit act of providing alcohol facilitated his victimization of the sisters. Both sisters happened to be under the age of sixteen.

Manifestly, the trial court's specific use of the term "child" is immaterial; the trial court could just as easily have used the term "minor," or "underage," or simply "young." As far as the victims' ages are concerned, to prove the aggravating factor by a preponderance of the evidence, the State was *not* required to show that the victims were under the age of sixteen, as it was required to prove pursuant to G.S. § 14-202.1. *See State v. Hargrove*, 104 N.C. App. 194, 408 S.E.2d 757, *disc. review denied*, 330 N.C. 444, 412 S.E.2d 79 (1991) (State must prove existence of non-statutory aggravating factor by a preponderance of the evidence). Thus, the trial court's finding of this non-statutory aggravating factor did not contravene G.S. § 15A-1340.16(d). We also note that the victims' intoxication could have been considered by the trial court regardless of their age. *See State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. review denied*, 311 N.C. 406, 319 S.E.2d 278 (1984). Defendant's argument is without merit.

[5] Defendant next contends that the trial court erred in enhancing his sentence based upon the non-statutory aggravating factor because that factor was not transactionally-related to the offense for which he was being sentenced. We note that defendant cites no authority in support of this contention, in violation of our Rules of Appellate Procedure; nonetheless, we consider the argument but find it to be wholly without merit. *See* N.C.R. App. P. 28(b)(5) (2001); N.C.R. App. P. 2 (2001). Assuredly, the act of providing alcohol to the victims was transactionally-related to the offenses for which defendant was being sentenced, to-wit, taking indecent liberties, and aiding and abetting taking indecent liberties.

[6] Next, defendant contends that the trial court's finding of the non-statutory aggravating factor was improper under N.C. Gen. Stat. § 15A-1340.12 (1999), which provides:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

We find no error, as we conclude that the trial court's finding of this non-statutory aggravating factor served the statutory purposes outlined.

[7] Lastly, defendant contends that the trial court's finding of the non-statutory aggravating factor was not supported by a preponderance of the evidence; we disagree. Both the older sister and Smith testified that Smith and defendant went into a store and emerged after having purchased alcohol. The evidence shows that the sisters consumed the alcohol, and subsequently defendant victimized the 14-year-old sister while Smith victimized the 13-year-old sister. Whether defendant independently conceived the idea to purchase the alcohol, personally paid for it, or physically and personally provided it to the sisters for their consumption is immaterial. The trial court found merely that "[t]he offenses in part involved the furnishing of alcoholic beverages to the child[ren] who are the victims of these crimes". A careful review of the evidence reveals that the State proved the existence of this non-statutory aggravating factor by a preponderance of the evidence.

No error.

Judges HUNTER and TYSON concur.

TEDDY D. SMITH, EMPLOYEE, PLAINTIFF v. PINKERTON'S SECURITY AND INVESTIGATIONS, EMPLOYER, AND INSURANCE COMPANY OF STATE OF PENNSYLVANIA (ALEXSIS), CARRIER, DEFENDANTS

No. COA00-1130

(Filed 18 September 2001)

Workers' Compensation— heart attack—denial of benefits

The Industrial Commission did not err in a workers' compensation case by denying benefits to plaintiff employee who suffered a heart attack on 20 March 1997 while on a job-related assignment based on the conclusion that the heart attack did not constitute an injury by accident arising out of and in the course of plaintiff's employment because: (1) the Commission found that plaintiff's heart attack was not the result of unusual or extraordinary exertion, but was due to plaintiff's heart disease; and (2) the Commission found that plaintiff was angry and that his confrontation with his nephew on a job-related assignment precipitated the heart attack, but that this confrontation did not involve any unusual or extraordinary exertion.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 27 April 2000. Heard in the Court of Appeals 22 August 2001.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., for the plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter and John W. O'Tuel III, for the defendants-appellees.

WYNN, Judge.

This appeal arises out of the denial of workers' compensation benefits to a plaintiff who suffered a heart attack on 20 March 1997. We affirm that denial.

Pinkerton's Security and Investigations ("Pinkerton's") employed plaintiff as a patrol supervisor. In late 1996 or early 1997, plaintiff convinced Pinkerton's to hire his nephew, Jimmy Young, as a security guard. Pinkerton's supplied Young with a uniform, patrol book (containing alarm codes and descriptions of keys for the buildings), statement log (to make inspection reports), and set of keys to the various buildings. However, when Young stopped working for Pinkerton's in early March 1997, he did not return those items. As Young's supervisor, plaintiff was responsible for recovering the items from him.

On 20 March 1997, plaintiff's wife called him at work to inform him that Young would be coming to their house that afternoon. When Young arrived at plaintiff's house, plaintiff's wife paged plaintiff at work, and plaintiff left work to address Young. Upon arriving at his house, plaintiff pulled into the driveway, blocking the exit. Young was engaged in an argument with Al Drummond, a friend of plaintiff's, over money owed by Young for a car that Drummond sold to him. Both Young and Drummond approached plaintiff's truck as he pulled into the driveway. Plaintiff told Young to return Pinkerton's keys to him; when Young refused, plaintiff began to get out of his truck, whereupon he suffered a heart attack and was taken to the hospital. Thereafter, plaintiff was out of work for several weeks, but ultimately returned to full-time work with no restrictions.

Following a hearing, Deputy Commissioner Morgan S. Chapman denied plaintiff's claim for workers' compensation benefits. Upon plaintiff's appeal, the full Commission affirmed and found in pertinent part that:

> 14. Prior to his heart attack on 20 March 1997, plaintiff had pre-existing coronary artery disease with plaque formation inside the arteries. The emotionally charged confrontation with Mr. Young on 20 March 1997 could have caused the plaque to fracture, causing a blood clot which occluded the artery and thereby causing plaintiff's heart attack. Plaintiff's heart attack also could have occurred at any time and from any event, such as simply smoking a cigarette.
>
> 15. On the afternoon of 20 March 1997, plaintiff wanted to retrieve the car keys for Mr. D[r]ummond, but he was equally motivated by his desire to retrieve the patrol book and keys for defendant-employer. Plaintiff went home on company business. The particular scenario involving Mr. Young and the keys was somewhat unusual; however, the level of exertion involved in the

confrontation with Mr. Young was not unusual or extraordinary. Plaintiff was simply angry.

16. Plaintiff's [heart attack] on 20 March 1997 was due to heart disease. The confrontation with Mr. Young was the event that precipitated plaintiff's heart attack, but the confrontation itself did not involve any unusual or extraordinary exertion.

The Commission then made the following conclusions of law:

1. Plaintiff's heart attack on 20 March 1997 was not caused by unusual or extraordinary exertion; therefore, it did not result from an injury by accident arising out of and in the course of his employment with defendant-employer. []

2. Plaintiff is not entitled to benefits under the Act for his heart attack. []

Plaintiff argues on appeal that the Commission erred in denying him benefits because there was evidence that he suffered an "unusual event" leading to his heart attack. Plaintiff also contends that the Commission erred in finding no unusual or extraordinary exertion on his part, and finding that he "was simply angry." We find no error.

In reviewing an appeal from a decision by the Industrial Commission, "this Court is limited to determining: (1) whether competent evidence exists to support the Commission's findings, and (2) whether those findings justify its conclusions of law." *Jarvis v. Food Lion, Inc.*, 134 N.C. App. 363, 367, 517 S.E.2d 388, 391, *disc. review denied*, 351 N.C. 356, 541 S.E.2d 139 (1999); *see Wall v. North Hills Properties, Inc.*, 125 N.C. App. 357, 481 S.E.2d 303, *disc. review denied*, 346 N.C. 289, 487 S.E.2d 573 (1997). If there is any competent evidence to support the Commission's findings of fact, those findings are deemed conclusive on appeal even if there is evidence supporting contrary findings. *See id.*; *see also Wall.*

Under the Workers' Compensation Act, an injury must result from an "accident arising out of and in the course of the employment" to be compensable. N.C. Gen. Stat. § 97-2(6) (1999); *see Wall*, 125 N.C. App. at 361, 481 S.E.2d at 306. The claimant bears the burden of proving these elements. *See Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988). As to workers' compensation benefits for injuries sustained due to a heart attack, this Court has held:

> When an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable. However, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to *unusual or extraordinary exertion* . . . or extreme conditions.

Wall, 125 N.C. App. at 361, 481 S.E.2d at 306 (internal citations omitted). *See also Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 502-03, 358 S.E.2d 380, 382 (1987) ("injuries caused by a heart attack must be precipitated by unusual or extraordinary exertion in order to be compensable"); *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E.2d 410 (1954) (ordinarily a heart attack does not result from an injury by accident arising out of or in the course of employment unless it results from unusual or extraordinary exertion incident to the employment).

In *Cody v. Snider Lumber Co.*, 328 N.C. 67, 399 S.E.2d 104 (1991), our Supreme Court considered a scenario similar to the case at bar. There, the plaintiff-decedent's estate appealed from the Industrial Commission's denial of workers' compensation benefits following the decedent's death by heart attack while working as a truck driver for the defendant lumber company. The decedent had hauled a load of material to a paper mill in a tractor-trailer truck. When he attempted to remove the tarp covering the trailer, the tarp became caught on something, and the decedent had to jerk the tarp several times to free it. Another truck driver observed that this series of events appeared to frustrate the decedent. The decedent then had difficulty backing the truck up a ramp to a hydraulic lift, which also appeared to aggravate the decedent. Shortly thereafter, the decedent, who had a pre-existing heart condition, suffered a fatal heart attack.

The Industrial Commission found that the incident with the tarp getting hung was the only occurrence that could be found to have been out of the ordinary. However, the Commission found that this occurrence was not the precipitating cause of the decedent's heart attack, which occurred 15 to 20 minutes later. Instead, the Commission found that it was the decedent's emotional response to the situation, in becoming aggravated and frustrated, that was the precipitating cause of his heart attack. The Commission denied the decedent's claim, finding that "[f]rustration . . . is a common reaction to many things," and that this emotional response did not constitute an injury by accident arising out of and in the course of the decedent's employment. 328 N.C. at 69, 399 S.E.2d at 105.

This Court reversed, *see Cody v. Snider Lumber Co.*, 96 N.C. App. 293, 385 S.E.2d 515 (1989), having determined that the fatal heart attack resulted from an injury by accident and was therefore compensable. Upon review, our Supreme Court reversed this Court's decision, stating:

> We need not decide here whether the type of "extraordinary exertion" which makes a resulting heart attack compensable includes extraordinary emotional exertion. Based upon substantial and competent evidence, the Commission found in the present case that the only event which could be deemed unexpected and extraordinary and, thus, an accident was the sticking of the tarp. The Commission also found, however, that the sticking of the tarp was not a precipitating factor in the decedent's death.

Cody, 328 N.C. at 72, 399 S.E.2d at 107. Accordingly, our Supreme Court held that the Commission had properly denied the decedent's claim, as his "heart attack was not the result of an accident arising out of and in the course of the decedent's employment[.]" *Id. See Bason v. Kraft Food Serv., Inc.*, 140 N.C. App. 124, 535 S.E.2d 606 (2000) (affirming Commission's denial of workers' compensation claim for death benefits arising from employee-decedent's death from cardiac arrhythmia, where Commission found nothing unusually strenuous about decedent's activities prior to his death). *See also Dye v. Shippers Freight Lines*, 118 N.C. App. 280, 454 S.E.2d 845 (1995) (affirming Commission's denial of benefits where Commission found plaintiff's heart attack was due to his pre-existing coronary artery disease, and that plaintiff experienced no unusual stresses that contributed to his heart attack); *Bingham v. Smith's Transfer Corp.*, 55 N.C. App. 538, 286 S.E.2d 570 (1982) (denying claim for death benefits where decedent suffered from a heart condition and evidence showed no overexertion or unusual stress precipitating his heart failure).

In the instant case, the Commission found that plaintiff's heart attack was not the result of unusual or extraordinary exertion, but rather was due to plaintiff's heart disease. The Commission found that plaintiff was angry and that his confrontation with Mr. Young precipitated the heart attack, but found that this confrontation "did not involve any unusual or extraordinary exertion." As in *Cody*, the Commission in the instant case concluded based thereon that plaintiff's heart attack did not constitute "an injury by accident arising out of and in the course of [plaintiff's] employment with defendant-employer[.]"

Having carefully reviewed the record, we hold that the Commission's conclusions are supported by its findings of fact, and those findings are supported by competent evidence in the record, despite the presence of conflicting evidence. *See Jarvis*, 134 N.C. App. 363, 517 S.E.2d 388; *Wall*, 125 N.C. App. 357, 481 S.E.2d 303. Indeed, the record shows that plaintiff testified before Deputy Commissioner Chapman that his family had a long history of heart disease, and that he personally had repeatedly suffered heart trouble prior to the heart attack on 20 March 1997. Additionally, plaintiff's physician, Dr. Jack W. Noneman, Jr., provided deposition testimony that plaintiff's condition rendered him likely to suffer further heart trouble at some point in his life. Dr. Noneman testified further that plaintiff could have spontaneously suffered a heart attack at any time, even in the absence of some triggering event. Moreover, there was evidence that plaintiff was angry when he confronted his nephew on the date of his heart attack. Because there is competent evidence in the record supporting the Commission's findings of fact, and those findings in turn support its conclusions of law, we uphold the decision of the full Commission.

Affirmed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. BRIAN ALEXANDER SCOTT

No. COA00-479

(Filed 18 September 2001)

1. Constitutional Law— double jeopardy—appeal by State from dismissal after verdict

The State was authorized by N.C.G.S. § 15A-1445(a)(1) to bring an appeal from the dismissal of an impaired driving charge for insufficient evidence after the jury returned a verdict of guilty. Even though defendant argued that the dismissal had the force and effect of a not guilty verdict and that reversal on appeal would violate double jeopardy, a reversal on appeal would only serve to reinstate the verdict. Defendant's double jeopardy rights have not been violated as long as he would not be subjected to a new trial on the issues.

2. Motor Vehicles— impaired driving—sufficiency of evidence

The trial court did not err by dismissing a charge of driving while impaired for insufficient evidence where the only evidence presented by the State was that defendant stopped his vehicle in an intersection after being signaled by an officer; defendant jumped out of the vehicle, approached the officer, and returned to his car when ordered by the officer; the officer smelled alcohol within the vehicle and on defendant; the officer noticed a half-full open bottle of beer on the seat beside defendant; and defendant had slurred speech. The State did not offer any evidence that defendant had difficulty controlling the vehicle, that he appeared appreciably impaired or that defendant's car had been weaving; there were limited places in which to pull the vehicle over; defendant did not appear to stumble or have difficulty walking when he left the vehicle; defendant was compliant, courteous, and non-combative at all times; defendant was not asked to submit to field sobriety tests; and defendant refused the Intoxilyzer test.

Appeal by the State from judgments entered 14 October 1999 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 17 April 2001.

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

Daniel Shatz, for defendant-appellee.

CAMPBELL, Judge.

Defendant was indicted on charges of driving while impaired, driving while license revoked, habitual driving while impaired, carrying a concealed weapon, possession of a firearm by a felon, and for being a habitual felon. Prior to trial, defendant informed the trial court that he intended to plead guilty to the driving while license revoked charge, and that he would do so at the conclusion of the trial on the remaining charges.

At the conclusion of the State's case in chief on the driving while impaired, concealed weapon, and possession of a firearm by a felon charges, defendant moved to dismiss the charges against him due to insufficient evidence. This motion was denied by the trial court. The jury found defendant not guilty of carrying a concealed weapon and possession of a firearm by a felon, but guilty of driving while

impaired. Defendant then moved again for dismissal of the impaired driving charge based on insufficient evidence under N.C. Gen. Stat. § 15A-1227(a)(3) (1999). The trial court granted this motion. Having no other felony charges pending against him, the trial court also dismissed the habitual felon charge.

The State has appealed to this Court contending that the trial court erred in granting defendant's N.C. Gen. Stat. § 15A-1227(a)(3) motion to dismiss based on insufficient evidence. Defendant asserts the State has no right to bring this appeal. Thus, we address this issue first.

[1] At common law, the State had no right to bring an appeal. *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986). Therefore, the State may only appeal a ruling if authorized to do so by statute. *Id.* N.C. Gen. Stat. § 15A-1445(a)(1) (1999) authorizes an appeal by the State where "there has been a decision or judgment dismissing criminal charges as to one or more counts," unless "the rule against double jeopardy prohibits further prosecution."

Clearly, granting defendant's motion to dismiss based on insufficient evidence was a "decision or judgment dismissing criminal charges." Therefore the State is within the statutory authority to bring this appeal as long as it does not violate the rule against double jeopardy. N.C. Gen. Stat. § 15A-1445(a)(1). The Double Jeopardy Clause is embodied in the Fifth Amendment of the United States Constitution, and its principles apply to the states through the Fourteenth Amendment. *State v. Sanderson*, 346 N.C. 669, 676, 488 S.E.2d 133, 136 (1997). The Double Jeopardy Clause ensures that "[o]nce a defendant has been tried for and acquitted of a crime . . . [he is protected] from being tried again for that crime," *id.*, and it acts to protect the individual from "being subjected to [the] 'embarrassment, expense and ordeal,' " of a second trial. *State v. Gilley*, 135 N.C. App. 519, 526, 522 S.E.2d 111, 116 (1999) (quoting *State v. Gardner*, 315 N.C. 444, 452, 340 S.E.2d 701, 707 (1986)).

Defendant contends that N.C. Gen. Stat. § 15A-1227(a)(3) (dismissal for insufficient evidence) and N.C. Gen. Stat. § 15-173 (1999) (allowing a motion for nonsuit, i.e., a dismissal for insufficient evidence) should be read together. When read together, defendant argues, these provisions imply that when the trial court granted defendant's motion to dismiss for insufficient evidence, it had "the force and effect of a verdict of 'not guilty' " on appeal. N.C. Gen. Stat. § 15-173. Therefore, since the dismissal had the effect of a not guilty

verdict, any further prosecution would violate the provisions of double jeopardy. We disagree.

When the State appeals from a criminal proceeding, and a reversal at the appellate level would result in a new trial—requiring defendant to once again defend himself, with all the emotional and monetary burdens associated therewith—the rule against double jeopardy would prohibit further prosecution. Thus, N.C. Gen. Stat. § 15A-1445(a)(1) does not authorize an appeal by the State in that situation. However, where, as in the case before us, the reversal would only serve to reinstate the verdict rendered by the jury, defendant is in no danger of reprosecution, and the appeal does not place the defendant in double jeopardy. As stated by the United States Supreme Court in *United States v. Wilson*, 420 U.S. 332, 344-45, 43 L. Ed. 2d 232, 242 (1975), where "reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution." Accordingly, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* at 344, 43 L. Ed. 2d at 242; *see also Smalis v. Pennsylvania*, 476 U.S. 140, 145 n.8, 90 L. Ed. 2d 116, 122 n.8 (1986); *State v. Metcalfe*, 974 P.2d 1189, 1192-93 (Or. 1999); *State v. Cetnar*, 775 A.2d 198, 203-04 (N.J. Super. Ct. App. Div. 2001); *State v. Timoteo*, 952 P.2d 865, 869 (Haw. 1997); *State v. Vorgvongsa*, 692 A.2d 1194, 1198 (R.I. 1997).

In the case *sub judice*, defendant has already had his trial, had his right to be heard and to present evidence, and will suffer no further harm (other than imposition of punishment) should this Court reverse the trial court's order, for the original jury verdict finding defendant guilty of driving while impaired would simply be reinstated. The emphasis of double jeopardy is on the possibility of defendant being subjected to a new trial—not whether the dismissal acts as a verdict of not guilty. As long as defendant would not be subjected to a new trial on the issues, his double jeopardy rights have not been violated. Therefore, we hold that the State may lawfully bring this appeal, as it does not violate the rule against double jeopardy.

[2] Having held that the State is entitled to bring this appeal, we turn to the assignment of error before us: whether the trial court was correct in granting defendant's motion to dismiss the impaired driving charge based on insufficient evidence. As both parties agree that the only element of this offense in question is

whether or not defendant was impaired, we will limit our discussion to this element.[1]

As defendant refused to take the Intoxilyzer test, the State needed to prove beyond a reasonable doubt that defendant was impaired through his actions and words, and through other indicia that showed he was appreciably impaired. We conclude the State has not met this burden.

The only evidence presented by the State to indicate that defendant was impaired is the following: (1) that, after being signaled by the officer to pull over, defendant had brought the vehicle to a stop in an intersection; (2) that defendant stopped the vehicle, jumped out of the vehicle and approached the officer, whereupon the officer ordered defendant back to the vehicle, and defendant complied; (3) that the officer smelled alcohol coming from within the vehicle; (4) that the officer noticed an open bottle of beer on the seat beside defendant; (5) that the bottle of beer was approximately one-half full; (6) that after defendant exited the vehicle, the officer noticed an odor of alcohol coming from defendant and/or defendant's clothing; and (7) that defendant appeared to have slurred speech. We hold that this evidence, in and of itself, is not sufficient to prove beyond a reasonable doubt that defendant was appreciably impaired. This Court has previously stated:

> [u]nder our statutes, the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired. Nor does the fact that defendant smells of alcohol by itself control. . . . The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired.

State v. Parisi, 135 N.C. App. 222, 224-25, 519 S.E.2d 531, 533 (1999) (quoting *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985)).

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1. N.C. Gen. Stat. § 20-138.1 (1999) entitled "Impaired Driving," reads in pertinent part:

> (a) Offense.—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.

Here, the State has not offered any evidence indicating that defendant had difficulty controlling the vehicle or that he appeared appreciably impaired. Although the officer did testify that defendant stopped his vehicle in the middle of an intersection, the transcript shows that the roads formed a T-intersection, and therefore at that intersection, there were limited places in which to pull the vehicle over. Furthermore, on cross-examination, the officer testified that he at no time observed defendant weaving in and out of his lane or within his lane, that defendant did not appear to stumble or have any difficulty walking when he left the vehicle, and that defendant was at all times compliant, courteous, and non-combative. In addition, defendant was not asked to submit to any field sobriety tests (which are designed to test whether or not an individual is impaired), as the officer was not trained in field sobriety tests at that time.

Thus, we conclude that the trial court was correct in dismissing the impaired driving charge due to insufficient evidence as the State has not proven defendant was appreciably impaired.

Affirmed.

Judges GREENE and McGEE concur.

TALMYR CLARK, COLIN A. HOLWAY AND MICHAEL D. BAKER, IN THEIR RESPECTIVE INDIVIDUAL CAPACITIES AND, ALTERNATIVELY, IN THEIR CAPACITIES OFFICERS, DIRECTORS AND SHAREHOLDERS OF FIBERCAP, INC., PLAINTIFFS V. KRISTOPHER PENLAND, RANDY PENLAND DAVID PENLAND, IN THEIR INDIVIDUAL CAPACITIES AND IN THEIR RESPECTIVE CAPACITIES AS OFFICERS, DIRECTORS AND SHAREHOLDERS OF FIBERCAP, INC. AND FIBERCAP DIGITAL, INC.; AND FIBERCAP, INC.; AND FIBERCAP DIGITAL, INC., DEFENDANTS

No. COA00-1152

(Filed 18 September 2001)

1. Discovery— sanctions—showing of prejudice—not required

The trial court did not abuse its discretion by entering default and default judgment for plaintiffs as a sanction for failure to comply with a discovery order where defendants contended that there was no prejudice from their failure to comply, but a showing of prejudice is not required to obtain sanctions under Rule 37 for abuse of discovery. Moreover, the court here specifically

found that plaintiffs had been prejudiced and stated that it had determined that lesser sanctions would not suffice.

2. Appeal and Error— appealability—discovery sanctions—interlocutory order—substantial right affected

A substantial right was affected by a discovery sanctions order striking defendants' answer and affirmative defenses and entering a default judgment.

3. Civil Procedure— Rule 59(e) motion for relief—failure to state grounds

The trial court did not abuse its discretion by denying a Rule 59(e) motion for relief from discovery sanctions and a default judgment where the motion failed to state its grounds.

4. Civil Procedure— Rule 60 relief—carelessness of attorney

The trial court did not abuse its discretion by denying a Rule 60(b)(1) motion for relief from discovery sanctions and a default judgment where defendants argued that their counsel failed to take notice of the order for sanctions. Ignorance, inexcusable neglect, or carelessness by an attorney will not provide grounds for Rule 60(b)(1) relief.

Appeal by defendants from orders entered 30 March 2000 and 25 May 2000 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 August 2001.

Jordan, Price, Wall, Gray, Jones & Carlton, P.L.L.C., by Paul T. Flick and Jonathan P. Carr, for plaintiff-appellee.

Parker & Howes, L.L.P., by David P. Parker, for defendant-appellant.

TYSON, Judge.

David Penland and Randy Penland ("defendants") appeal the trial court's entry of default and default judgment 30 March 2000 in favor of Talmyr Clark, Colin A. Holway, Michael D. Baker, and Fibercap, Inc. ("plaintiffs") and order denying defendants' motion for relief dated 25 May 2000.

I. Facts

Plaintiffs and defendants agreed to incorporate Fibercap, Inc. for the installation and sale of fiber optic communications cable and con-

duit. During construction of a fiber optic loop for Wake Forest University, plaintiffs learned that defendants were appropriating money received from Wake Forest University. Plaintiffs filed suit on 15 October 1998.

On 18 March 1999, plaintiffs served defendants with a first set of interrogatories and on 29 July 1999 a second set of interrogatories. Plaintiffs then moved for an order compelling discovery. On 15 October 1999, the trial court ordered defendants to supplement responses to first set of interrogatories and answer second set of interrogatories within 30 days.

Defendants served their supplemental responses and answers on 15 November 1999. The trial court found defendants' answers were insufficient. Plaintiffs moved for sanctions. On 30 March 2000, the trial court found that defendants failed to comply with the court order and struck defendants' answer and affirmative defenses, and entered default judgment on all claims as to liability only.

On 7 April 2000, defendants timely filed a motion for relief from judgment or order, pursuant to Rule 59 and 60, which motion was denied on 25 May 2000. Defendants filed notice of appeal on 12 June 2000.

II. Issues

Defendants raise twenty-three assignments of error. Those assignments of error relating to the findings of facts and conclusions of law not argued in defendants' brief are deemed abandoned. N.C. R. App. P. 28(b)(5) (1999). Defendants raise two issues and argue that the trial court abused its discretion in (1) entry of default as sanctions against defendants for failure to comply with discovery requests and (2) denying defendants' motion for relief. We disagree and affirm the order of the trial court.

A. Sanctions

[1] Defendants argue that the trial court abused its discretion in entering default and default judgment, and that such a sanction was too severe. Rule 37(b)(2) allows "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." N.C. Gen. Stat. Sec. 1A-1, Rule 37(b)(2) (1999). "Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that

discretion." *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (citation omitted). This Court may reverse for abuse of discretion only upon a showing that the trial court's order is "manifestly unsupported by reason." *Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564 (1996), *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996) (citations omitted).

Defendants assert that the trial court committed reversible error because plaintiffs have not shown any prejudice due to defendants failure to comply with the court's order compelling discovery. We disagree. "Rule 37 does not require the [movant] to show that it was prejudiced by the [nonmovant's] actions in order to obtain sanctions for abuse of discovery." *Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 668 (1990), *disc. rev. denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). Even so, the trial court specifically found that plaintiffs had been prejudiced. The trial court further stated that it considered less severe sanctions and determined that lesser sanctions would not suffice. *Cheek* at 374, 465 S.E.2d at 564 (trial court must consider less severe sanctions). We find no abuse of discretion.

B. Motion for Relief

[2] The entry of default and default judgment by order on 30 March 2000 was not a final default judgment. The trial court retained jurisdiction to determine the issue of damages. While this appeal is interlocutory, the order striking defendants' answer, affirmative defenses, and entering default affects a substantial right. *Vick v. Davis*, 77 N.C. App. 359, 360, 335 S.E.2d 197, 198 (1985) (appeal from order imposing sanctions after defendant refused to identify a material witness) (citing *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E.2d 162 (1983)).

[3] Defendants argue the trial court abused its discretion in denying its motion for relief. Defendants' Rule 59(e) motion fails to state the grounds therefor under section (a) of this rule and as required under Rule 7(b). *See* N.C. Gen. Stat. Sec. 1A-1, Rule 59(e) (1999); N.C. Gen. Stat. Sec. 1A-1, Rule 7(b)(1) (1999); *Meehan v. Cable*, 135 N.C. App. 715, 721, 523 S.E.2d 419, 423 (1999). Defendants' Rule 59(e) motion was properly denied.

[4] Rule 60(b)(1) provides that a party may be relieved from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect. N.C. Gen. Stat. Sec. 1A-1, Rule 60(b)(1) (1999).

"Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered." *PYA/Monarch, Inc. v. Ray Lackey Enterprises, Inc.*, 96 N.C. App. 225, 227, 385 S.E.2d 170, 171 (1989) (citations omitted). In determining whether to grant relief under Rule 60(b)(1), the trial court acts within its sound discretion. *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983) (citation omitted). The ruling will be disturbed only upon a showing of abuse of discretion. *Id.*

Defendants claim that the trial court's denial of their motion for relief was "manifestly unsupported by reason." Defendants fail to articulate the basis for this argument. We note that Defendants argued in their Rule 60(b)(1) motion that defendants' counsel mistakenly failed to take note of the order for sanctions, which was timely served, and mistakenly thought that the motion for sanctions that appeared on the court docket pertained to another defendant. Ignorance, inexcusable negligence, or carelessness on the part of an attorney will not provide grounds for relief under Rule 60(b)(1). *Henderson v. Wachovia Bank of N.C., N.A.*, 145 N.C. App. 621, — S.E.2d —, — (2001) (citing *Briley v. Farabow*, 348 N.C. 537, 545, 501 S.E.2d 649, 655 (1998). The choice of sanctions under Rule 37 lies within the trial court's discretion and the sanctions imposed by the trial court are among those expressly authorized by the statute. We find no abuse of discretion by the trial court in denying defendants' motion. The judgment and order are affirmed.

Affirmed.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. KUWSH ABDULLAH MUHAMMAD

No. COA00-1070

(Filed 18 September 2001)

Constitutional Law— double jeopardy—robbery and kidnapping—victim's greater danger

The trial court did not err in a prosecution for common law robbery and second-degree kidnapping by denying defendant's motion to vacate the second-degree kidnapping conviction on the

ground of double jeopardy where defendant placed the victim in a choke hold, hit him in the side three times, wrestled with him on the floor, grabbed him around the throat, and marched him to the front of the store with a gun to his head. Defendant did substantially more than force the victim to walk from one part of the restaurant to another and there was sufficient evidence of restraint and removal separate and apart from that which is inherent in common law robbery.

Appeal by defendant from judgment entered 18 April 2000 by Judge David Q. LaBarre in Orange County Superior Court. Heard in the Court of Appeals 20 August 2001.

Michael F. Easley, Attorney General, by Jill B. Hickey, Assistant Attorney General, for the State.

James E. Williams, Jr., Public Defender, by LaFonda R. Jones, Assistant Public Defender, for defendant-appellant.

THOMAS, Judge.

Defendant, Kuwsh Abdullah Muhammad, was found guilty in a jury trial of common law robbery and second-degree kidnapping. He appeals the kidnapping conviction, arguing that it violates the prohibition against double jeopardy guaranteed by the Fifth Amendment to the United States Constitution and should have been vacated by the trial court.

We disagree and find no error.

The state's evidence tended to show the following: Defendant entered a Pizza Hut in Hillsborough, North Carolina, through a back door on 11 February 1999. Jeremiah Cash, an employee, was in the rear of the building washing dishes. Defendant approached Cash from behind, put an arm around Cash's throat, and hit him three times in the side. The two men wrestled and fell to the floor where the struggle continued until defendant pointed what appeared to be a gun at Cash's head and told him to get up.

Cash complied. When Cash stood back up, however, defendant again grabbed him around the neck. Defendant, pointing the gun at Cash's head, forced Cash to walk to the front of the restaurant where restaurant manager Fred McQuaig was standing. Upon seeing the two men, McQuaig said repeatedly, "Please don't hurt him." McQuaig then took money from the safe and cash register and handed it to defend-

ant. After getting the money, defendant released Cash and ran out the back door.

Law enforcement officials later determined that the gun used by defendant was a cap gun.

Defendant presented no evidence at his trial during the 18 April 2000 session of Orange County Superior Court, and was convicted of both second-degree kidnapping and common law robbery. He moved for the kidnapping conviction to be vacated based on double jeopardy grounds. The trial court denied the motion and sentenced defendant to consecutive terms in the North Carolina Department of Corrections of twenty-nine to forty-four months for second-degree kidnapping and fifteen to eighteen months for common law robbery.

By defendant's only assignment of error, he argues that the trial court erred in not vacating the second-degree kidnapping conviction because there was insufficient evidence of restraint and removal separate and apart from that which is inherent in common law robbery. Therefore, he contends, the kidnapping conviction violates the double jeopardy guarantees of the Fifth Amendment. We disagree.

N.C. Gen. Stat. § 14-39(a) (1999) provides in pertinent part that a person is guilty of kidnapping if he:

> shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . if such confinement, restraint or removal is for the purpose of:
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony. . . .

Common law robbery is the taking of personal property of another by violence or placing the person in fear. *See* N.C. Gen. Stat. § 14-87.1.

The Double Jeopardy Clause, found in the Fifth Amendment and enforceable against the states through the Fourteenth Amendment, ensures against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. BLACK'S LAW DICTIONARY 491 (6th ed. 1990).

Our Supreme Court in *State v. Fulcher* held that the General Assembly did not intend the element of restraint inherent in some

felonies to also constitute kidnapping. *Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). "It is self-evident that some crimes (*e.g.*, forcible rape, armed robbery) cannot be committed without some restraint of the victim." *Id.* The *Fulcher* Court further stated that to hold otherwise would violate the constitutional prohibition against double jeopardy. *See id.*

However, the Court also observed that it is well-established that two or more criminal offenses may arise from the same course of action. *Id.* at 523, 243 S.E.2d at 351. Thus, a conviction for kidnapping does not violate the constitutional prohibition against double jeopardy where the restraint is used to facilitate the commission of another felony, provided the restraint is a separate, complete act, independent of and apart from the other felony. *Id.* at 524, 243 S.E.2d at 352.

Cases since *Fulcher* have held that the key question is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the underlying felony itself. *See State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998). Evidence that a defendant increased the victim's helplessness and vulnerability beyond what was necessary to enable the robbery or rape is sufficient to support a kidnapping charge. *Id.*

Defendant here contends the kidnapping conviction is improper because Cash was not exposed to greater danger than that which was necessary to commit the robbery, and cites *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), as support for his position. In *Irwin*, the Court held that there was no separate kidnapping offense because forcing the armed robbery victim to walk a short distance to or away from a cash register did not subject the victim to the kind of danger and abuse our kidnapping statute was designed to prevent. The Court found that the removal of the victim was a mere technical asportation inherent in the offense of robbery. *See id.* at 103, 282 S.E.2d at 446.

The evidence in *Irwin*, however, was only that the defendant forced an employee at knife point to walk to the back of the store in order to obtain money and prescription drugs. Defendant in the present case did not simply hold Cash at gun point and force him to walk to the cash register. Defendant placed Cash in a choke hold, hit

him in the side three times, wrestled with Cash on the floor, grabbed Cash again around the throat, pointed a gun at his head and marched him to the front of the store. Taken together, these actions constituted restraint beyond what was necessary for the commission of common law robbery. *See Beatty*, 347 N.C. 555, 495 S.E.2d 367 (holding that there was no kidnapping where the victim was forced to go inside the restaurant and held at gunpoint during the robbery but was not harmed or otherwise moved; but that there was a kidnapping where a second victim was forced to lie on the floor with his wrists and mouth bound with duct tape and then kicked twice in the back); *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992) (sustaining the kidnapping conviction where the defendant bound the victim's hands and feet); and *Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (upholding the kidnapping conviction where the defendant bound both rape victims' hands).

We distinguish *State v. Featherson*, 145 N.C. App. 134, 548 S.E.2d 828 (Jul. 17, 2001) (No. COA00-471), which held that there was no kidnapping where the robbers bound the victim, who was already in the same room as them, loosely with duct tape to the defendant, "in such a manner as to allow them to escape quickly." *Id.* at 139, 548 S.E.2d at 832.

In the instant case, defendant did substantially more than just force Cash to walk from one part of the restaurant to another. Accordingly, we hold that there was sufficient evidence of restraint and removal separate and apart from that which is inherent in common law robbery. The trial court did not err in denying defendant's motion to vacate the conviction of second-degree kidnapping.

NO ERROR.

Judges EAGLES and TIMMONS-GOODSON concur.

MILLS POINTE HOMEOWNER'S ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF v. JOAN P. WHITMIRE, GARY D. MORGAN VIRGINIA M. MORGAN, GARY D. MORGAN DEVELOPER, INC., A NORTH CAROLINA CORPORATION, AND SOUTHWIND ENTERPRISES INCORPORATED, A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA00-1067

(Filed 18 September 2001)

Appeal and Error–appealability–interlocutory order–no substantial right

Plaintiff's appeal from an order partially granting defendant's motion to dismiss the claims for declaratory judgment, fraud, unfair and deceptive trade practices, breaches of covenants, and attorney fees is dismissed because it is an appeal from an interlocutory order since the claims for conversion and punitive damages remain, and the appeal does not affect a substantial right.

Appeal by plaintiff from order entered 3 July 2000 by Judge Ronald K. Payne in Henderson County Superior Court. Heard in the Court of Appeals 15 August 2001.

Dungan & Mitchell, P.A., by Robert E. Dungan and Shannon Lovins, for plaintiff-appellant.

Prince, Youngblood & Massagee, by Boyd B. Massagee, Jr. and Sharon B. Alexander, for defendant-appellee Whitmire.

HUDSON, Judge.

Mills Pointe Homeowner's Association, Inc. ("plaintiff") appeals from an order granting in part defendant Joan P. Whitmire's motion to dismiss. The order is interlocutory, and, plaintiff having failed to demonstrate that a substantial right will be affected if plaintiff is not given the right of immediate appeal from the order, this appeal is dismissed.

The pertinent procedural history is as follows. On 29 April 1999, plaintiff filed a complaint naming as defendants Whitmire, Gary D. and Virginia M. Morgan ("the Morgans"), Gary D. Morgan Developer, Inc., and Southwind Enterprises Inc. ("Southwind"). At all relevant times, Whitmire was the president and secretary of Southwind. The complaint alleges causes of action for: (1) a declaratory judgment regarding real property known as the Mills Pointe Subdivision; (2)

fraud against all defendants; (3) unfair and deceptive trade practices against all defendants, *see* N.C. Gen. Stat. § 75-1.1 (1999); (4) breaches of covenants against all defendants; (5) breaches of fiduciary duties against the Morgans; (6) conversion against Whitmire and Southwind; (7) attorney's fees against all defendants; and (8) punitive damages against the Morgans, Southwind, and Whitmire.

On 2 July 1999, Whitmire and Southwind filed an answer and a motion to dismiss all causes of action, pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Pursuant to plaintiff's motions for entry of default, the trial court entered an order of default against the Morgans on 23 August 1999, and against Gary D. Morgan Developer, Inc. on 30 May 2000. After hearing Whitmire's motion to dismiss, the court granted the motion in part in an order filed 3 July 2000. Specifically, the court dismissed the claims for declaratory judgment, fraud, unfair and deceptive trade practices, breaches of covenants, and attorney's fees as to Whitmire. Plaintiff appeals from the 3 July 2000 order.

Although neither party addressed the interlocutory nature of plaintiff's appeal, we raise this issue of appealability on our own motion. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). An order granting a motion to dismiss certain claims in an action, leaving other claims to go forward, is an interlocutory order. *See Thompson v. Newman*, 74 N.C. App. 597, 328 S.E.2d 597 (1985). In the order at issue here, the superior court dismissed the claims for declaratory judgment, fraud, unfair and deceptive trade practices, breach of covenants, and attorney's fees, but allowed the conversion and punitive damages claims against Whitmire, as well as all of the claims against Southwind, to go forward. In addition, while the clerk has entered defaults in the claims against the Morgans, no judgments have been entered on these claims. Therefore, the order from which plaintiff appeals is interlocutory.

In general, there is no right to appeal from an interlocutory order. *See, e.g., Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, a party may appeal an interlocutory order "where the order represents a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal," or "where delaying the appeal will irreparably impair a sub-

stantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999) (internal quotation marks omitted); *see* N.C. Gen. Stat. §§ 1A-1, Rule 54(b), 1-277, 7A-27(d) (1999). Here, the trial court did not certify that there is no just reason to delay the appeal. Thus, an immediate appeal from the interlocutory order here is proper if delay would irreparably impair a substantial right of plaintiff.

The party desiring an immediate appeal of an interlocutory order bears the burden of showing that such appeal is necessary to prevent loss of a substantial right. *See Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. In *Jeffreys*, our Court dismissed an interlocutory appeal when the appellant "presented neither argument nor citation to show this Court that [it] had the right to appeal the [interlocutory order]. It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order . . . ." *Id.* Although at oral argument here, plaintiff's counsel asserted that the substantial right which plaintiff seeks to protect is the avoidance of inconsistent verdicts, plaintiff neither mentioned nor argued in its brief that it risked loss of a substantial right absent immediate appeal. We conclude that plaintiff has not met its burden. Accordingly, plaintiff's appeal is dismissed.

Appeal dismissed.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. AARON BERNARD BROWN

No. COA00-1039

(Filed 18 September 2001)

Sentencing— double jeopardy—Habitual Felons Act—structured sentencing

The use of the Habitual Felons Act under N.C.G.S. § 14-7.1 et. seq. in combination with structured sentencing under N.C.G.S. § 15A-1340.10 et. seq. to enhance defendant's sentence for possession with intent to sell and deliver marijuana as a result of his being an habitual felon does not violate double jeopardy because: (1) the statutory scheme of these statutes ensures that a defend-

ant's prior convictions will not be used to simultaneously enhance punishment; and (2) the North Carolina Supreme Court has already concluded that our state's Habitual Felons Act conforms with the constitutional strictures dealing with double jeopardy.

Appeal by defendant from judgment entered 3 January 2000 by Judge Russell G. Walker, Jr. in Moore County Superior Court. Heard in the Court of Appeals 15 August 2001.

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

Bruce T. Cunningham, Jr. for defendant-appellant.

WALKER, Judge.

Defendant appeals his sentence for possession with intent to sell and deliver marijuana which was enhanced as a result of his being an habitual felon. Our review of the record reveals the following: On 16 May 2000, defendant pleaded guilty to possession with intent to sell and deliver marijuana and to being an habitual felon. Prior to the entry of this plea, the defendant moved the trial court to dismiss his habitual felon indictment arguing that the enhancement of his structured sentence through an application of habitual felon status violates his constitutional rights. After the trial court denied defendant's motion, he proceeded to enter a guilty plea. The trial court then imposed a sentence of 80 to 105 months based on defendant's status as an habitual felon and a calculated prior record level of IV.

At the outset, we note the State has filed a motion to dismiss the appeal contending that the defendant's entry of a guilty plea precludes his right to raise the constitutional issues presented in his appeal. *See* N.C. Gen. Stat. § 15A-1444(e) (1999); *see also State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995) (holding where defendant pleaded guilty to being an habitual felon and did not move in the trial court to withdraw his guilty plea, defendant was not entitled to an appeal of right from the trial court's ruling). In response, the defendant has filed a petition for certiorari. We elect to grant review of the constitutional issue raised in the appeal. *See* N.C.R. App. P. 21(a)(1) (1999).

Defendant presents the following constitutional questions: First, whether N.C. Gen. Stat. § 14-7.1 et. seq. (Habitual Felons Act), when

used in conjunction with N.C. Gen. Stat. § 15A-1340.10 et. seq. (structured sentencing), violates the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution by subjecting him to double jeopardy. Second, whether the Habitual Felons Act violates Article I, Section 6 of the North Carolina Constitution by granting to a district attorney the complete discretion to seek an enhancement of a statutorily prescribed sentence. This Court has recently rejected an identical challenge to the Habitual Felons Act as violating Article I, Section 6 of our State's constitution. *See State v. Wilson*, 139 N.C. App. 544, 550-51, 533 S.E.2d 865, 870 (2000). Accordingly, we limit our discussion to defendant's double jeopardy argument.

Our appellate courts have previously addressed double jeopardy challenges to this State's Habitual Felons Act. *See e.g. State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985) (holding the Habitual Felons Act alone did not violate double jeopardy); *State v. Mason*, 126 N.C. App. 318, 321, 484 S.E.2d 818, 820 (1997) (rejecting double jeopardy challenge to the Violent Habitual Felons Act); *State v. Stevenson*, 136 N.C. App. 235, 246, 523 S.E.2d 734, 740 (1999), *disc. rev. denied*, 351 N.C. 368, 543 S.E.2d 144 (2000) (also rejecting double jeopardy challenge to the Violent Habitual Felons Act). Notwithstanding this line of decisions, the defendant argues that the use of the Habitual Felons Act in combination with structured sentencing violates double jeopardy by twice enhancing his sentence. We disagree.

In reviewing the combined use of the Habitual Felons Act and structured sentencing, it is apparent our legislature anticipated such an argument as the defendant is now making. The statutory scheme of these statutes ensures that a defendant's prior convictions will not be used to simultaneously enhance punishment. N.C. Gen. Stat. § 14-7.6 specifically prohibits the State from using those prior "convictions used to establish a person's status as an habitual felon" to determine a defendant's prior record level for structured sentencing. N.C. Gen. Stat. § 14-7.6 (1999); *see also State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). Additionally, our Supreme Court, in *State v. Todd* addressed the constitutionality of this State's Habitual Felons Act and found the law to conform with the constitutional strictures dealing with double jeopardy, cruel and unusual punishment, and equal protection. *Todd*, 313 N.C. at 117, 326 S.E.2d at 253.

Based on our review of the record, we find the trial court properly determined defendant's status as an habitual felon and correctly

calculated his prior record level for structured sentencing. Further, neither structured sentencing nor the Habitual Felons Act was used to punish the defendant for his prior convictions. Rather, both laws were used to enhance the defendant's punishment for his current offense. Therefore, we conclude the Habitual Felons Act used in conjunction with structured sentencing did not violate the defendant's double jeopardy protections. Any further argument by the defendant regarding the punishment provided by each of these laws should be addressed to the legislature. Defendant's motion for appropriate relief is denied.

Affirmed.

Judges McGEE and HUDSON concur.

IN THE MATTER OF: HEAVEN ANGEL LEIGH SMITH, MACKENZIE MITCHELL COREY VAN EATON, KRISTINA WHITLEY SADE VAN EATON, TRISTAN MIELEL DANTE VAN EATON

No. COA00-1170

(Filed 18 September 2001)

1. Child Abuse and Neglect— adjudication of neglect—sufficiency of evidence

The trial court erred by finding that respondent mother neglected her four children within the meaning of N.C.G.S. § 7B-101(15) based on a finding that the four children on and about 20 May 2000 were living in a mobile home without water or electricity and with very little food, because: (1) there was no evidence the children lived in the mobile home after February 2000, the date the mother moved with them to Ohio; and (2) the evidence revealed that the children lived with either their father, the children's relatives, or with the mother in the Surry County Women's Shelter after their return from Ohio and prior to the entry of the nonsecure orders.

2. Child Abuse and Neglect— adjudication of neglect—adequate housing—sufficiency of evidence

The trial court erred by finding that respondent mother neglected her four children within the meaning of N.C.G.S.

§ 7B-101(15) based on a finding that there was insufficient housing for the children, because the evidence revealed the mother made arrangements for adequate housing on each occasion when she was unable to provide housing for her children.

Appeal by respondent mother from orders filed 14 August 2000 by Judge Charles M. Neaves, Jr. in Surry County District Court. Heard in the Court of Appeals 21 August 2001.

Francisco & Merritt, by H. Lee Merritt, Jr., for petitioner-appellee Surry County Department of Social Services.

Kim Grabs guardian ad litem.

Donnelly & Bowen, by Heather J. Bowen, for respondent mother-appellant.

GREENE, Judge.

Crystal Smith Van Eaton (the mother) appeals juvenile adjudication orders filed 14 August 2000 finding her to have neglected her four minor children.

In February 2000, the mother and her children moved from North Carolina to Ohio. Upon their return to North Carolina on 14 May 2000, the mother was placed in the custody of the Sheriff of Surry County for seven days. During this period, the children stayed with their father, Gary Van Eaton, during the day and with relatives at night. After the mother's release on 21 May 2000, she and her children resided with an aunt for a couple of days.

On 22 May 2000, while the children's parents were removing their personal items from a mobile home in which they previously resided, a social worker arrived and noted there was no electricity, water, or food in the home. There also was no evidence the children had resided in the home since February 2000.

On 25 May 2000, the mother asked the Surry County Department of Social Services (DSS) for housing assistance. DSS arranged temporary shelter at the Surry Women's Shelter for the mother and her children. The next day, however, the mother was arrested, and she requested DSS take custody of her children for the duration of her incarceration. On 30 May 2000, DSS filed juvenile petitions alleging neglect of the four children, and pursuant to nonsecure custody orders, the children were placed in foster care.

On 30 June 2000, an adjudication hearing was conducted by the trial court. The trial court found the parents were living in a mobile home with the children on and about 22 May 2000 and there was no water, no electricity, and very little food in the home. The trial court also found that on 26 May 2000, the date of the mother's second incarceration, "there was not sufficient housing for the four children." The trial court concluded the children were neglected within the meaning of section 7B-101(15), and in four separate disposition orders, directed custody of the children remain with DSS.

The issues are whether the evidence supports: (I) the finding that the four children were, on and about 22 May 2000, living in a mobile home without water or electricity and with very little food; and (II) the finding that on 26 May 2000 "there was not sufficient housing for the four children."

A trial court's findings of fact are deemed conclusive, even where some evidence supports contrary findings, if they are supported by clear and convincing competent evidence. *See In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997); N.C.G.S. § 7B-805 (1999). Clear and convincing evidence "is greater than the preponderance of the evidence standard required in most civil cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citation omitted). It is defined as "evidence which should 'fully convince.' " *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934) (citation omitted).

I

[1] In this case, there simply is no evidence the children lived in the mobile home after February 2000, the date the mother moved with them to Ohio. After their return from Ohio and prior to the entry of the nonsecure orders, the evidence reveals the children lived with either their father (in some place other than the mobile home), the children's relatives, or with the mother in the Surry Women's Shelter. Accordingly, this finding is not supported by clear and convincing evidence.

II

[2] Moreover, the record does not support the finding that there was "not sufficient housing" for the children. The evidence instead reveals the mother made arrangements for adequate housing on each occasion she herself was unable to provide housing for her children.

During the seven days she was in the custody of the Surry County Sheriff's Department, the children were cared for by their father and some of the children's other relatives. When the mother was released from custody, she and her children lived with an aunt for a few days and then in the Surry Women's Shelter. Upon the mother's second incarceration, she asked DSS to take custody of the children and they were placed in foster care. There is no evidence the children were ever without adequate housing. Accordingly, this finding is not supported by clear and convincing evidence.

Since the relevant findings are not supported by the evidence, the trial court's conclusion of neglect cannot survive. *See Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. It follows that the adjudication of neglect must be reversed.

Reversed.

Judges CAMPBELL and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 SEPTEMBER 2001)

HARDISTER v. DEAN No. 00-1053	Randolph (99CVD2045)	Vacated and remanded
IN RE JOHNSON No. 00-1011	Catawba (98J358)	Appeal dismissed
IN RE SMITH No. 00-1169	Surry (95J40-A) (95J41-A) (95J42-A) (00J77-A)	Reversed
POTEET v. TATE No. 00-1151	McDowell (91CVS101)	Affirmed
REINNINGER v. PRESTIGE FABRICATORS, INC. No. 00-798	Ind. Comm. (432839) (506658)	Affirmed
SOUTHERN STATES COOP., INC. v. FAIRLESS No. 00-1086	Hertford (98CVS223)	Reversed
STATE v. ALEXANDER No. 00-851	Cabarrus (98CRS009048) (98CRS009049) (99CRS002839)	No error
STATE v. BIVENS No. 00-1354	Mecklenburg (98CRS26664)	Affirmed
STATE v. BRENNAN No. 00-671	Haywood (99CRS5133) (99CRS5134) (99CRS5135) (99CRS5136) (99CRS5829) (99CRS5872)	No error
STATE v. BRYANT No. 00-1000	Wake (99CRS98060) (99CRS98061)	No error
STATE v. CAMANCHO No. 00-1109	Greene (99CRS600)	No error
STATE v. CHANEY No. 01-227	Wake (99CRS7795) (99CRS7796)	No error

STATE v. GONZALEZ No. 01-168	Mecklenburg (99CRS45627) (99CRS45629)	Remanded to correct error in judgment; appeal dismissed
STATE v. GOODS No. 00-1119	Guilford (99CRS023577) (99CRS41386) (99CRS51591)	No error
STATE v. HAMILTON No. 00-1473	Cumberland (99CRS59081)	No error; remanded for correction of clerical error
STATE v. JONES No. 00-1021	Iredell (99CRS13341) (99CRS13342) (99CRS13343) (99CRS13344)	No error
STATE v. JONES No. 01-46	Wake (97CRS8368) (97CRS8369) (97CRS37283)	No error
STATE v. LYNCH No. 00-1389	Mechlenburg (98CRS127252) (98CRS127253) (98CRS127254)	No error
STATE v. McQUAIG No. 99-1432-2	Durham (97CRS38912) (97CRS38914) (97CRS38915)	In sum, defendant received a fair trial free of prejudicial error. In 97CRS38914, judgment is vacated and the case is remanded for re-sentencing. In 97CRS38912, assault with a deadly weapon inflicting serious bodily injury, no error. In 97CRS38914, second-degree kidnapping, no error in the trial, remanded for re-sentencing. In 97CRS38915, attempted robbery with a dangerous weapon, no error.

STATE v. MILLER No. 00-1497	Wilkes (98CRS1207) (98CRS1248) (98CRS2876)	Affirmed
STATE v. PICKARD No. 00-1105	Rockingham (96CRS12499)	No error
STATE v. RASHEED No. 00-1143	Durham (99CRS57988) (99CRS57990) (99CRS57992) (99CRS57993) (99CRS57994) (99CRS57996) (99CRS57997) (99CRS57999) (99CRS58000) (99CRS58002) (99CRS58030) (99CRS58031) (99CRS58032) (99CRS58033) (99CRS58034) (99CRS58035) (99CRS58036) (99CRS58037) (99CRS58038) (99CRS58040)	No error
STATE v. SMITH No. 00-1491	Guilford (98CRS104366)	No error
STATE v. STONE No. 00-1058	Moore (00CRS976)	Affirmed
STATE v. WELDON No. 01-92	Wake (99CRS45968)	No error at trial; remanded to correct error in judgment
STATE v. WHITE No. 00-1132	Cumberland (98CRS72585)	Affirmed

IN RE D.D.

[146 N.C. App. 309 (2001)]

IN THE MATTER OF: D.D.

No. COA00-947

(Filed 2 October 2001)

1. **Search and Seizure— juvenile on school grounds—not a student—officer involvement—reasonableness**

The trial court properly denied a juvenile's motion to suppress in a proceeding based upon an allegation that she was in possession of a knife on school property where a substitute teacher relayed to the principal an overheard conversation that a group of girls were coming onto the campus at the end of the day for a fight; the principal and several officers found four girls in a parking lot where their presence was unusual; and an eventual search in the principal's office revealed the knife. In balancing the students' privacy interest against the principal's obligation to maintain both a safe and educational environment, the facts of this case weigh in favor of applying the standard of *New Jersey v. T.L.O.*, 469 U.S. 325, even though some of the students were not from that school. Moreover, the T.L.O. standard should apply when school officials bring police officers into the school setting because the officers are there to assist the school in creating and sustaining a safe environment conducive to learning. Given the totality of the evidence, the officers' involvement here was minimal relative to the actions of the principal.

2. **Juveniles— delinquency—possession of knife on school property—sufficiency of evidence**

There was sufficient evidence to support a juvenile's conviction for possessing a knife on school property where she contended that the parking lot where she first encountered the principal was not educational property because a city bus stop was located on the property, but the principal testified that the parking lot was school property. In reviewing a challenge to the sufficiency of evidence, the evidence must be viewed in the light most favorable to the State. N.C.G.S § 14-269.2(d).

Appeal by juvenile from judgment entered on 1 May 2000 by Judge Kenneth C. Titus in District Court, Durham County. Heard in the Court of Appeals 22 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General George K. Hurst, for the State.

UNC Clinical Programs, by Joseph E. Kennedy, for juvenile-appellant.

TIMMONS-GOODSON, Judge.

D.D. ("juvenile") appeals from an order adjudicating her delinquent and placing her on a one-year period of supervised probation. For the reasons herein stated, we affirm juvenile's adjudication of delinquency.

On 15 February 2000, a petition was filed alleging that juvenile was delinquent, in that she "unlawfully, willfully did possess[] a knife on educational property, Hillside High School ("Hillside")" in violation of North Carolina General Statutes section 14-269.2(d). During 4 April 2000 adjudication hearing, juvenile moved to suppress the knife referenced in the petition. Pursuant to juvenile's motion, the trial court conducted a *voir dire* of Hillside's principal, Hermitage Hicks ("Principal Hicks"), and juvenile.

Principal Hicks testified that on 11 January 2000, a substitute teacher overheard a conversation among a group of students during in-school suspension and related the substance of that conversation to the principal. According to the substitute teacher, a group of girls was coming onto Hillside's campus to fight at the end of the school day. The substitute teacher further related to Principal Hicks the name of one Hillside student who the students noted would be involved in the fight.

In response to the teacher's comments, Principal Hicks "got with" Hillside's resource officer, Officer May, approximately ten minutes prior to the end of the school day and "made him aware of what the situation was." Officer May and Principal Hicks stationed themselves at opposite ends of the Hillside school building.

As Principal Hicks observed the front end of campus from his office, he noticed four female students in the parking lot. Principal Hicks testified that the females' presence in the lot was unusual for that time of the day, because students were not allowed in that parking lot without permission from an administrator. Principal Hicks recognized only one of the females as a Hillside student.

Principal Hicks stated that the parking lot was property of Hillside and only senior students, faculty, and visitors were authorized to park in the lot. A city bus stopped in the parking lot and thus, non-students could board buses from the lot.

Principal Hicks "gathered" Officer May, and two other police officers, Officers Burwell and McDonald, and the four men walked to the parking lot. Principal Hicks referred to Officer May as the school resource officer. The principal referred to Officers Burwell and McDonald as off-duty officers and specifically stated that Officer Burwell was "employed in our school." Officer Burwell later testified at the adjudication hearing that he was the city police officer assigned to Hillside as a "security officer." Juvenile testified on *voir dire* that the officers were in uniform and were carrying guns.

By the time the principal and the officers reached the lot, Hillside students had been dismissed from their classes and were filtering into the parking lot. According to Principal Hicks, when he and the officers arrived in the lot, the officers "allowed" him to confront the students. Principal Hicks then inquired of the Hillside student what she was doing in the parking lot. The student told the principal that she "had had an appointment and that she had met these three girls that were with her up at the bus stop on Fayetteville Street and they had walked to school with her. But she was just coming to get her books out of her locker."

According to Principal Hicks, the Hillside student stated that she knew she was in an unauthorized area. As Principal Hicks confronted the Hillside student, the other three girls "became very talkative" and one of them became "profane and vulgar." According to Principal Hicks, the females had a "don't careish [sic] attitude," and he and the officers "had to listen to all this back talk." The principal further recalled that the students "were joking about not being in school." As the students "kept trying to walk away," the officers "were there to tell them to 'hold on.' " Principal Hicks testified that while he questioned the girls, other than telling the students to "hold on," he could not remember the officers speaking to the students, as "they are there to assist [school officials] and that we are in control of the school. So we should be the front person in that kind of thing."

Principal Hicks then began to ask the girls for their names. The principal used a cellular telephone to call the Durham Public Schools' central office and determined that the names given by the students were false. He then asked the three girls for the name of the school

they attended. Principal Hicks testified that he called the school referenced by the three girls, and determined that they did not go to that particular school. Principal Hicks then testified that he called "the Learning Center," and confirmed that the girls attended "the Learning Center." Principal Hicks further attempted to contact the Learning Center's principal, but was unable to do so at that time. Principal Hicks testified that he was not going to let the girls leave because:

> Based on the information that I had within my mind and my frame of thought at that particular time, I knew of no school in our school system that would have dismissed and allowed students to have been on my campus at that time.
>
> And I feel an obligation when they are on my campus to call and try to see where they should be in school. . . . [I was not going to let them leave] '[t]ill I got some information as to where they attended school and why they were not in school.

In addition, Principal Hicks testified that he had "to make reports when [he found] students from another school on [his] campus like that." The principal likewise expressed concern that because he was aware that when students come on the school's campus to fight, "sometimes they bring things to use."

At some point during the encounter, Officer May requested permission from one of the female students, S.J., to search her purse. Principal Hicks testified that he did not remember specifically where the search of S.J.'s purse took place, either later in his office or in the parking lot. Juvenile subsequently testified on *voir dire* that the search of the purse occurred in the parking lot and that before S.J. could give Officer May her purse, the officer "grabbed" the purse from S. J.'s shoulder. Upon searching the purse, the officer discovered a box cutter.

The principal and the officers "took the four [girls] over to [his] office." Principal Hicks testified that from the time he and the officers first confronted the students until they left for the office, the students had moved a third of the way across the parking lot toward the street.

Upon arriving in his office, Principal Hicks contacted the principal of what he called the "Alternative School." As he was receiving the necessary information from the other school, Principal Hicks told the officers, "Since I have information that they were coming here to

fight, then I think I have a reason to ask them what they have on their persons." The officers agreed, and Principal Hicks asked juvenile and the other girls to empty their pockets. Subsequent trial testimony revealed the juvenile had a knife in her pocket, which she placed on the principal's desk. Officer Burwell later testified at the adjudication hearing that he and Principal Hicks made the decision to charge juvenile.

Juvenile testified on *voir dire* that school had just let out of session when she and the other individuals entered campus. She further testified that prior to being approached by the principal and the three officers, she was leaving to go home via the city bus that stopped in the parking lot. According to juvenile, she and two of the other girls were enrolled at the "High School Learning Center" and that she had attended school that day. Juvenile testified that the female students who came onto the Hillside campus after school had been dismissed for the purpose of allowing the one Hillside student to retrieve her possessions. Juvenile stated that she remained in the parking lot because she missed the bus, and she and the other females were crossing the street to catch another bus. Juvenile further stated that when the group was approached by Principal Hicks and the officers, they were attempting to leave the lot.

Following juvenile's *voir dire* testimony and arguments from counsel, the trial court denied juvenile's motion to suppress. The court concluded the following:

> The case [*New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985)] does not apply. Those were not students of Mr. Hicks [sic].
>
> However, you have to look at the facts as they existed at the time of Mr. Hicks [sic] and the subsequent activity.
>
> Mr. Hicks has a right to talk to any person who is not a student who is on Hillside property, which is what he did.
>
> [Juvenile's] testimony is that the bus was gone. She was not there for the bus. They were leaving because they had missed that bus. They weren't on the property for the purpose of obtaining a ride from the bus. She testified to that herself.
>
> So, she is on school property. She is not a student at Hillside. He knows that she is not a student at Hillside. That was his testimony. And he does have a right to talk to anybody who is a potential trespasser on the school property. He talked to her.

> She has no standing to contest the search of [S.J.'s] purse. None whatsoever. A weapon was discovered in [S.J.'s] purse. [Juvenile] was with [S.J.].
>
> And so I agree, the detention of non-students in the school was in that nature of an arrest. They were detained without permission to leave and at that point the standard has to become in their minds they literally were detained and, therefore, arrested.
>
> And so the standard changes obviously and he has to show that he has a right to search that individual. And if you view a detention as an arrest, it's a search incident to arrest. And if that is . . . (End of tape 1).
>
> (Beginning of Tape 2) . . . to conduct a search incident to an arrest and a weapon was discovered.

The trial court denied juvenile's motion to dismiss at the close of the State's evidence. The juvenile was adjudicated delinquent and placed on supervised probation for one year subject to certain conditions. Juvenile appeals.

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[1] By her first assignment of error, juvenile argues that the trial court erred in failing to grant her motion to suppress. We disagree.

Our review of an order suppressing evidence is strictly limited. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). In evaluating such an order, this Court must determine whether competent evidence supports the trial court's findings of fact. *Id.* Findings of fact supported by competent evidence are binding on appeal. *Id.* Although a trial court's findings of fact may be binding, we review its conclusions of law *de novo*. *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). We must not disturb the court's conclusions when they are supported by the factual findings. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. Juvenile does not assign error to any of the trial court's findings. Therefore, we need only determine whether those findings support the court's ultimate conclusion. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (2000).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and is applicable to the several states through the Due Process Clause of the Fourteenth Amendment. *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 727-28

(2000). Generally, a search or seizure is valid under the Fourth Amendment where the police or other state actors possess a warrant based upon probable cause or, in some instances, simply obtain probable cause. *State v. Peaten*, 110 N.C. App. 749, 751, 431 S.E.2d 237, 238 (1993). However, there are certain circumstances which "make it impractical to secure a search warrant" or to obtain probable cause. *State v. Legette*, 292 N.C. 44, 56, 231 S.E.2d 896, 903 (1977).

In *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985), the United States Supreme Court found that searches by school officials present such circumstances. The Court determined that the students retained a degree of privacy at school and, therefore, the Fourth Amendment's prohibition against unreasonable searches and seizures applied to students when being searched by school officials. However, the Court found that "[t]he warrant requirement . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340, 83 L. Ed. 2d at 733. The Court likewise found that "the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause[.]" *Id.* at 341, 83 L. Ed. 2d at 734.

In balancing students' right to privacy and the school officials' need to maintain discipline, the Supreme Court concluded that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.* Every jurisdiction, including North Carolina, having the occasion to do so, has adopted the *T.L.O.* standard for school searches. *See In re Murray*, 136 N.C. App. 648, 525 S.E.2d 496 (2000). *See generally Com. v. Cass*, 709 A.2d 350, 362-63 (Pa. 1998), *cert. denied*, 525 U.S. 833, 142 L. Ed. 2d 70 (1998); *In Interest of Doe*, 887 P.2d 645, 651-52 n.6 (Haw. 1994).

In the case *sub judice*, the trial court concluded that the evidence found in the search should not be suppressed but determined that *T.L.O.* did not apply because juvenile was not a Hillside student. Although we agree with the trial court's ultimate conclusion that the physical evidence in the present case was admissible, we disagree that the *T.L.O.* reasonableness standard was inapplicable. In fact, the search was constitutional under traditional Fourth Amendment principles. We are persuaded that the application of *T.L.O.* to the present case further strengthens the trial court's ruling.

The *T.L.O.* Court concerned an assistant vice-principal searching the purse of one of his students. Several other courts have subsequently interpreted and applied *T.L.O.* in a variety of situations. We found no cases in this or other jurisdictions supporting the trial court's conclusion that *T.L.O.* does not apply to students who are not the students of the school official conducting the search. In fact, the policies expressed by the United States Supreme Court and other courts examining searches in the school setting indicate that the reasonableness standard announced in *T.L.O.* should apply, despite juvenile's status as a non-Hillside student.

The Supreme Court has repeatedly emphasized that school officials' power over students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia v. Acton*, 515 U.S. 646, 655, 132 L. Ed. 2d 564, 576 (1995). However, "school personnel 'do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.' " *Earls v. Board of Educ. of Tecumseh School District*, 242 F.3d 1264, 1268 (10th Cir. 2001)(quoting *T.L.O.*, 469 U.S. at 336, 83 L. Ed. 2d at 731).

As indicated *supra*, inherent in the educational setting is a need to maintain "swift and informal disciplinary procedures." *T.L.O.*, 469 U.S. at 340, 83 L. Ed. 2d at 733. Schools are "unique environment[s]," *Earls*, 242 F.3d at 1269, where officials *must* be able to "move quickly when dealing with immediate threats to a school's 'proper educational environment' " and student safety. *Com. v. J.B.*, 719 A.2d 1058, 1062 (Pa. Super. 1998) (quoting *T.L.O.*, 469 U.S. at 339, 83 L. Ed. 2d at 733).

> School officials not only educate students who are compelled to attend school, but they have a responsibility to protect those students and their teachers from behavior that threatens their safety and the integrity of the learning process. With the growing incidence of violence and dangerous weapons in schools, this task has become increasingly difficult.

In Interest of Angelia D.B., 564 N.W.2d 682, 689 (Wis. 1997).

We recognize that one who is not a student such as juvenile, certainly retains a degree of privacy when traveling to other campuses during school hours. We further recognize that one who is not a student does not have the relationship with school officials from other

schools that they possess with those within their own schools. *See T.L.O.*, 469 U.S. at 349, 83 L. Ed. 2d at 740 (Powell, J., concurring) (noting that there exists "a commonality of interests between teachers and their pupils" and that the teacher has a sense of "personal responsibility for the student's welfare as well as for his education"). However, in the present case, the school official testified that he had an obligation to report the non-students' unauthorized presence on his campus, thus having some, albeit slight, control and custodial relationship with non-Hillside students. Furthermore, the school-aged students who were filtering into the parking lot at the time of the encounter, represented a possible threat to their own safety, as well as a threat to the school staff and student body.

In balancing the non-Hillside students' privacy interest against Principal Hicks' obligation to maintain both a safe and educational environment, the facts of this particular case weigh in favor of applying the *T.L.O.* reasonableness standard. Furthermore, we agree with the State that not applying *T.L.O.* to the facts presented *sub judice* could lead to absurd results. It is difficult to imagine, given Principal Hicks' obligations in the school setting, that our law would prohibit him from approaching the non-Hillside students and taking further action simply based upon the students' status as non-Hillside students. As such, we conclude that, contrary to the trial court's reasoning, the *T.L.O.* standard should have been applied to the search of juvenile, despite her status as a non-Hillside student.

Juvenile argues that *T.L.O.* does not apply to the present case because Principal Hicks was acting at the direction of law enforcement officers and not by his own volition. In support of her argument, juvenile notes that contrary to the present case, *T.L.O.* involved a search by a school official with no law enforcement involvement.

We recognize that the *T.L.O.* Court expressly limited its holding to situations where the search of a student was conducted solely by a school official. *See T.L.O.*, 469 U.S. at 341 n.7, 83 L. Ed. 2d at 735. However, since the Supreme Court handed down the *T.L.O.* decision, courts have applied *T.L.O.*'s lower standard to school searches that concern various degrees of law enforcement involvement. In determining whether to apply the *T.L.O.* standard, courts consider "the role of law enforcement agent, as well as the nature and extent of the officer's participation in the investigation and search[.]" *In Re Josue T.*, 989 P.2d 431, 436 (N.M. Ct. App.), *cert. denied*, 128 N.M. 149, 990 P.2d 823 (1999).

Generally, school search cases fall into three categories. First, courts apply the *T.L.O.* reasonableness standard to those cases where a school official initiates the searches on his own or law enforcement involvement is minimal. *Angelia*, *D.B.*, 564 N.W.2d at 687. Courts characterize these cases as ones in which the police officers act "in conjunction with" the school official. *See Cason v. Cook*, 810 F.2d 188, 192 (8th Cir.), *cert. denied*, 482 U.S. 930, 96 L. Ed. 2d 704 (1987).

More recently, the *T.L.O.* standard has also been applied to cases where a school resource officer conducts a search, based upon his own investigation or at the direction of another school official, in the furtherance of well-established educational and safety goals. *Id.*; *People v. Dilworth*, 661 N.E.2d 310 (Ill. 1996), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996); *J.B.*, 719 A.2d at 1961 (Pa. Super. 1998); *see Angelia D.B.*, 564 N.W.2d at 688. Generally, cases applying the *T.L.O.* standard to searches conducted pursuant to the school police officer's own investigation, do so where the officer is " 'employed by a school district[,]' and [is] 'ultimately responsible to the school district,' " rather than the local police department. 4 Wayne R. LaFave, *Search and Seizure* § 10.11, at 144 (3d ed. 1996 & Supp. 2001) (quoting *Dilworth*, 661 N.E.2d at 323 (Nickels, J., dissenting)); *See State v. D.S.*, 685 So.2d 41, 43 (Fla. Dist. Ct. App. 1997) ("even if school police officer had directed, participated, or acquiesced in the search" the *T.L.O.* standard applies because "*school* police officer is a school official who is employed by the district School Board").

Courts draw a clear distinction between the aforementioned categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official search students at the request or behest of the outside law enforcement officers and law enforcement agencies. *Angelia D.B.*, 564 N.W.2d at 687. Courts do not apply *T.L.O.* to these cases but instead require the traditional probable cause requirement to justify the search. *See, e.g.*, *F.P. v. State*, 528 So.2d 1253 (Fla. Dist. Ct. App. 1988); *State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997), *cert. denied*, 123 N.M. 83, 934 P.2d. 277 (1997); *In Interest of Thomas B.D.*, 486 S.E.2d 498 (S.C. App. Ct. 1997). The purpose of the search conducted by so-called " 'outside' police officers" is not to maintain discipline, order, or student safety, but to obtain evidence of a crime. *Josue T.*, 989 P.2d at 436-37 (citation omitted).

Our appellate courts have never directly examined the role of law enforcement in school searches as it relates to the application of the

T.L.O. standard. However, in *Murray*, 136 N.C. App. 648, 525 S.E.2d 496, this Court applied the lower *T.L.O.* standard where an assistant principal requested that a school resource officer handcuff an uncooperative and disruptive student, enabling her to search the student's book bag. The *Murray* Court found that the school resource officer simply "acted to enable [the assistant principal] to obtain the bag and search it[,]" and therefore "did not search the bag himself, nor did he conduct any investigation on his own." *Id.* at 650, 525 S.E.2d at 498. This Court concluded that because the search in question was conducted by the school official, *T.L.O.* squarely applied. *Id.*

Juvenile argues that *Murray* is distinguishable from the present case because several facts indicate that the search at issue not only involved police officers, but that the officers actually directed the conduct of the principal. To support her argument, juvenile notes, *inter alia*, that in the present case, the three officers were present during the entire event. Principal Hicks sought the officer's guidance throughout the entire encounter, and the officers prevented the females from leaving the parking lot. Given the depth of the officers' involvement, juvenile argues that the lower *T.L.O.* standard applicable in *Murray* does not apply to the case *sub judice*. We disagree.

We recognize that there are distinctions between the situation existing in *Murray* and the one presented by the case *sub judice*. However, the *Murray* Court did not limit the application of the *T.L.O.* reasonableness standard to the facts of that case. Furthermore, in finding the *T.L.O.* standard applicable, the *Murray* Court referenced cases from other jurisdictions in which courts concluded that *T.L.O.'s* standard applied where "a police officer *works in conjunction with* school officials," in varying degrees, to maintain a safe and educational environment. *Cason*, 810 F.2d at 192; *see also Martens v. District No. 220, Bd. of Educ.*, 620 F. Supp. 29 (N.D. Ill. 1985); *Coronado v. State*, 806 S.W.2d 302 (Tex. App. 1991), *rev'd on other grounds*, 835 S.W.2d 636 (Tex. Crim. App. 1992).

The application of *T.L.O.* in situations where law enforcement acts in conjunction with school officials is based on the premise that

> [a] police investigation that includes the search of a public school student, when the search is initiated by police and conducted by police, usually lacks the "commonality of interests" existing between teachers and students. But when school officials, who

> are responsible for the welfare and education of all of the students within the campus, initiate an investigation and conduct it on school grounds in conjunction with police, the school has brought the police into the school-student relationship.

Angelia, D.B., 564 N.W.2d at 688 (quoting *T.L.O.*, 469 U.S. at 350, 83 L. Ed. 2d at 740) (citation omitted). When school officials bring police officers into the school setting, officers are to assist "the school administration in creating and sustaining a safe environment conducive to learning." *Josue T.*, 989 P.2d at 437. As noted *supra*, school officials' duty to protect "students and their teachers from behavior that threatens their safety" has become a difficult task "[w]ith the growing incidence of violence and dangerous weapons in school." *Angelia D.B.*, 564 N.W.2d at 689 (citations and footnotes omitted). "It could be hazardous to discourage school officials from requesting the assistance of available trained police [officers]," as teachers and other school officials are "generally . . . untrained in proper pat down procedures or in neutralizing dangerous weapons." *Id.*, 564 N.W.2d at 690.

We are persuaded by the aforementioned reasoning that the *T.L.O.* standard should apply in this jurisdiction where the officers act "in conjunction with" school officials. We are likewise convinced that such was the situation existing in the case *sub judice*.

These facts notwithstanding, we conclude that given the totality of the evidence, the officers' involvement was minimal relative to the actions of Principal Hicks and that at most, the officers acted in conjunction with the principal to further his obligations to maintain a safe, educational environment and to report truants from other schools. None of the officers initiated any investigation, nor were the officers directing Principal Hicks in an investigation to collect evidence of a crime. Rather, Principal Hicks "gathered" them together and requested *their* assistance in determining whether information received from the substitute teacher would materialize. Instructing the females to "hold on" when they attempted to walk away in the parking lot did not amount to an unauthorized detention by the officers, as juvenile argues on appeal, but simply enabled Principal Hicks to further investigate his suspicions. One officer requested to search one of the student's personal items and "grabbed" her purse before she could take it off her shoulder. Assuming, *arguendo*, that such a request amounted to an unauthorized search, juvenile, who was not the subject of the search, has no standing to challenge the propriety

of that search on appeal. *State v. Hudson*, 103 N.C. App. 708, 407 S.E.2d 583 (1991), *disc. review denied*, 103 N.C. 615, 412 S.E.2d 91 (1992). Most importantly, given the aforementioned facts, there was "no basis for thinking that [Principal Hicks'] action was a subterfuge to avoid warrant and probable cause requirements," *Marten*, 620 F. Supp. at 32; nor does the situation in the present case represent an effort to mask an investigation by "outside" police officers. *Compare Tywayne H.*, 933 P.2d at 254 (finding probable cause, not *T.L.O.*, standard applicable where outside officers hired by school-affiliated club for security-detail at school dance conducted a search on their own and with little contact with school officials); *F.P.*, 528 So.2d at 1254 (finding likewise where outside police officer investigating auto theft requested and received assistance of school resource officer).

Evidence gleaned from the suppression *voir dire* revealed little about the role of the officers in the school. However, it is reasonable to infer that at the very least the official duties of Officer May, referred to as the school's resource officer, were to assist in "maintaining a safe and proper educational environment[.]" *Angelia, D.B.*, 564 N.W.2d at 690. Furthermore, Principal Hicks testified that he understood this to be the role of all of the officers. Given this understanding, Principal Hicks sought their advice concerning certain police procedures, and we determine that the law enforcement responses were appropriate. Not allowing a school official to utilize the officers in such a manner is illogical and indeed defeats the officers' purpose for being on the school campus. *See id.* at 690. Given the circumstances existing in the present case, we conclude that the law enforcement officers acted in conjunction with Principal Hicks, and therefore the *T.L.O.* reasonableness standard should apply to the present case, despite law enforcement's involvement.

Finding *T.L.O.* applicable, we must next examine whether the search of juvenile was reasonable under the circumstances presented. *Murray*, 136 N.C. App. at 651, 525 S.E.2d at 499.

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," . . . second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place[.]" ibid.

Id. (quoting *T.L.O.*, 469 U.S. at 341, 83 L. Ed. 2d at 734 (omission in original) (citation omitted)). "[A] search of a student by a teacher or

other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 341-42, 83 L. Ed. 2d at 734-35. The search is "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342, 83 L. Ed. 2d at 735.

In the present case, Principal Hicks received certain information that non-Hillside students would come onto the school's campus to fight and that one Hillside student would be involved. Based upon his prior experience, the principal knew that when students come on campus to fight, they usually bring weapons with them to use. Furthermore, as found by the trial court, the principal had an obligation to confront any trespasser visiting the Hillside campus. As discussed *supra*, this obligation extended specifically to non-Hillside students, whose unauthorized presence Principal Hicks testified he was required to report.

Based upon the information possessed by Principal Hicks, he confronted the students, attempting to confirm or dispel any suspicion he had regarding the substitute teacher's information. The students were evasive, profane, and gave false names. Unable to dispel the possible suspicion that the student-aged females had come to fight and following the discovery of a weapon in the purse of one of the students, all of the students were escorted into the school and asked to empty their pockets. These facts provided Principal Hicks with sufficient grounds to believe that taking further action would reveal evidence of a crime or school rule violation.

Juvenile argues, based upon *Florida v. J.L.*, 529 U.S. 266, 146 L. Ed. 2d 254 (2000), that Principal Hicks' approach and subsequent search were not justified because they were based upon an anonymous tip. We disagree. In *J.L.*, an anonymous caller reported to the local police department that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* at 268, 146 L. Ed. 2d at 259. Officers approached a group of black males at the bus stop, observed defendant in a plaid shirt, and without observing anything suspicious, frisked defendant and seized a gun from his pocket. *Id.* The Supreme Court found that the anonymous tip, with nothing more, did not constitute a reasonable suspicion and therefore did not justify the subsequent frisk of defendant. The Court reasoned that "[u]nlike a tip from a known informant whose reputa-

tion can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.' " *Id.* at 270, 146 L. Ed. 2d at 260 (quoting *Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990)(citations omitted)).

J.L. is simply inapplicable in the present case. Assuming *arguendo* that information from the substitute teacher can be considered an "anonymous tip," it was not the basis of an immediate stop and frisk or search of the female students. Rather, the information received from the substitute teacher placed Principal Hicks on alert that disruptive activity may take place in a parking lot. The principal confronted the students based upon his authority to approach any trespasser on Hillside property and not solely based upon the substitute teacher's information. Only after his original suspicions were not dispelled, but indeed heightened by the behavior of the students and their false answers to reasonable questions were the students taken into the principal's office.

Juvenile further argues that her detention and subsequent search of her cohorts was not reasonable because a public bus stop exists in the parking lot. We also disagree with this argument. We recognize that testimony at the suppression *voir dire* concerning the location of the city bus stop and the females' location in relation to that city bus stop was, at best, ambiguous. However, the location of the bus stop in the parking lot does not abrogate Principal Hicks' duty to record the truancy of school-aged individuals. Furthermore, Principal Hicks maintained that the parking lot was school property and that students were not authorized to be in the lot when he noticed the presence of the Hillside student and her companions. Given these facts, we cannot say that approaching the students was unreasonable, despite the location of a bus stop in the lot.

Concerning part two of the *T.L.O.* reasonableness test, we conclude that the scope of the search in question was not unnecessarily intrusive in light of the circumstances. The non-Hillside students became profane and disruptive in the parking lot, as Principal Hicks attempted to question the Hillside student and further ascertain which school the girls attended. The girls joked about not being in school. As noted by Principal Hicks, he and the officers had to listen to "a lot of back talk." After Principal Hicks could not ascertain necessary information from brief cellular phone calls and when Officer May found the box cutter, concern for student safety was heightened.

Escorting the females to the office, where the principal could obtain more information without the distractions of a parking lot, and then simply requesting the students to empty their pockets was not unnecessarily intrusive. Accordingly, we conclude that the trial court properly denied juvenile's motion to suppress.

By her second assignment of error, juvenile contends that the trial court erred in denying her motion to dismiss based upon the insufficiency of the evidence. Juvenile first argues that because the knife discovered on her person was improperly admitted, there was no evidence to support her adjudication for possession of a weapon on educational property. Given our resolution of juvenile's first assignment of error, we find juvenile's contention to be wholly without merit.

[2] Juvenile next contends that there was insufficient evidence to support her conviction because there no evidence indicating that she possessed a knife on Hillside property. Juvenile argues that the parking lot was not "educational property," as specified by the statutory authority under which she was adjudicated delinquent, because a city bus stop was located on the property. We disagree.

In reviewing a challenge to the sufficiency of evidence, we must 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. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). The petition alleged that juvenile was delinquent in that she violated North Carolina General Statutes section 14-269(d), which prohibits the possession of certain specified weapons "on educational property." N.C. Gen. Stat. § 14-269.2(d) (1999). Principal Hicks testified that the parking lot, in which he located juvenile and her cohorts, was Hillside property. There was evidence that a city bus stopped in the Hillside parking lot. However, given Principal Hicks' testimony that the parking lot was school property and construing all evidence concerning the nature of the lot in the light most favorable to the State, juvenile's argument fails, and we conclude that there was sufficient evidence to support her conviction under section 14-269.2(d).

We note that in the order appealed, the trial court incorrectly cited the statutory provision under which juvenile was adjudicated delinquent as "G.S. 14-269," rather than section 14-269.2(d). Consequently, we remand the present appeal for the limited purpose

of allowing the trial court to make this clerical correction in its order to reflect the proper statutory provision.

For the foregoing reasons, we affirm the juvenile's adjudication of delinquency and remand for the limited purpose of correcting the clerical error in the adjudication order.

Affirmed in part; remanded in part.

Judges CAMPBELL and JOHN concur.

STATE OF NORTH CAROLINA v. CLYDE EARNEST WILLIAMSON

No. COA00-982

(Filed 2 October 2001)

1. Appeal and Error— preservation of issues—failure to object—no plain error argument

Although defendant contends the trial court erred in an indecent liberties, crimes against nature, and statutory sex offenses case by allowing into evidence testimony regarding defendant's prior Florida conviction for lewd and lascivious behavior based on the fact that the testimony was allegedly inadmissible as repressed memory testimony without accompanying expert testimony, this argument was not preserved for review because: (1) defendant never objected to the introduction of the testimony on grounds that it was improper repressed memory testimony without the necessary accompanying expert testimony as required by N.C. R. App. P. 10(b)(1); and (2) defendant has failed to assert plain error.

2. Evidence— prior crimes or acts—lewd and lascivious behavior—common plan or scheme—remoteness

The trial court did not abuse its discretion in an indecent liberties, crimes against nature, and statutory sex offenses case by allowing into evidence testimony regarding defendant's prior Florida conviction for lewd and lascivious behavior, that occurred about ten years earlier, under N.C.G.S. § 8C-1, Rule 404(b) because the similarities between the incidents establish defendant's common plan or scheme when both acts involved: (1)

defendant befriending adolescent girls; (2) the girls spending significant amounts of time unsupervised with defendant on a daily basis; (3) the girls periodically spending the night with defendant and sometimes in the company of another adolescent girl; (4) the girls helping with chores around defendant's house but defendant did not pay them for their work; (5) defendant buying the girls gifts including toys; (6) defendant allowing the girls to drive his car and providing them with marijuana, alcohol and cigarettes while in his company; (7) defendant showing affection to both girls in the form of hugging and kissing them; (8) the sexual abuse occurring in defendant's home; (9) defendant showing pornographic videos to both girls; and (10) defendant instructing the victims to take showers before sexual activity, and defendant performing the same sexual acts on the victims.

3. Evidence— pornographic videotape—testimony regarding content

The trial court did not err in an indecent liberties, crimes against nature, and statutory sex offenses case by admitting into evidence a pornographic videotape seized by a detective and his accompanying testimony regarding the content of the video, because: (1) the detective's testimony establishing that the videotape was the same videotape recovered from defendant's bedroom laid the proper foundation for its admission, N.C.G.S. § 8C-1, Rule 901(a); (2) the jury only viewed the video case making the victim's identification of the video as the one defendant played for her, and the detective's identification as the one seized from defendant's trailer, sufficient for its admission; and (3) there was no prejudicial error in light of previous testimony that the videotape was a "porno movie," as well as defendant's failure to object to such characterizations.

4. Evidence— testimony regarding nude photograph of victim—photograph not offered into evidence

The trial court did not err in an indecent liberties, crimes against nature, and statutory sex offenses case by allowing the victim's friend to testify that she saw a nude photograph of the victim in defendant's bedroom when the State did not offer the photograph into evidence, because: (1) although the photograph itself is the best evidence of its contents, defendant failed to show he was prejudiced by this testimony when the victim previously testified that defendant took nude photographs of her and that she brought her friend into defendant's bedroom and showed

her some of the nude photographs that defendant kept in his bedroom; and (2) the fact that the friend observed a nude photograph of the victim in defendant's bedroom was not a vital part of the State's evidence.

5. Evidence— defendant hugged young sex victim excessively-corroboration

The trial court did not err in an indecent liberties, crimes against nature, and statutory sex offenses case by admitting a detective's testimony that defendant hugged the victim excessively to corroborate the testimony of the mother of the victim's friend stating that she observed defendant hug the victim a couple of times, because: (1) the law does not require that the detective's testimony about the mother's statements must be in the same words; (2) the detective's testimony was corroborative of the mother's statements that she witnessed defendant hugging the victim; and (3) the trial court gave a limiting instruction that the detective's testimony was for the sole purpose of corroboration.

Appeal by defendant from judgments entered 24 February 2000 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 15 August 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anne M. Middleton, for the State.

Carolyn Clark for defendant-appellant.

HUNTER, Judge.

Clyde Earnest Williamson ("defendant") appeals judgments and sentencing upon convictions of taking indecent liberties with a child, crimes against nature, and statutory sex offenses. We find no prejudicial error in the proceedings below.

The evidence presented at trial tended to establish that the victim, "Joannie," was fifteen years old in 1998 when she began spending time with defendant. Joannie, along with her father and sister, were assisting defendant with the building of a new house. Joannie helped defendant with such chores as mending walls, hanging sheetrock, and painting. Joannie testified that she spent virtually every day helping defendant around his house. During construction on his house, defendant resided in a nearby trailer.

Joannie testified that during this time she became friends with a fourteen-year-old girl named "Jeannie" who was also helping defendant with his house. Joannie testified that defendant would usually take everyone home for the night after work on his house was completed for the day. Within a couple of weeks of working for defendant, Joannie and Jeannie began returning to defendant's trailer after defendant took the others home. The three would listen to music and spend time outside. Sometimes defendant would take the girls home, and sometimes the girls would spend the night with defendant in his trailer. Joannie testified that she and Jeannie spent about two nights a week at defendant's trailer.

Joannie testified that within a few weeks of her spending nights with defendant, he began to act in a sexual manner towards her. Joannie testified that in the first incident with her, defendant instructed her to take a shower, which she did. Defendant then placed a towel on his bed and told Joannie to lay on the towel so that he could "check [her] for a yeast infection." Joannie testified that defendant then "had his tongue down near [her] private area" and that he also inserted his finger into her vagina "a couple of times."

Joannie testified regarding four separate occasions on which the same sequence of events occurred, although she could not remember if defendant had inserted his fingers into her vagina each time. Joannie stated that after each incident, defendant would get "one of his wipes" which he kept in his night stand and wipe her off. She further testified that about the same time that her first sexual incident with defendant occurred, she observed defendant engaging in the same conduct with Jeannie, instructing her to take a shower, stating that he must "check her for a yeast infection," and then performing oral sex on her. Defendant threatened that if Joannie ever disclosed the abuse, he would put Joannie's father in jail or send her back to Washington State from where she had moved.

Joannie testified that defendant took polaroid photographs of her "about every time [she and Jeannie] stayed the night." Joannie stated that in some of the photographs she was nude or partially clothed. She also testified that defendant kissed her a couple of times, took a video of her while she was taking a bath, and played a pornographic video entitled "With Love, Loni" for her and Jeannie.

During the times Joannie and Jeannie were with defendant, he provided the girls with wine coolers and cigarettes. Defendant also had the girls smoke marijuana "almost every time [they] stayed the

night." Although defendant did not pay the girls for any work performed on his house, defendant allowed the girls to drive his car, and he would take them to Wal-Mart and buy them jewelry, clothes, toys, underwear and bras. The girls were allowed to wear the underwear and bras when with defendant, but they were not permitted to take them home.

Joannie's friend, Alisha Wallace ("Alisha"), testified that she went to defendant's trailer with Joannie on various occasions. Alisha testified that on one occasion, she saw a nude photograph of Joannie on defendant's desk in his bedroom. Alisha also testified that defendant had hugged her and "rubbed up against [her]" and remarked that her breasts were "bigger than Joannie's." Alisha witnessed defendant hugging Joannie and saw him "grab her behind." Alisha testified that Joannie told her defendant took nude pictures of her and had a video of her. Joannie later told Alisha and her mother, Jackie Wallace, of the events which had transpired with defendant. Jackie Wallace notified the Department of Social Services.

The State also presented the testimony of Detective David Grant of the Jackson County Sheriff's Department regarding his interviews with Joannie and Alisha, as well as items he recovered pursuant to a search of defendant's trailer. These items included a box of "Summer's Eve Feminine Cleansing Cloths" recovered from defendant's night stand, "various articles of female undergarments," a nude photograph of Joannie, and a video entitled "With Love, Loni." In addition, Christa Farash ("Christa"), the victim in defendant's prior Florida conviction for lewd and lascivious behavior with a minor, testified about the events surrounding her sexual abuse.

Defendant testified on his own behalf, denying all allegations. On 24 February 2000, the jury returned verdicts of guilty on one count of taking indecent liberties with a child, four counts of crimes against nature, and four counts of statutory sex offense. Defendant appeals.

On appeal, defendant argues that the trial court erred in admitting the following evidence: (1) testimony regarding defendant's prior conviction for lewd and lascivious behavior with a minor; (2) the videotape "With Love, Loni" and accompanying testimony regarding its contents; (3) testimony regarding the contents of a photograph not entered into evidence; (4) Detective Grant's testimony regarding statements made to him by Jackie Wallace; (5) Alisha Wallace's testimony regarding defendant's behavior towards her; and (6) a photograph of Joannie clothed in a sports bra and shorts.

I.

[1] Defendant argues that the trial court erred in allowing into evidence testimony regarding defendant's prior Florida conviction for lewd and lascivious behavior involving witness Christa Farash. For the first time on appeal, defendant argues that the majority of Christa's testimony regarding defendant's sexual conduct towards her is inadmissible as "repressed memory" testimony without accompanying expert testimony. This Court has held that repressed memory testimony "must be accompanied by expert testimony on the subject of memory repression so as to afford the jury a basis upon which to understand the phenomenon and evaluate the reliability of testimony derived from such memories." *Barrett v. Hyldburg*, 127 N.C. App. 95, 101, 487 S.E.2d 803, 806 (1997).

Christa stated on *voir dire* that some of her memories regarding her sexual abuse perpetrated by defendant were brought to light through therapy aimed at helping her deal with the events. Following *voir dire*, defense counsel voiced his frustration with having to contend with evidence not originally presented at the prior Florida trial. However, counsel never objected to the introduction of Christa's testimony on grounds that it was improper repressed memory testimony without the necessary accompanying expert testimony. Rather, defense counsel stated that he was solely "requesting the court exclude [the evidence] under 404(b) in that the only thing it's going to do is attempt to set forth a propensity and attack my client's character." There was no discussion before the trial court of repressed memory testimony and its requirements for admission.

> Pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, . . . "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" in order to preserve a question for appellate review.

State v. Call, 353 N.C. 400, 426, 545 S.E.2d 190, 206-07 (2001) (quoting N.C.R. App. P. 10(b)(1)) (holding defendant abandoned argument that testimony was "inherently unreliable" and violated his constitutional rights where he failed to argue such grounds to trial court). Appellate courts will not entertain an argument where the issue was not " ' "raised and determined in the trial court." ' " *Id.* at 426, 545 S.E.2d at 207 (quoting *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999)).

Moreover, because defendant has failed to assert that the introduction of Christa's testimony without accompanying expert testimony was plain error, this argument is not preserved for our review. *See id.*; N.C.R. App. P. 10(c)(4) (appellate court may review for plain error only where "the judicial action questioned is specifically and distinctly contended to amount to plain error"). We therefore only address defendant's argument that the evidence was improperly admitted under Rule 404(b), as such was the basis for defendant's objection at trial.

[2] The trial court in this case admitted Christa's testimony under Rule 404(b) of the Rules of Evidence to show intent and "that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged." As a general rule, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). 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.*

> [E]ven though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Frazier, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996) (emphasis omitted) (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987)).

Defendant argues that admission of the evidence under Rule 404(b) was improper because insufficient similarities exist between the acts surrounding the prior conviction and the alleged acts perpetrated here, that the acts are too remote in time, and that the probative value of the evidence is substantially outweighed by its prejudice to defendant. We disagree.

In *Frazier*, our Supreme Court addressed the issue of admissibility of witness testimony offered to demonstrate the existence of a common plan or scheme by the defendant to sexually abuse adolescent female family members. *Frazier*, 344 N.C. at 615, 476 S.E.2d at 299. The Court noted that "[t]he test for determining whether such evidence is admissible is whether the incidents establishing the com-

mon plan or scheme are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *Id.* (citing *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)); *see also State v. Harris*, 140 N.C. App. 208, 212, 535 S.E.2d 614, 617 (test for admission of prior sex offenses to show common plan, scheme, system or design is two-part: ". . . 'whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time' " (citation omitted)), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000).

The testimony in *Frazier* tended to prove that the defendant's prior acts of sexual abuse occurred over a period of approximately twenty-six years and in a similar pattern. *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300. The Supreme Court noted that all of the victims were adolescents at the time defendant began his sexual assaults; that in each instance defendant slowly began touching the victim and gradually reached more serious abuse; that during the period of the abuse, defendant bought his victims gifts and gave them money; that he threatened each of them that if she revealed to anyone what he was doing, she would be sent away or suffer some other severe sanction; and that all of the victims lived with or near defendant during the course of the abuse. *Id.* The Court concluded that "this evidence presents a classic example of a common plan or scheme." *Id.; see also, Harris*, 140 N.C. App. at 212, 535 S.E.2d at 617 (acts sufficiently similar where "defendant befriended the women, took them to a secluded place, pinned the women down, became aggressive with them, sexually assaulted and raped them and afterwards acted like nothing had happened").

In the present case, the similarities between the incidents involving Christa and Joannie also establish defendant's common plan or scheme. Both acts involved defendant befriending adolescent girls. In each case, Christa and Joannie spent significant amounts of time unsupervised with defendant on a daily basis. Both Christa and Joannie periodically spent the night with defendant, and sometimes in the company of another adolescent girl. Both victims helped with chores around defendant's house, but defendant did not pay them for their work. In both instances, defendant bought the victims several gifts, including toys. In each case, defendant allowed the victims to drive his car and he provided them with marijuana, alcohol and cigarettes while in his company. Defendant showed affection to both Christa and Joannie in the form of hugging and kissing them. In both cases, the sexual abuse occurred in defendant's home. Defendant

showed pornographic videos to both Christa and Joannie. In both instances, defendant instructed the victims to take showers before sexual activity, performed oral sex on the victims, and put his finger inside their vaginas.

"It is not necessary that the similarities between the two situations rise to the level of the unique and bizarre." *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (citing *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)), *disc. review denied*, 353 N.C. 382, 546 S.E.2d 114 (2000). "Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts." *Id.* As in *Frazier*, we hold that the evidence presented in this case "presents a classic example of a common plan or scheme." *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300.

The *Frazier* court also rejected the defendant's argument that the testimony was too remote in time to be relevant or probative, given that the prior acts occurred over a time period of seven to twenty-seven years prior to the trial. *Id.* at 615, 476 S.E.2d at 300. The Court noted:

> This Court has been liberal in allowing evidence of similar offenses in trials on sexual crime charges. . . . Subsequent to *Jones*, it has permitted testimony as to prior acts of sexual misconduct which occurred more than seven years earlier. In *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989), a case tried prior to the effective date of the Rules of Evidence, we held that it was not error for the trial court to admit the testimony of sisters of the victim that their father had also sexually abused them. There, the defendant's prior sexual misconduct with the sisters occurred during a twenty-year period. Likewise, we recently held that a ten-year gap between instances of similar sexual misbehavior did not render them so remote in time as to negate the existence of a common plan or scheme.

Id. at 615-16, 476 S.E.2d at 300 (citations omitted).

"Significantly, our Supreme Court has been 'markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in rule 404(b).' " *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119 (quoting *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987)), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999). That Court has held that a ten-year gap between incidents

does not render evidence of the prior bad act too remote in time to be admissible under 404(b). *See State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) ("[g]iven the commonality of the distinct and bizarre behaviors, the ten-year gap between the incidents did not 'negate[] the plausibility of the existence of an ongoing and continuous plan to engage . . . in such . . . activities' " (quoting *State v. Shane*, 304 N.C. 643, 656, 285 S.E.2d 813, 821 (1982))), *cert. denied*, *Penland v. North Carolina*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997); *see also*, *Blackwell*, 133 N.C. App. at 36, 514 S.E.2d at 120 (prior acts occurring seven and ten years prior not too remote to be considered relevant and admissible).

In the present case, defendant's trial for sexual crimes perpetrated against Christa occurred in July 1988. The events complained of in the instant case began occurring around June 1998, approximately ten years following defendant's prior conviction. The record further indicates that defendant spent at least one year in prison following his 1988 conviction. "It is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." *State v. Berry*, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154 (citing *Blackwell*, 133 N.C. App. at 36, 514 S.E.2d at 120), *disc. review denied*, 353 N.C. 729, — S.E.2d — (2001). We conclude the gap in time is not too remote to warrant admission of the evidence under Rule 404(b), given our Supreme Court's liberal treatment of admitting prior evidence of similar sexual offenses, and its express holding that a ten-year gap between incidents is not sufficiently remote in time to preclude admission under 404(b).

Nor is there merit in defendant's argument that the trial court should have excluded the evidence because its probative value was outweighed by its prejudice to defendant. Under Rule 403, evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (1999). "The question of whether evidence is unfairly prejudicial 'is a matter left to the sound discretion of the trial court.' " *State v. Chavis*, 141 N.C. App. 553, 564, 540 S.E.2d 404, 413 (2000) (quoting *State v. Haskins*, 104 N.C. App. 675, 680, 411 S.E.2d 376, 381 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992)). Defendant has failed to show an abuse of discretion. These assignments of error are overruled.

II.

[3] Defendant next argues that the trial court erred in admitting into evidence a videotape seized by Detective Grant, and his accompanying testimony regarding the content of the video. Defendant argues (1) that the State failed to lay a proper foundation for admission of the videotape because no *voir dire* was conducted prior to its admission, and (2) that Detective Grant's characterization of the videotape as "pornographic" was inadmissible.

The videotape was a pornographic video entitled "With Love, Loni." Joannie identified the videotape at trial as the same videotape that defendant played for her and Jeannie. Joannie stated twice, without objection, that the videotape was a "porno movie." The videotape was admitted into evidence following the direct testimony of Detective Grant. Detective Grant identified the videotape inside the cassette case as the same videotape he recovered from defendant's bedroom pursuant to a search warrant. The videotape exhibited the title "With Love, Loni." Detective Grant further testified that he viewed the videotape, that it was "pornographic" in nature, and that it depicted "various sex acts between males and females."

Rule 901 provides that " '[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *State v. Redd*, 144 N.C. App. 248, 252, 549 S.E.2d 875, 878-79 (2001) (quoting N.C.R. Evid. 901(a) (1999)). "Upon a proper foundation, videotapes, like photographs, are admissible at trial for either illustrative or substantive purposes." *State v. Mason*, 144 N.C. App. 20, 24, 550 S.E.2d 10, 14 (2001).

Moreover, the requirements for admission here differ from the requirements of laying a foundation for a videotape that actually depicts the actions of the victim or the defendant. *See, e.g., State v. Mewborn*, 131 N.C. App. 495, 498, 507 S.E.2d 906, 909 (1998). Rather, the videotape in this case is "real" evidence, or an object " 'offered as having played an actual, direct role in the incident giving rise to the trial.' " *State v. Bryant*, 50 N.C. App. 139, 141, 272 S.E.2d 916, 918 (1980) (quoting *State v. Harbison*, 293 N.C. 474, 483, 238 S.E.2d 449, 454 (1977)). "When real evidence is properly identified, it is, in general, freely admissible." *Id.* at 140-41, 272 S.E.2d at 918 (citations omitted). It must simply " 'be identified as the same object involved in the incident in order to be admissible' " and as not having undergone any material change. *Id.* at 141, 272 S.E.2d at 918 (citation omit-

ted). Authentification of real evidence " 'can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is.' " *Id.* (quoting 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973)). Moreover, "[a]s there are no specific rules for determining whether an object has been sufficiently identified, the trial judge possesses, and must exercise, sound discretion." *Id.*

Defendant's assertion that the trial court was required to conduct *voir dire* prior to admitting the videotape is erroneous. Detective Grant's testimony, establishing that the videotape was the same videotape recovered from defendant's bedroom, laid the proper foundation for its admission. *See State v. Rael*, 321 N.C. 528, 533-34, 364 S.E.2d 125, 128-29 (1988) (detective's testimony that " 'playboy playmate workout' " videotape seized from defendant's home was same videotape being presented as State's exhibit sufficient to admit videotape to corroborate victim's testimony that defendant showed him videotape of people not wearing clothes).

We also reject defendant's argument that the videotape was not properly introduced because both Joannie and Detective Grant only "identified a video case" and not the actual contents of the videotape. In the same argument, however, defendant states that there is no "indication in the record that the video was shown to the jury in whole or in part." Taking defendant's statement as true, the jury only viewed the "video case," and therefore Joannie's identification of the video as the one defendant played for her, and Detective Grant's identification of the video as the one seized from defendant's trailer was sufficient for its admission.

Defendant also argues that Detective Grant's testimony regarding the contents of the videotape violated the "best evidence rule." "Rule 1002 of the North Carolina Rules of Evidence, commonly known as the 'best evidence rule,' provides that, '[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.' " *State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997) (quoting N.C. Gen. Stat. § 8C-1, Rule 1002 (1992)).

Even if Detective Grant's statements should not have been admitted, we find no prejudicial error in light of previous testimony that the videotape was a "porno movie," as well as defendant's failure to object to such characterizations. *See State v. Campbell*, 133 N.C. App. 531, 540, 515 S.E.2d 732, 738 ("evidentiary errors are harmless unless

[a] defendant proves that absent the error, a different result would have been reached [at trial]"), *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999); *State v. Townsend*, 99 N.C. App. 534, 537, 393 S.E.2d 551, 553 (1990) (quoting *State v. Brooks*, 83 N.C. App. 179, 191, 349 S.E.2d 630, 637 (1986)) ("[t]he settled law of this State, unchanged by the adoption of the North Carolina Rules of Evidence, is that '[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost' "). These assignments of error are overruled.

III.

[4] Defendant argues that the trial court erred in allowing Alisha Wallace to testify that she saw a nude photograph of Joannie in defendant's bedroom where the State did not offer the photograph into evidence. Defendant argues that Alisha's testimony violates the best evidence rule. Although we agree with defendant that the photograph itself is the best evidence of its contents, defendant has failed to show that he was prejudiced by Alisha's testimony that she observed the photograph in defendant's bedroom.

Joannie previously testified, without objection, that defendant took nude photographs of her, and that she brought Alisha into defendant's bedroom and showed her some of the nude photographs that defendant kept in his bedroom. Joannie also previously testified in detail regarding the contents of the photographs that she showed Alisha, without objection. In light of the fact that such evidence was already introduced, any error in the admission of Alisha's testimony did not prejudice defendant. *See State v. Jones*, 98 N.C. App. 342, 349, 391 S.E.2d 52, 57-58 (1990) (although note itself was "best evidence" of its contents, testimony regarding what note said did not prejudice defendant). Moreover, the fact that Alisha observed a nude photograph of Joannie in defendant's bedroom was "not a vital part of the State's evidence." *See In re Potts*, 14 N.C. App. 387, 390, 188 S.E.2d 643, 645 (best evidence rule not invoked where contents of evidence not in question and "not a vital part of the State's evidence"), *cert. denied*, 281 N.C. 622, 190 S.E.2d 471 (1972).

IV.

[5] Defendant assigns error to the admission of Detective Grant's testimony corroborating the testimony of Alisha's mother, Jackie Wallace. Jackie testified that she observed defendant hug Joannie

"a couple of times." Detective Grant testified regarding statements Jackie made to him during his investigation and interview of her, including a statement that defendant hugged Joannie "excessively." The trial court gave a limiting instruction that Detective Grant's testimony was only for the purpose of corroborating Jackie Wallace's prior testimony. Defendant argues that Detective Grant's testimony that Jackie Wallace stated defendant hugged Joannie "excessively" was not corroborative of her prior testimony that defendant hugged Joannie "a couple of times."

"Evidence of an out-of-court statement of a witness, related by the in-court testimony of another witness, may be offered as substantive evidence or offered for the limited purpose of corroborating the credibility of the witness making the out-of-court statement." *State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000) (footnotes omitted). "This Court has long held that 'corroborative' means '[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence.' " *State v. Brown*, 350 N.C. 193, 204, 513 S.E.2d 57, 64 (1999) (citations omitted) (holding that contested witnesses' testimony about prior conversations with other witnesses, "although not precisely identical to the original testimony, tended to strengthen and confirm the testimony of the first witnesses. As such, the secondary witnesses' statements constituted corroborating evidence supplementing and confirming the first witnesses' testimony"). " 'It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible.' " *Id.* (quoting *State v. Higginbottom*, 312 N.C. 760, 768, 324 S.E.2d 834, 840 (1985)).

The law does not require that Detective Grant's testimony about Jackie's statements be in the exact words used by Jackie. His testimony need only have tended to strengthen and confirm her testimony that she witnessed defendant hugging the victim. We hold that Detective Grant's testimony was indeed corroborative of Jackie's statements that she witnessed defendant hugging Joannie. In light of the trial court's limiting instruction that Detective Grant's testimony was for the sole purpose of corroboration, we find no error in the admission of the testimony.

We have carefully reviewed defendant's remaining arguments regarding the admission of Alisha's testimony that defendant hugged her and remarked that her breasts were "bigger than Joannie's," and

of a photograph of Joannie wearing a sports bra that defendant purchased for her. We conclude these arguments are without merit.

No error.

Judges WYNN and TYSON concur.

MARGARET WRENN ANDERSON, PLAINTIFF v. DR. DEAN GEORGE ASSIMOS, M.D., DR. R. LAWRENCE KROOVARD, M.D., DR. MARK R. HESS, M.D., WAKE FOREST UNIVERSITY PHYSICIANS, WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, THE MEDICAL CENTER OF BOWMAN GRAY SCHOOL OF MEDICINE AND NORTH CAROLINA BAPTIST HOSPITAL AND THE NORTH CAROLINA BAPTIST HOSPITALS, INCORPORATED, DEFENDANTS

No. COA00-587

(Filed 2 October 2001)

1. **Medical Malpractice— negligence—res ipsa loquitur—unfavorable reaction to medicine**

The trial court did not err in a medical malpractice action by granting defendants' motion to dismiss plaintiff patient's complaint alleging negligence under the theory of res ipsa loquitur based on plaintiff's unfavorable reaction to medicine given to plaintiff as part of her treatment, because: (1) the side effects of the medicine and defendants' possible failure to monitor those effects on plaintiff are not areas within the jury's common knowledge or experience; and (2) plaintiff needs expert testimony to establish the standard of care to be used in the administration of the medicine and defendants' possible breach of this standard.

2. **Medical Malpractice— Rule 9(j) certification—unduly burdensome requirement—equal protection violation—unconstitutional**

The trial court erred in a medical malpractice action by dismissing plaintiff patient's complaint based on an alleged failure to comply with N.C.G.S. § 1A-1, Rule 9(j) certification requirements, because: (1) the certification requirement violates Article I, Section 18 of the North Carolina Constitution since it impairs, unduly burdens, and in some instances prohibits the filing of any medical malpractice claim where the injured party is unable to

timely find an expert or is without funds; and (2) the certification requirement violates the equal protection clause of both the state and federal constitutions since it does not reflect the least restrictive method for the asserted state interest of preventing frivolous lawsuits.

Judge CAMPBELL concurring in part and dissenting in part.

Appeal by plaintiff from order filed 14 December 1999 by Judge James R. Vosburgh in Guilford County Superior Court. Heard in the Court of Appeals 27 March 2001.

Mary K. Nicholson for plaintiff-appellant.

Tuggle, Duggins & Meschan, P.A., by Robert A. Ford and Demetrius L. Worley, for defendant-appellees.

GREENE, Judge.

Margaret Wrenn Anderson (Plaintiff) appeals an order filed 14 December 1999 granting the motion of Dr. Dean George Assimos (Dr. Assimos), Dr. R. Lawrence Kroovard, Dr. Mark R. Hess, Wake Forest University Physicians, Wake Forest University Baptist Medical Center, The Medical Center of Bowman Gray School of Medicine, North Carolina Baptist Hospital, and The North Carolina Baptist Hospitals, Inc. (collectively, Defendants) to dismiss Plaintiff's complaint.

Plaintiff filed a complaint on 17 August 1999 alleging medical malpractice on the part of Defendants in their failure "to adequately and properly and fully inform[] her of the risks known to be associated with" the administration of the drug gentamicin, a drug given to Plaintiff during her treatment by Defendants. Plaintiff also alleged *res ipsa loquitur* in her complaint. On 23 August 1999, Plaintiff filed a motion to "extend the statute of limitations for a period of 120 days to file a complaint in medical malpractice conforming to . . . Rule 9(j) of the Rules of Civil Procedure as [it] relate[s] to medical malpractice actions." Plaintiff filed her amended complaint on 10 November 1999 detailing the medical treatment provided to her by Defendants and the symptoms she suffered after that treatment. Plaintiff's amended complaint, in pertinent part, alleged:

> 6. . . . [Plaintiff] went to the emergency room at North Carolina Baptist Hospital at the end of August of 1996 for a kidney problem . . . . [Plaintiff] became a little dizzy in the hospital.

When [Plaintiff] came home from the hospital, she started down the hall of her home and staggered. She got worse and became really nauseated . . . and vomited seven or eight times. Her head was dizzy and she felt drunk, her ears felt like she was in an airplane and they were pushing out. This was the first time that she had this problem with her ears that she can recall. It is also the first time that she had the symptoms of dizziness related to a drunken feeling that she felt when she tried to do anything. Dr. Assimos' office is located at Baptist Hospital. [Plaintiff] was taken in a [wheelchair] to see Dr. Assimos [who was treating her for a kidney problem] and he told her nothing was wrong with her. . . . She then went to Duke Hospital on her own initiative and saw at least two doctors at Duke Hospital. [Plaintiff] received no medication at Duke Hospital, but Duke Hospital did do some testing. . . . She had to be taken, by her son, to Duke Hospital in a wheelchair because of her inability to walk, due to the dizziness and related problems. . . . Dr. Assimos [telephoned Plaintiff] at home, after she came back from Duke Hospital, and Dr. Assimos wanted her to come back to Baptist Hospital. . . . Upon[] Dr. Assimos' request, she went back to Baptist Hospital and stayed several days in September[] 1996. [Plaintiff] had a lot of tests done, the doctors at Baptist Hospital told her that she had a stroke and that they had found an ulcer. They dismissed her and she went home in September[] 1996. Around the first of October[] 1996, she went to see Dr. Brown at North Carolina Baptist Hospital. . . . Dr. Brown put water in [Plaintiff's] ears and she could not feel the water. Dr. Brown asked [Plaintiff] . . . what medicine she had been given. . . . At the time . . . [Plaintiff] saw Dr. Brown, she had already [scheduled] an appointment . . . with Dr. Troost, again at North Carolina Baptist Hospital. After Dr. Troost looked at the results of the testing, he told [Plaintiff] that she had an equilibrium problem and that the drug "gentamicin" had burned out her ear. . . . [Dr. Assimos later telephoned Plaintiff] and he told her that gentamicin caused her problem. . . . [Plaintiff's kidney was removed and t]he kidney was practically a solid mass, like stone, when removed and was not functional. She still has problems with equilibrium, nausea and dizziness. . . . Plaintiff alleges that the drug that was administered was known to have a side effect that in fact occurred and had in fact occurred in other patients at the same hospital. [Defendants] failed to warn [Plaintiff] of the side effect. . . . [A] monitoring process was available to prevent the potential side effect and . . .

[D]efendants failed to monitor the drug and [Plaintiff's] injuries are the result of the drug treatment.

7. Pursuant to the injuries being caused by the sole acts of [Defendants, Plaintiff] alleges the doctrine of res ipsa loquitur.

8. Plaintiff contends that there was an injury, and that the occurrence causing the injury is one which ordinarily doesn't happen without negligence on someone's part and that the instrumentality which caused the injury was under the exclusive control and management of [Defendants].

Defendants filed a motion to dismiss Plaintiff's complaint on 16 November 1999 for Plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.[1] At the hearing on Defendants' motion, Plaintiff's attorney stated Plaintiff is "an elderly woman, . . . who has a very limited income." Prior to filing her complaint, Plaintiff attempted to obtain an expert witness to certify her complaint and had sent her medical file to expert witnesses. Plaintiff, however, was unable to obtain an expert witness because Defendants failed to perform a monitoring test and the expert witnesses would have to testify Defendants "had improperly applied the test that they didn't take." At the conclusion of the hearing, the trial court allowed Plaintiff's motion to amend her complaint and also allowed Defendants' motion to dismiss Plaintiff's complaint.

The issues are whether: (I) Plaintiff alleged facts establishing negligence through *res ipsa loquitur*; and (II) the pre-filing certification requirement of Rule 9(j) violates Article I, Section 18 of the North Carolina Constitution and the equal protection clauses of the federal and state constitutions.

I

[1] Plaintiff argues the trial court erred in dismissing her complaint because her complaint stated a claim for negligence, alleging *res ipsa loquitur*. We disagree.

The doctrine of *res ipsa loquitur* applies if a plaintiff is able to establish, without the benefit of expert testimony, an injury would not

1. A complaint alleging medical malpractice must: (1) specifically assert the complaint has been reviewed by a person "who is expected to qualify" or who the "complainant will seek to have qualified" as an expert witness under Rule 702(e) of the Rules of Evidence; or (2) "allege[] facts establishing negligence under the existing common-law doctrine of" *res ipsa loquitur*. N.C.G.S. § 1A-1, Rule 9(j) (1999).

typically occur in the absence of some negligence by the defendant. *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000). Specifically, "the negligence complained of must be of the nature that a jury[,] through common knowledge and experience[,] could infer" negligence on the part of the defendant. *Id.* at 379, 536 S.E.2d 362. If a medical drug is "an approved and acceptable treatment and the dosages as prescribed [are] proper, the mere fact that [a plaintiff] had an unfavorable reaction from its use would not make the doctrine of *res ipsa loquitur* applicable." *Hawkins v. McCain*, 239 N.C. 160, 169, 79 S.E.2d 493, 500 (1954).

In this case, the side effects of gentamicin and Defendants' possible failure to monitor those effects on Plaintiff are not areas within a jury's common knowledge or experience. Thus, Plaintiff needs the benefit of expert testimony to establish the standard of care to be used in the administration of gentamicin and Defendants' possible breach of this standard of care. *See id.* Accordingly, the doctrine of *res ipsa loquitur* did not apply to Plaintiff's medical malpractice action.

II

[2] Plaintiff next argues the trial court erred in dismissing her complaint because Rule 9(j) is unconstitutional in that it unduly restricts her access to the courts and violates the equal protection clause of the state and federal constitutions.[2]

Access to the courts

Our North Carolina Constitution provides that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. This section was added to our North Carolina Constitution in 1868

2. We note this constitutional question was not raised below at the trial court, although Plaintiff has made it the basis of an assignment of error in the record to this Court. Moreover, both Plaintiff and Defendants fully addressed the constitutional issue, and Defendants did not object to Plaintiff arguing this issue for the first time on appeal. Generally, constitutional questions that were not raised and passed upon by the trial court, will not be considered on appeal. *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001). Nevertheless, pursuant to Rule 2 of the Appellate Rules of Procedure, we elect to address the constitutional question. *See State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981); *see also State v. Brown*, 320 N.C. 179, 211, 358 S.E.2d 1, 22, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Swann*, 322 N.C. 666, 671, 370 S.E.2d 533, 536 (1988); *Rice v. Rigsby*, 259 N.C. 506, 511, 131 S.E.2d 469, 472 (1963).

and has its roots in the Magna Carta. John V. Orth, *The North Carolina State Constitution* 54 (1993). The promise was that "[j]ustice would be available to all who were injured; to this end, the courts would be 'open.' " *Id.* The General Assembly, therefore, is "clearly forbidden" from enacting any statute that "impairs" the right of any person to recover for an injury to his person, property, or reputation. *Osborn v. Leach*, 135 N.C. 628, 631, 47 S.E. 811, 812 (1904). The General Assembly is permitted, under the "due course of law" language of section 18, to "define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983). Thus, the General Assembly is permitted to abolish or modify a claim if it has not vested, *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 78, 40 S.E.2d 690, 694-95 (1946), establish a statute of limitations, *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 593, 284 S.E.2d 188, 191 (1981), *modified on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1982), establish a statute of repose, *Lamb*, 308 N.C. at 444, 302 S.E.2d at 882, or establish limited immunities for some claims, *Pangburn v. Saad*, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985). In no event, however, may the General Assembly under the guise of "due course of law" deny a person, whose claim is not barred by the statutes of limitations/repose, the "opportunity to be heard before being deprived of property, liberty[,] or reputation, or having been deprived of either," deny that person "a like opportunity [for] showing the extent of his injury" or deny that person an adequate remedy. *Osborn*, 135 N.C. at 636-37, 47 S.E. at 814.

In this case, the General Assembly has placed a restriction on a party's right to file a malpractice claim against a "health care provider." N.C.G.S. § 1A-1, Rule 9(j) (1999). That restriction requires the party's pleading to certify, in her complaint, that the medical care has been "reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care."[3] N.C.G.S. § 1A-1, Rule 9(j)(1) (1999). The failure to include this certification in the complaint mandates the dismissal of the complaint. *Id.* This certification requirement impairs, unduly burdens,[4] and in some instances, where the injured party is

3. There is no similar requirement for non-medical malpractice claims.

4. "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path" of a party seeking

unable to timely find an expert or is without funds to employ such an expert or find an attorney who is willing to advance the funds to employ an expert, prohibits the filing of any medical malpractice claim. Even if an expert is obtained, Rule 9(j) places in the hands of that expert the right to decide if the injured party may proceed into court with her claim. It is for the courts of this state to adjudicate in a meaningful time and manner the merits of an injured party's claim after granting a hearing appropriate to the nature of the case. Because Rule 9(j) denies a plaintiff this right, it violates Article I, Section 18 of the North Carolina Constitution and is therefore void. *See Boddie v. Connecticut*, 401 U.S. 371, 378, 28 L. Ed. 2d 113, 119 (1971) (holding due process prohibits a state from denying, solely because of inability to pay filing fee, access to the courts to individuals who seek judicial dissolution of their marriage).

Equal protection

Moreover, Rule 9(j) classifies malpractice actions into two groups: medical and non-medical. This classification implicates the equal protection clause and thus can be sustained, because it affects a fundamental right (Article I, Section 18 of the North Carolina Constitution), *see Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999), *cert. denied*, 529 U.S. 1033, 146 L. Ed. 2d 337 (2000); *see also Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999) (fundamental rights are those explicitly or implicitly guaranteed by the federal or state constitutions), only if it serves a compelling state interest and the statute is narrowly drawn to promote that interest, "without needless overinclusion or suspicious underinclusion, thereby favoring the use of the least restrictive alternative," *see* Louis D. Bilionis, *Liberty, the "Law of the Land," and Abortion in North Carolina*, 71 N.C. L. Rev. 1839, 1850 (1993); *see also Reno v. Flores*, 507 U.S. 292, 302, 123 L. Ed. 2d. 1, 16 (1993) (government cannot infringe on fundamental rights "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Roe v. Wade*, 410 U.S. 113, 155, 35 L. Ed. 2d 147, 178 (1973) (regulation limiting fundamental rights can only be justified by a compelling state interest and "must be narrowly drawn to express only the legitimate state interests at stake").

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to exercise her constitutional right. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878, 120 L. Ed. 2d 674, 715 (1992) (using "undue burden" test to balance constitutional right against state's interest).

In this case, the interest asserted by Defendants is that Rule 9(j) prevents frivolous lawsuits. There is nothing in this record to support the claim that frivolous lawsuits were a problem in medical malpractice cases before the enactment of Rule 9(j). Even if we assume it is a problem, there is nothing in this record to support the claim that Rule 9(j) alleviates that problem or that the problem is not also present in the context of non-medical practice actions. In any event, assuming there is such a problem unique to medical malpractice actions, Rule 9(j) is not the least restrictive method for solving the problem. Many states addressing this issue have adopted medical review panels which simply require the claim be reviewed prior to the filing of a medical malpractice action. 1 David W. Louisell and Harold Williams, *Medical Malpractice* § 13A (2001). These panels are "seen as a device designed to [weed] out frivolous medical malpractice claims and to encourage timely settlement of meritorious claims." *Id.* Failure to settle the claim, however, does not preclude the filing of the claim. *Id.* Thus, frivolous claims can be discouraged and done so in a manner that does not deny access to the courts. Accordingly, because Rule 9(j) does not reflect the least restrictive method for addressing the asserted state interest, it violates the equal protection clauses of both the federal and state constitutions and is therefore void.

Because Rule 9(j) is unconstitutional and therefore void, Plaintiff is not obligated to meet the pleading requirements of Rule 9(j). The dismissal of the action for failure to comply with Rule 9(j) must, therefore, be reversed and the matter remanded to the trial court.

Reversed and remanded.[5]

Judge McGEE concurs.

Judge CAMPBELL concurs in part and dissents in part in a separate opinion.

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

I concur with the majority opinion in holding that the doctrine of *res ipsa loquitur* did not apply to plaintiff's medical malpractice

5. Because Rule 9(j) is unconstitutional in that it unduly restricts access to the courts and violates the equal protection clause of the state and federal constitutions, we need not address Plaintiff's arguments concerning the constitutionality of the rule based on exclusive emoluments or due process.

action in that the alleged acts of negligence are not areas within a jury's common knowledge or experience, and, thus, plaintiff would need the benefit of expert testimony to establish the applicable standard of care and any possible breach of this standard of care by defendants. However, I respectfully dissent from the majority's holding that the trial court erred in dismissing plaintiff's complaint because N.C. R. Civ. P. 9(j) (Rule 9(j)) is unconstitutional.

As the majority notes, plaintiff filed her original complaint on 17 August 1999, and then, on 23 August 1999, filed a motion pursuant to Rule 9(j)(3) requesting an additional 120 days to file a complaint conforming to Rule 9(j). The record does not indicate whether plaintiff ever brought her motion pursuant to Rule 9(j)(3) on for a hearing, and the trial court did not enter an order extending the statute of limitations. On 10 November 1999, plaintiff filed an amended complaint identical to her original complaint with the exception of a more extensive recitation of factual allegations detailing the medical treatment defendants provided her and the symptoms she suffered after that treatment. The amended complaint did not include the certification requirements of Rule 9(j)(1) or (2), instead stating, as did the original complaint, that it was being brought under the doctrine of *res ipsa loquitur* under Rule 9(j)(3). Defendants filed a motion to strike the amended complaint and a motion to dismiss pursuant to Rule 9(j) on 16 November 1999. After a hearing, the trial court denied defendants' motion to strike but allowed defendants' motion to dismiss for failure to comply with Rule 9(j). Plaintiff gave timely notice of appeal.

Although not raised before and ruled upon by the trial court, plaintiff made constitutional issues the basis of an assignment of error in the record on appeal to this Court. Specifically, plaintiff asserted that the pre-filing certification requirement of Rule 9(j) violates article I, section 18 of the North Carolina Constitution and the equal protection clauses of the federal and state constitutions. In their respective briefs, both parties fully addressed the issue of whether Rule 9(j) unconstitutionally restricts access to the courts in violation of article I, section 18 of the North Carolina Constitution. However, plaintiff did not address the equal protection argument in her brief to this Court. As the majority points out, constitutional questions that were not raised and passed upon by the trial court, generally will not be considered on appeal. *State v. Cummings*, 353 N.C. 281, 291, 543 S.E.2d 849, 856, *reh'g dis'd*, 353 N.C. 533, 549 S.E.2d 553 (2001). Further, assignments of error not set out or supported in the

appellant's brief, will be deemed abandoned pursuant to N.C. R. App. P. 28(b)(5). However, the majority has elected to consider the important constitutional issues raised pursuant to this Court's discretionary authority under N.C. R. App. P. 2. While I do not object to the majority's election to address these important constitutional issues, I cannot agree with the majority's conclusion that Rule 9(j) is unconstitutional either under article I, section 18 of the North Carolina Constitution or under the equal protection clauses of the federal and state constitutions.

Access to the Courts

Although I wholeheartedly concur with the majority that the courts of this State should be open to all and that the General Assembly is forbidden from impairing the rights guaranteed by article I, section 18 of the North Carolina Constitution, *see Osborn v. Leach*, 135 N.C. 628, 631, 47 S.E. 811, 812 (1904), our General Assembly is nevertheless permitted, under the "due course of law" language of article I, section 18, to "define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983). Further, it is well-established that there is a presumption in favor of the constitutionality of any legislative enactment and that reasonable doubts must be resolved in favor of sustaining legislative acts. *Id.* at 433, 302 S.E.2d at 876. Application of these principles to the instant case leads me to conclude that Rule 9(j) does not unconstitutionally restrict plaintiff's access to the courts in violation of article I, section 18.

I disagree with the majority's conclusion that the pre-filing certification requirement of Rule 9(j) so impairs and unduly burdens the right to file a medical malpractice action that it runs afoul of article I, section 18. Rather, I view Rule 9(j) as a permissible attempt by our General Assembly to define the circumstances under which relief will be available to an injured plaintiff in certain medical malpractice contexts. *See Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985) (upholding the constitutionality of N.C.G.S. § 122-24, which grants personal immunity from certain suits to staff members at state hospitals). The majority recognizes that since plaintiff's complaint does not allege facts that bring it within the doctrine of *res ipsa loquitur*, plaintiff "needs the benefit of expert testimony to establish the standard of care to be used with the administration of gentamycin and Defendants' possible breach of this standard of care." Thus, it is without contention that plaintiff would ultimately need an expert in order

to meet her burden to carry her claim to a jury. To require plaintiff to assert in her pleading that the medical care has been reviewed by a person who is at least presumably qualified and willing to testify for plaintiff, does not in my opinion deny plaintiff the right of access to our courts. Rather, Rule 9(j) is similar to those statutory prohibitions, such as our rules of procedure and statutes of limitations, as well as constitutional provisions such as sovereign immunity, which restrict the ability of plaintiffs to recover for certain injuries, but do not completely deny recovery or abolish common law causes of action, and have consistently been found not to violate article I, section 18 of the North Carolina Constitution. *See Dixon v. Peters*, 63 N.C. App. 592, 306 S.E.2d 477 (1983).

Equal Protection

I likewise dissent from the majority's conclusion that Rule 9(j) violates the equal protection clauses of the federal and state constitutions. The majority states that Rule 9(j) creates two classes of individuals, those seeking to assert a medical malpractice claim and those seeking to assert a non-medical malpractice claim, and unconstitutionally discriminates against those seeking to assert a medical malpractice claim. While I agree with the majority's identification of the two classes created by Rule 9(j), I do not agree that Rule 9(j) affects a fundamental right, and is therefore subject to strict scrutiny analysis. Rather, the right arguably being infringed upon by Rule 9(j) is the right to file a medical malpractice claim, which I do not agree rises to the level of a fundamental right. Since no suspect class or fundamental right is involved, Rule 9(j) need only bear a rational relationship to a legitimate government interest in order to comply with equal protection.

While the majority correctly contends that the record contains no support for defendants' claim that frivolous medical malpractice lawsuits were a problem before the enactment of Rule 9(j), or that Rule 9(j) has alleviated that problem, that is necessarily the case since the constitutionality of Rule 9(j) was not argued in the trial court, and plaintiff did not present any argument in her brief that Rule 9(j) violated equal protection.

However, there is ample judicial authority from which one can conclude that the purpose of Rule 9(j) is to free the courts from frivolous medical malpractice suits at an early state of litigation. Since the early-1970's, nearly every jurisdiction in the country has responded in some fashion to the perceived medical malpractice

insurance crisis, in an attempt to reduce the cost of medical malpractice insurance and insure its continued availability to the providers of health care. In North Carolina, the Report of the North Carolina Professional Liability Insurance Study Commission (1976), analyzed the malpractice crisis in this state, with the Study Commission recommending procedural changes which were subsequently enacted by the legislature. *See Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982), *aff'd*, 307 N.C. 465, 298 S.E.2d 384 (1983) (upholding the constitutionality of the statute of repose (N.C.G.S. § 1-15(c)) for a medical malpractice action based upon the leaving of a foreign object in a person's body during the performance of professional services). In the more recent past, nearly every state has passed some form of a remedial measure designed to weed out frivolous medical malpractice claims at an early stage of litigation. As the majority points out, some states have addressed this issue by the adoption of medical review panels which simply require that medical malpractice claims be reviewed prior to being filed. 1 David W. Louisell and Harold Williams, *Medical Malpractice* § 13A (2001). Many other states have adopted requirements similar to Rule 9(j), requiring the filing of an affidavit of an expert witness or a summary of the expert's testimony concerning the merits of the claim. *Id.* § 9.07[2]. Such statutes have consistently been held to be rationally related to the legitimate state interest of eliminating frivolous medical malpractice suits. *See Mahoney v. Doergoff Surgical Servs.*, 807 S.W.2d 503 (Mo. Sup. Ct. 1991); *Henke v. Dunham*, 450 N.W.2d 595 (Minn. Ct. App. 1990); *Sakovich v. Dodt*, 529 N.E.2d 258 (Ill. Ct. App. 1988). I agree with the reasoning of these cases and would hold that Rule 9(j) does not violate equal protection.

For the foregoing reasons, I respectfully dissent, and would affirm the order of the trial court.

WILLIAM J. PATTERSON, LISA K. PATTERSON, PLAINTIFFS v. PHILIP SWEATT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, PHILLIP RAINWATER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, WENDELL SESSOMS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DALE FURR, SHERIFF OF RICHMOND COUNTY, AND WESTERN SURETY COMPANY, AS SURETY, DEFENDANTS

No. COA00-746

(Filed 2 October 2001)

1. Attorneys— approved vacation—hearing conducted during attorney's absence—adequate representation

The trial court did not abuse its discretion by conducting a hearing and entering a protective order while one of plaintiffs' attorneys was on an approved vacation allegedly pursuant to North Carolina Superior Court Rule 26 in an action seeking the return of money and other property seized by defendant deputies from plaintiffs' home, because: (1) the attorney's leave was in September and October 1999, and Rule 26 was not effective until 1 January 2000; and (2) even if Rule 26 applied to plaintiff counsel's leave, plaintiffs did not lack adequate representation at the hearing before the trial court when other associates from the same law firm participated in plaintiffs' case.

2. Discovery— sanctions—attorney fees

The trial court did not abuse its discretion by awarding a sanction of attorney fees in favor of defendant surety's counsel in the 11 October 1999 protective order based on plaintiffs' failure to properly notice depositions under N.C.G.S. § 1A-1, Rule 30 in an action seeking the return of money and other property seized by defendant deputies from plaintiffs' home, because: (1) defendant surety was not properly served with notice of the taking of the depositions, and it did not matter whether defendant surety had actual or constructive notice of the lawsuit; and (2) plaintiffs failed to seek leave of court for a deposition that was scheduled prior to the expiration of the 30 days after service of the summons and complaint in violation of Rule 30(a).

3. Discovery— sanctions—attorney fees—dismissal

The trial court did not abuse its discretion by finding that plaintiffs violated N.C.G.S. § 1A-1, Rule 8(a)(2) and by awarding sanctions in the form of a dismissal of the action with attorney fees under N.C.G.S. § 1A-1, Rule 37(b) in an action seeking the return of money and other property seized by defendant deputies

from plaintiffs' home, because: (1) plaintiffs repeatedly violated discovery rules; (2) plaintiffs filed three lawsuits for improper purposes; (3) there were multiple protective orders granted on behalf of defendants; (4) earlier impositions of less drastic sanctions by the trial court did not deter plaintiffs' wrongful conduct; and (5) the grant of attorney fees under § 1A-1, Rule 37(b) was within the trial court's inherent authority.

Judge GREENE dissenting in part.

Appeal by plaintiff from judgment entered 9 February 2000 by Judge W. Erwin Spainhour in Richmond County Superior Court. Heard in the Court of Appeals 5 June 2001.

Henry T. Drake for plaintiffs-appellants.

Stott Hollowell Palmer & Windham, L.L.P., by Martha Raymond Thompson for defendants-appellees Sweatt, Rainwater, Sessoms and Furr.

Kitchin Neal Webb Webb & Futrell, P.A., by Stephan R. Futrell for defendant-appellee Western Surety.

BRYANT, Judge.

On 10 August 1998, Richmond County deputies (defendants) searched the plaintiffs' (Pattersons) residence and seized cash and paperwork. At the time of the seizure, William Patterson was a suspect in relation to the sale and distribution of cocaine. Patterson was subsequently charged and pled guilty to several criminal charges including Possession with Intent to Sell and Distribute Cocaine and Maintaining a Dwelling Used for the Purposes of Keeping and Selling a Controlled Substance.

Plaintiffs have filed three lawsuits in relation to the seizure of the cash and paperwork. The first lawsuit (Patterson I) was filed in September 1998 and sought the return of money and other property. The Patterson I lawsuit also sought punitive damages against defendants, Richmond County law enforcement officers, for alleged willful and wanton conduct in converting plaintiffs' money and property. Defendants had Patterson I removed to federal court. Meanwhile, plaintiffs filed a second lawsuit (Patterson II) in state court while the civil claim was still pending in federal court. The Pattersons filed notices of depositions of the two defendant deputies in Patterson II. Upon defendants' motion, the court entered a protective order. After

the protective order was entered, the trial court dismissed Patterson II because of the pending federal action. The federal court thereafter granted plaintiffs' motion for a voluntary dismissal.

In August 1999, plaintiffs re-filed their complaint, (originally Patterson II now Patterson III). Plaintiffs' counsel Henry T. Drake (Drake) confirmed his vacation for the weeks of 27 September 1999, 4 October, 11 October and for the day of 18 October 1999 with Judge Beale, the senior resident superior court judge, and notified opposing counsel by copy of his letter to Judge Beale.

On 29 September 1999, Carneval, an associate at Drake's firm, Drake & Pleasant, mailed defendants' counsel Martha Raymond Thompson (Thompson) notice of depositions of the two defendant-deputies scheduled for 15 October 1999. Thompson was on maternity leave and upon receipt of the notice, her office spoke with Carneval about delaying the depositions until her return. Carneval refused.

On 1 October 1999, counsel for defendant-surety, Futrell, filed a Special Appearance, Motion for Protective Order and Request for Expedited Hearing in relation to the depositions. On 11 October the trial court granted the motion for a protective order and awarded $312.50 in sanctions against plaintiffs. The protective order did not specify a time for the monetary sanction to be paid.

On 19 October 1999, Thompson filed a Request for Statement of Monetary Relief and plaintiffs filed a response to that request. On 16 November 1999, the defendants jointly filed and served a Motion to Dismiss or For Other Sanctions. Immediately upon receiving defendants' motion, Drake, without obtaining a judge's order or filing a request for permission to do so, withdrew plaintiffs' Response to Request for Statement of Monetary Relief. Drake filed a response to defendants' motion. On 24 December 1999, Drake served notice (without certificate of service) of the videotaped deposition of Wendell Sessoms and Philip Sweatt. On 29 December 1999, Thompson filed a Motion for Protective Order to Quash the Deposition Notices and for Sanctions. Drake again served a Notice of Deposition Upon Oral Examination for the taking of the videotaped deposition of Philip Sweatt. In response, Thompson filed a Second Motion for Protective Order and For Sanctions. On 19 January 2000, an order was granted postponing the depositions of Sweatt, Rainwater and Sessoms until all of defendants' motions could be heard. On 7 February 2000, the trial court heard the motions and ordered a dismissal of plaintiffs' case on several grounds: 1) the filing

of Plaintiffs' Response to Request for Monetary Relief and its removal without a judge's permission; 2) plaintiffs' failure to pay $312.50 in sanctions awarded in the protective order within a reasonable amount of time; and 3) for attempting to obtain through civil action discovery, that which cannot be obtained in the criminal action. Plaintiffs appeal from both the 11 October 1999 Order allowing defendants' Motion for a Protective Order and Sanctions and the 7 February 2000 Order dismissing plaintiffs' case. For the reasons which follow we affirm the trial court's rulings.

I.

[1] Plaintiffs argue that the trial court erred by conducting a hearing and entering a protective order while one of plaintiffs' attorneys was on an approved vacation pursuant to North Carolina Superior Court Rule 26. We disagree.

Rule 26 of the General Rules of Practice for the Superior and District Court states in pertinent part:

> SECURE LEAVE PERIOD FOR ATTORNEYS
>
> (C) Designation, Effect . . . . the secure leave period so designated shall be deemed allowed without further action of the court and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.
>
> . . .
>
> (H) Procedure When Deposition Scheduled Despite Designation. If . . . any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation . . . and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period.

Gen. R. Pract. Super. and Dist. Ct. 9, 2000 Ann. R. N.C. 7.

We note initially that Rule 26 was adopted in May 1999, but it was not effective until January 1, 2000. Plaintiffs' lead attorney, Drake, was on leave in September and October of 1999, several months before Rule 26's enactment. Thus, Drake was technically not on approved vacation under Rule 26.

Assuming, however, that Rule 26 applies to plaintiffs' counsel's leave, we are nevertheless unpersuaded by plaintiffs' argument that

the trial court erred in conducting a hearing and entering the protective order for several reasons. First, plaintiffs did not lack adequate representation at the hearing before the trial court. Carneval, the associate at Drake's firm who noticed the depositions of defendant deputies, appeared on behalf of plaintiffs at the hearing. Plaintiffs have failed to demonstrate how they were prejudiced by Carneval's defense before the trial court of his own notices of depositions. Second, although Drake acted as lead counsel for plaintiffs, it is evident from the record that Carneval and other attorneys at Drake's firm actively participated in plaintiffs' case. For example, Carneval not only signed and filed the notices of deposition, he also refused the request of defendants' attorney Thompson to postpone the depositions until she returned from maternity leave. Furthermore, Carneval and another partner at Drake's firm appeared, without Drake, on plaintiffs' behalf at the hearing on the motion for protective order. In light of this procedural history, we disagree with plaintiffs' assertions that Drake was the only attorney with the actual authority to represent plaintiffs at the hearing.

In *Jenkins v. Jenkins*, 27 N.C. App. 205, 206, 218 S.E.2d 518, 519 (1975), we held the trial court did not abuse its discretion in denying a motion for a continuance of a matter set for trial where lead counsel was unavailable and defendant was represented in court by a member of defendant attorney's law firm. In affirming the trial court's denial of the continuance, we noted that "[i]t is a well established rule in North Carolina that the granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion." *Jenkins*, 27 N.C. App. at 206, 218 S.E.2d at 519. Because plaintiffs were adequately represented at the hearing by counsel with actual authority, we hold that the trial court did not err in conducting a hearing and entering a protective order. We therefore overrule plaintiffs' assignment of error.

II.

[2] Plaintiffs next argue that the trial court erred in the 11 October 1999 protective order which awarded a sanction of attorneys' fees in favor of counsel for defendant-surety, citing plaintiffs' failure to properly notice depositions pursuant to Rule 30 of the North Carolina Rules of Civil Procedure. We disagree. Rule 30(a) states:

> Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expira-

> tion of 30 days after service of the summons and complaint upon any defendant or service . . . except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) if special notice is given as provided in section (b)(2) of this rule.

N.C.G.S. § 1A-1, Rule 30(a) (1999) [emphasis added]. A Rule 26(c) protective order "is discretionary and is reviewable only for abuse of that discretion." *Booker v. Everhart*, 33 N.C. App. 1, 9, 234 S.E.2d 46, 53 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E.2d 360 (1978).

The only authority plaintiffs cite in support of their argument is that "discovery rules 'should be construed liberally' so as to substantially accomplish their purposes." *AT&T Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 (1979) (citations omitted). Plaintiffs contend that they did not violate Rule 30(a) because they noticed defendant-deputies on 29 September 1999 for depositions to be taken on 15 October 1999, which was outside of the thirty (30) day limitation. However, plaintiffs did violate Rule 30(a) with respect to defendant-surety, who was not served with the summons and complaint in Patterson III until 27 September 1999. Defendant-surety was noticed of the 15 October 1999 depositions on the same day as defendant-deputies.

Under Rule 30(a), the thirty day limitation must be met with respect to every defendant, not just the ones being deposed. 1 G. Gray Wilson, *North Carolina Civil Procedure* § 30-2, at 520 (1995). Plaintiffs attempt to circumvent the rule with respect to defendant-surety by arguing that its counsel had actual as well as constructive notice of the lawsuit and was therefore properly served with notice of the taking of the depositions. It does not matter if counsel for defendant-surety had actual or constructive notice of the lawsuit when he was noticed of the deposition, because this not a requirement of the Rules of Civil Procedure, Rule 30(a) in particular.

Based on the foregoing facts, we find that plaintiffs failed to seek "leave of court" for a deposition that was scheduled "prior to the expiration of 30 days after service of the summons and complaint," in violation of Rule 30(a) and it was within the trial court's power to grant a protective order and impose a sanction of attorneys' fees. Additionally, the court had available to it the history of the plaintiffs' complaints and the knowledge that a protective order was previously granted in Patterson II for similar actions. Moreover, North Carolina

Rule of Civil Procedure 37(a)(4) states that the court may award the "moving party the reasonable expenses incurred in obtaining the order, including attorney's fees." N.C.G.S. § 1A-1, Rule 37(a)(4) (2000). Thus, it does not appear that the trial court abused its discretion by imposing sanctions on plaintiffs. Accordingly, we affirm the trial court's sanction of attorneys' fees.

III.

[3] The plaintiffs next argue that the trial court erred in finding that plaintiffs violated N.C.G.S. § 1A-1, Rule 8(a)(2) and awarding sanctions in the form of a dismissal of the action with attorneys' fees. We disagree.

> Rule 8(a)(2) of the N.C. Rules of Civil Procedure provides in part:
>
> [A]t any time after service of the claim for [monetary] relief, any party may request of the claimant a written statement of the monetary relief sought, and the claimant shall, within 30 days after such service, provide such statement, which shall not be filed with the clerk until the action has been called for trial or entry of default entered.

N.C.G.S. § 1A-1, Rule 37(a)(4) (2000). Rule 8(a)(2) does not identify a particular sanction that may be imposed for filing a response to a request for monetary relief before the "action has been called for trial or entry of default entered." However, we reason that the trial court has the same authority to punish such a violation as it would if a complaint demanding a specific sum above ten thousand dollars were filed in violation of Rule 8(a)(2). *See* 1 G. Gray Wilson, *North Carolina Civil Procedure* § 8-3, at 136 (1995). A dismissal of the action pursuant to N.C.G.S. § 1A-1, Rule 41(b) is one of the permissible sanctions for violating the provision of Rule 8(a)(2) regarding pleading of damages in excess of ten thousand dollars. *McLean v. Mechanic*, 116 N.C. App. 271, 275, 447 S.E.2d 459, 461 (1994). However, "it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient." *Id.*

Our court in *Miller v. Ferree*, 84 N.C. App. 135, 137, 351 S.E.2d 845, 847 (1987), held that sanctions may not be imposed mechanically. Rather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience. *Id.* at 137, 351 S.E.2d at 847. *See also Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d

847 (1986) (in determining whether to dismiss a case for violation of motion in limine, trial court must determine the effectiveness of alternative sanctions). Once the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion. *Miller* at 137, 351 S.E.2d at 847. Moreover, our Supreme Court allowed a dismissal to stand when "it [was] clear that a lesser sanction . . . would not serve the best interests of justice." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 681, 360 S.E.2d 772, 780 (1987), *affirming in part and reversing in part Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d 847 (1986) (reversing the Court of Appeals' decision to vacate the portion of the trial court order dismissing plaintiff's action).

In addition, our Supreme Court held "it to be within the inherent power of the trial court to order plaintiff to pay defendant's reasonable costs including attorney's fees for failure to comply with a court order." *Daniels* at 674, 360 S.E.2d at 776. If a party fails to obey a court order, the court has the authority to require that party to "pay the reasonable expenses, including attorney's fees, caused by the failure." N.C.G.S. § 1A-1, Rule 37(b) (2000).

In the present case, the trial court, in its 9 February 2000 Order, set out the entire history of the three Patterson cases and cited counsel for plaintiffs' repeated violation of discovery rules including: 1) backdating certificates of service that accompanied notices of depositions to make it appear that those notices were mailed two weeks earlier; 2) noticing depositions without allowing sufficient notice beforehand; 3) the improper filing of a response to the Request for Monetary Relief and subsequent removal of that document without the permission of a judge; 4) continuing efforts to depose the defendant-deputies despite a protective order; 5) use of civil action discovery in an attempt to benefit from them in the criminal action and 6) filing complaints and seeking discovery when plaintiffs knew and admitted in a written statement, that the allegations were not legitimate. Also, in support of its decision to dismiss the case, the court noted that there were indications that the three lawsuits were filed for improper purposes, that there were multiple protective orders granted on behalf of defendants, and that the earlier impositions by the trial court of less drastic sanctions did not deter plaintiffs' wrongful conduct. For example, the court specifically noted "plaintiff's failure to pay . . . sanctions awarded by the Protective Order dated October 14, 1999, by Judge Beale . . . within a reasonable time" as one of the many reasons why dismissal was appropriate.

With respect to the attorneys' fees, the trial court awarded defendants' attorneys fees for time spent in the "defense of this lawsuit, including the preparation, filing and prosecution of their respective and joint discovery-related motions . . . ." The court examined the affidavits of counsel for all of the defendants and found that time expended and expenses incurred by the attorneys were reasonable under the circumstances. The trial court further found that $150.00 per hour was a reasonable attorneys' fee associated with the type of legal work in that region and commensurate with the experience and training of the attorneys involved.

Based on the foregoing, we find that the trial court did not abuse its discretion in ordering the dismissal of plaintiffs' action with attorneys' fees. We hold that here, like in *Daniels* it was clear to the trial court as shown by the findings in the order, that a lesser sanction would not serve the best interests of justice. Therefore the trial court's failure to specifically state that other less drastic sanctions were considered was not error. Moreover, we hold that the grant of attorneys' fees in favor of the defendants pursuant to N.C.G.S. § 1A-1, Rule 37(b) was within the trial court's inherent authority. Accordingly, we affirm the trial court's decision to dismiss the plaintiffs' action.

AFFIRMED.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in part with a separate opinion.

GREENE, Judge, dissenting in part.

I disagree with the majority that the trial court's failure to consider less severe sanctions was not error. I, therefore, respectfully dissent from section III of the majority's opinion.

Before a trial court orders the dismissal of an action, it "must at least *consider* a less severe sanction," *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993), and dismissal pursuant to Rule 41(b) should be allowed "only when the trial court determines that less drastic sanctions will not suffice," *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984). In this case, there is no evidence from the 9 February 2000 order that the trial court "considered" a less severe sanction before ordering a dismissal. Accordingly, I believe the

order should be remanded to the trial court for entry of any sanctions deemed appropriate after consideration of less severe sanctions.

STATE OF NORTH CAROLINA v. ANTHONY C. LAMBERT

No. COA00-1133

(Filed 2 October 2001)

1. **Constitutional Law— resentencing—probation conditions—no right to counsel**

The trial court did not err by not appointing counsel for a resentencing hearing for the unauthorized practice of law because the resentencing in this case was not a critical stage of the criminal proceeding where the trial court, on remand from the Court of Appeals, only addressed the issue of how to modify the special condition of probation that defendant not file documents in any court without prior approval of his probation officer, and the trial court was not likely to either sentence defendant to an active term of imprisonment or fine defendant five hundred dollars or more. N.C.G. S. § 7A-451(a)(l).

2. **Sentencing— resentencing—pro se representation—required inquiry not made**

The trial court did not err by not making the inquiry required by N.C.G.S. § 15A-1242 before allowing defendant to represent himself at a resentencing hearing because defendant was not entitled to counsel at the hearing.

3. **Probation and Parole— term longer than statutory period—no findings**

The trial court erred at a resentencing for the unauthorized practice of law by ordering a term of probation longer than the statutorily prescribed period without making the required findings that a longer term of probation was necessary. N.C.G.S. § 15A-1343.2(d).

4. **Probation and Parole— probation—condition—curfew—relation to rehabilitation**

The trial court did not err when sentencing defendant for the authorized practice of law by imposing as a condition of proba-

tion that defendant remain in his residence from 7:00 p.m. until 6:00 a.m. The challenged condition is permitted by N.C.G.S. § 15A-1343(b1) (1999); the legislature has deemed all of the special conditions enumerated by the statute appropriate to the rehabilitation of criminals and their assimilation into a law-abiding society and the condition need not be reasonably related to defendant's rehabilitation.

5. Probation and Parole— conditions—written notice required

The trial court erred when sentencing defendant for the unauthorized practice of law by imposing as a condition of probation that defendant file documents with the court only when the documents were signed and filed by a licensed attorney. The record on appeal was devoid of any evidence that defendant was served with a written copy of this particular condition of probation; oral notice of conditions of probation is not a satisfactory substitute for the written statement required by statute.

6. Appeal and Error— probation condition—earlier decision in same case by different panel—binding

The trial court did not err when sentencing defendant for the unauthorized practice of law by imposing as a condition of probation that defendant not work as a private investigator or paralegal. This condition of probation was upheld in the earlier unpublished opinion in this case; one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case.

Appeal by defendant from judgment entered 22 May 2000 by Judge William C. Griffin, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 23 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General Kristine L. Lanning, for the State.

Anthony Lambert, pro se, defendant appellee.

McCULLOUGH, Judge.

Defendant Anthony C. Lambert was indicted for obtaining property by false pretenses and the unauthorized practice of law on 2 December 1996. The pertinent facts are as follows: On 2 July 1996, Rosa Harvey visited defendant's home and spoke with defendant about a divorce action. During their conversation, defendant told Ms.

Harvey that he was a licensed attorney and agreed to draft her divorce documents for a fee of fifty dollars. The next day, during a meeting with Ms. Harvey and her fiancé, defendant presented the documents to her. Defendant also promised to provide Ms. Harvey with other necessary documents, but failed to deliver the documents to her by the morning of her district court appearance. The district court refused to grant Ms. Harvey a divorce because of the insufficient and incorrect documents prepared by defendant. Following the divorce hearing, the district court judge advised Ms. Harvey to speak with a detective at the Elizabeth City Police Department concerning her dealings with defendant.

As a result of the information provided by Ms. Harvey, defendant was charged with one count of obtaining property by false pretenses and one count of the unauthorized practice of law. On 4 March 1998, a jury found defendant not guilty of obtaining property by false pretenses, but convicted him of the unauthorized practice of law. Defendant received a sentence of forty-five days in jail, suspended for thirty-six months, with regular and special terms of probation. Defendant appealed.

On appeal, defendant contended that, because the jury acquitted him of obtaining property by false pretenses, he could not be guilty of the unauthorized practice of law. Defendant also argued that the trial court erred in finding sufficient evidence to support his conviction for the unauthorized practice of law, resulting in denial of his motion to dismiss. Defendant further assigned error to the jury instruction on the unauthorized practice of law and two special conditions of his probation: (1) the condition that defendant not file documents in any court without prior approval from his probation officer, and (2) the condition that defendant not practice as a paralegal or private investigator. A panel of this Court found no error in defendant's trial, but vacated in part the trial court's sentencing judgment and remanded defendant's case for resentencing.

On 22 May 2000, defendant appeared *pro se* at the resentencing hearing. Once again, the trial court imposed an intermediate punishment and sentenced defendant to forty-five days in jail, suspended for thirty-six months, with regular and special terms of probation. From this resentencing judgment, defendant appeals.

Defendant brings forward five assignments of error, one challenging the trial court's failure to appoint counsel to represent defendant during resentencing and four relating to special conditions

of probation, namely (1) the thirty-six months of supervised probation; (2) the condition that defendant is under curfew from 7:00 p.m. until 6:00 a.m. and may not leave his residence during that time without authorization from his probation officer; (3) the condition that defendant may file documents with the court only when the documents are signed and filed by a licensed attorney; and (4) the condition that defendant not practice as a paralegal. For the reasons set forth below, we vacate in part the trial court's resentencing judgment and remand defendant's case for resentencing.

[1] Defendant first argues that the trial court erred by not appointing counsel for him at his resentencing hearing, thereby violating his Sixth Amendment right to counsel under the United States Constitution. We disagree. The sources of an indigent person's right to appointed counsel are the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution, *Jolly v. Wright*, 300 N.C. 83, 90, 265 S.E.2d 135, 141 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993), and Article I, Section 23 of the North Carolina Constitution. Under the Sixth and Fourteenth Amendments, a criminal defendant is entitled to effective assistance of counsel during trial, *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963); during the penalty phase of a capital case, *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984); and during every critical stage of a criminal proceeding where "substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134, 19 L. Ed. 2d 336, 340 (1967).

Sentencing is a critical stage of the criminal proceeding during which the criminal defendant is entitled to effective assistance of counsel. *Gardner v. Florida*, 430 U.S. 349, 358, 51 L. Ed. 2d 393, 402 (1977). In *Argersinger v. Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 530 (1972), the United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." *Id.* at 37, 32 L. Ed. 2d at 538. The Supreme Court in Argersinger emphasized imprisonment as the event triggering an absolute right to counsel under the Sixth Amendment. *Jolly*, 300 N.C. at 91, 265 S.E.2d at 141. In *Scott v. Illinois*, 440 U.S. 367, 59 L. Ed. 2d 383 (1979), the Supreme Court reaffirmed that "the central premise of Argersinger—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprison-

ment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373, 59 L. Ed. 2d at 389. *See also State v. Neeley*, 307 N.C. 247, 297 S.E.2d 389 (1982).

N.C. Gen. Stat. § 7A-451 enumerates those actions and proceedings in which an indigent person is entitled to the services of counsel. Subdivision (1) is the only subdivision that applies to criminal proceedings, and defines the scope of an indigent's entitlement to court-appointed counsel. *Jolly*, 300 N.C. at 90, 265 S.E.2d at 141. N.C. Gen. Stat. § 7A-451(a)(1) (1999) provides that

> (a) An indigent person is entitled to services of counsel in the following actions and proceedings:
>
> (1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged[.]

The language in N.C. Gen. Stat. § 7A-451(a)(1) responds to the "precise holding of *Argersinger*, which states that the Sixth Amendment precludes *imprisonment* of a person for 'any offense,' however classified, unless he [is] represented by counsel at his trial. . . .[T]he right to appointed counsel [also] attaches in felony or misdemeanor cases where the authorized punishment exceeds a five hundred dollar fine." *Jolly*, 300 N.C. at 88, 265 S.E.2d at 140 (emphasis in original).

Defendant Lambert's resentencing hearing was not a critical stage of the criminal proceeding in which he was entitled to counsel. At trial, defendant was represented by counsel through the sentencing phase and received a suspended sentence with regular and special terms of probation. On defendant's first appeal, this Court in an unpublished opinion found no error in defendant's trial, but vacated in part the trial court's sentencing judgment and remanded defendant's case for resentencing, consistent with the panel's opinion that the trial court erred in delegating a judicial function to defendant's probation officer. *State v. Lambert*, No. COA98-1222, slip op. at 9-10 (N.C. App. Nov. 16, 1999). On remand, the trial court only addressed the issue of how to modify the special condition of probation that defendant not file documents in any court without prior approval from his probation officer. Thus, during resentencing, none of defendant's substantial rights were at stake. The trial court was not likely to either sentence defendant to an active term of imprisonment or fine defendant five hundred dollars or more. Therefore, we determine that none of defendant's constitutional rights were violated during resen-

tencing because under the provisions of N.C. Gen. Stat. § 7A-451, defendant was not entitled to counsel.

[2] Defendant also contends that the trial court failed to make the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 (1999) before allowing him to represent himself at his resentencing hearing. N.C. Gen. Stat. § 15A-1242 provides that

> [a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Defendant correctly argues that this inquiry is required in every case in which the defendant has a right to counsel but waives that right. "[N.C. Gen. Stat.] § 15A-1242 sets forth the prerequisites necessary before a defendant may waive his right to counsel and elect to represent himself at trial." *State v. Gerald*, 304 N.C. 511, 517, 284 S.E.2d 312, 316 (1981) (footnote omitted). Defendant's argument fails because under N.C. Gen. Stat. § 7A-451, defendant was not entitled to counsel at his resentencing hearing. Since defendant could not waive a right to counsel he did not have in the first place, the trial court was not required to make the inquiry mandated by N.C. Gen. Stat. § 15A-1242. Defendant's first assignment of error is overruled.

[3] Defendant next argues that the sentence imposed by the trial court, particularly the length of supervised probation for thirty-six months, is disproportionate to the crime for which defendant was convicted and violative of the Eighth Amendment to the United States Constitution. While we agree with defendant that the trial court erred by ordering a thirty-six-month term of probation, we do not agree with defendant that his sentence was unconstitutionally disproportionate to the crime of the unauthorized practice of law. Where the sentence ultimately imposed falls within statutory limits prescribed for the offense, we defer to the wisdom of our Legislature regarding the appropriateness of the minimum or maximum punishment. *State*

v. Ahearn, 307 N.C. 584, 598, 300 S.E.2d 689, 698 (1983). N.C. Gen. Stat. § 15A-1343.2(d) (1999) prescribes lengths of probation under the North Carolina Structured Sentencing Act and provides that

> [u]nless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:
>
> . . . .
>
> (2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months;
>
> . . . .
>
> If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years.

In the present case, the trial court found that defendant had a prior conviction level of 2, and sentenced him to an intermediate punishment for committing a Class 1 misdemeanor by placing him on probation for thirty-six months. Pursuant to N.C. Gen. Stat. § 15A-1343.2(d), such a term of probation was within the discretion of the trial court; however, an examination of the record and transcript of the hearing reveals that the trial court failed to make the required findings of fact that a longer term of probation was necessary. Accordingly, we vacate this condition of defendant's probation and remand this portion of defendant's case for resentencing. The trial court must reduce defendant's probation to the statutory period of twelve to twenty-four months or enter appropriate findings of fact that a longer period of probation is necessary. *See State v. Cardwell*, 133 N.C. App. 496, 516 S.E.2d 388 (1999) (resentencing required when trial court imposed twelve months' supervised and forty-eight months' unsupervised probation for reckless driving without finding that the extended period of probation was necessary); and *State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000) (resentencing required when trial court imposed sixty months' supervised probation on a felon sentenced to intermediate punishment without finding that the extended period of probation was necessary).

[4] Defendant next argues that the trial court erred by imposing the condition of probation that defendant remain under curfew and not

be away from his place of residence from 7:00 p.m. until 6:00 a.m. because the condition is "unreasonable, oppressive, unduly burdensome and has no relationship to the crime of which defendant was convicted for [sic]." We disagree. The challenged condition of probation is permitted by N.C. Gen. Stat. § 15A-1343(b1)(3c) (1999), which provides in pertinent part:

> (b1) Special Conditions.—In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions:
>
> . . . .
>
> (3c) Remain at his or her residence unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training.

Defendant contends that nothing in the record supports the imposition of this condition as related to the crime of the unauthorized practice of law, and that the condition is not reasonably related to his rehabilitation. To support this argument, defendant relies on the "reasonably related" standard articulated in N.C. Gen. Stat. § 15A-1343(b1)(10) (1999). Under N.C. Gen. Stat. § 15A-1343(b1)(10), "the trial court may in addition to the statutorily described conditions impose 'any other conditions . . . reasonably related to [defendant's] rehabilitation." *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985).

The language of N.C. Gen. Stat. § 15A-1343(b1)(10) operates as a check on the discretion of trial judges in devising special conditions of probation other than those enumerated in the statute. *State v. Parker*, 55 N.C. App. 643, 645-46, 286 S.E.2d 366, 368 (1982). However, when the trial judge imposes one of the special conditions of probation enumerated by N.C. Gen. Stat. § 15A-1343(b1), the condition need not be reasonably related to defendant's rehabilitation because the Legislature has deemed all those special conditions appropriate to the rehabilitation of criminals and their assimilation into law-abiding society. *Parker*, 55 N.C. App. at 646, 286 S.E.2d at 368. In this case, the challenged condition of probation is not a creation of the trial court, but rather one of those appropriate and reasonable conditions of probation expressly authorized by the Legislature under N.C. Gen.

Stat. § 15A-1343(b1)(3c). We conclude that defendant's argument is without merit and overrule this assignment of error.

[5] Defendant next argues that the trial court erred by imposing as a condition of probation that he file documents with the court only when the documents were signed and filed by a licensed attorney whose signature was affixed thereto. Defendant maintains that this condition violates his constitutional right of access to the courts, and is unreasonable and beyond the power of the trial court to devise. We agree that the trial court erred by imposing this condition, but disagree with defendant as to why the trial court erred.

It is the settled policy of this Court that when a case can be disposed of on appeal without reaching the constitutional issue, it is to be first disposed of on non-constitutional grounds. *Burwell v. Griffin*, 67 N.C. App. 198, 209, 312 S.E.2d 917, 924, *appeal dismissed, disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984).

N.C. Gen. Stat. § 15A-1343(c) (1999) mandates that

> [a] defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

Here, the trial court orally modified the original terms of defendant's probation in light of the Court of Appeals' remand order:

> THE COURT: . . . I believe the only thing [the Court of Appeals] said I couldn't do was require him not to file papers. . . .
>
> * * * *
>
> THE COURT: With regard to that during the [thirty-six] month period of probation he may file documents with the clerk of Superior Court when it has been—when it is filed by an attorney, a licensed attorney practicing law in the State of North Carolina, filed on his behalf by a licensed attorney practicing law in North Carolina. Or has been reviewed by a licensed attorney practicing law in North Carolina who has affixed his signature thereto.

The trial court's recital does not appear anywhere in the written record on appeal, including the text of the trial court's resentencing judgment. The record on appeal is completely devoid of any evidence that defendant was served with a written copy of this

particular condition of probation, so this condition is invalid as prescribed by the trial court. Oral notice to defendant of his conditions of probation is not a satisfactory substitute for the written statement required by statute. *State v. Suggs*, 92 N.C. App. 112, 113, 373 S.E.2d 687, 688 (1988). Accordingly, we vacate this condition of defendant's probation and remand this portion of defendant's case for resentencing.

We emphasize that our ruling today does not determine the propriety or reasonableness of this contested condition of defendant's probation. However, we note that the right to counsel guaranteed to all criminal defendants by the federal and state constitutions implicitly gives a defendant the right to refuse counsel and conduct his or her own defense *pro se*. *State v. Thacker*, 301 N.C. 348, 353-54, 271 S.E.2d 252, 256 (1980). Integral to a defendant's right to proceed *pro se* is his ability to prepare and submit legal documents to the trial court. This Court is well aware that the trial court has substantial discretion in devising conditions of probation under N.C. Gen. Stat. § 15A-1343(b1)(10). *Harrington*, 78 N.C. App. at 48, 336 S.E.2d at 857. Nevertheless, any condition which violates defendant's constitutional rights is *per se* unreasonable and beyond the power of the trial court to impose. *State v. Simpson*, 25 N.C. App. 176, 180, 212 S.E.2d 566, 569, *cert. denied*, 287 N.C. 263, 214 S.E.2d 436 (1975).

[6] Lastly, defendant argues that the trial court erred by imposing the condition of probation that "[defendant] not engage in the practice [as a] paralegal or be permitted to engage in any work as a private investigator and surrender to the probation officer any license or permit as to either of these occupations." Defendant urges this Court to hold the challenged condition invalid as to his ability to practice before the Social Security Administration because paralegal work before the Administration is not itself criminal and is governed by federal, not state, law. We do not find defendant's argument persuasive.

The North Carolina Supreme Court has held that one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566-67, 299 S.E.2d 629, 631-32 (1983). Defendant's previous appeal challenged the exact same condition of probation prohibiting defendant from practicing as a paralegal and private investigator. In *Lambert*, slip op. at 9-10, this Court upheld the trial court's special condition of probation under N.C. Gen. Stat. § 15A-1343(a) (Cum. Supp. 1998), which gives the trial court author-

ity to impose conditions of probation "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." The first panel decided that the contested condition bore some relation to defendant's offense, and that the condition was aimed at preventing defendant from engaging in similar offenses. *Lambert*, slip op. at 10. 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. Indus. Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998). Defendant's final assignment of error is therefore overruled.

For the foregoing reasons, we vacate in part the trial court's resentencing judgment and remand defendant's case for resentencing consistent with this opinion.

Vacated in part, and remanded for resentencing.

Judges MARTIN and BIGGS concur.

GRANT CONSTRUCTION COMPANY, PLAINTIFF v. W. PHILIP McRAE, LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, AND DENNIS M. WARD, DEFENDANTS

No. COA00-1183

(Filed 2 October 2001)

1. Workers' Compensation— subrogation lien—failure to file action against third party

The trial court properly granted a Rule 12(b)(6) dismissal of an action by an employer against a lawyer, his malpractice insurer, and a workers' compensation claimant where the workers' compensation claim was settled, the attorney allowed the statute of limitations to lapse without filing a personal injury claim against a third party, the malpractice suit was settled, and plaintiff brought this action seeking to extend its subrogation lien to the malpractice settlement. The third party, which negligently failed to maintain scaffolding, caused the injury to the employee (Ward); the attorney who failed to timely file a suit against Formco did not cause an injury to Ward as that term is defined in the Workers' Compensation Act.

2. Workers' Compensation— benefits and legal malpractice settlement—no double recovery

A workers' compensation claimant did not receive a double recovery where he settled his workers' compensation action, his attorney did not file an action against a third party within the statute of limitations, the employee settled a malpractice action against the attorney, and the court allowed the employee to keep the entire malpractice settlement rather than extending the employer's subrogation lien to the settlement. The malpractice insurer had reduced its award by the amount of malpractice benefits.

3. Workers' Compensation— subrogation lien—additional legal malpratice proceeds

The trial court did not have the authority under N.C.G.S. § 97-10.2(j) to determine the amount of a workers' compensation subrogation lien and then to distribute the recovery, and payment should not have gone to the Commission under that statute, where an employee settled his workers' compensation claim, his attorney allowed the statute of limitations to lapse without filing a claim against a third party, the employee settled a malpractice claim against the attorney, and the employer sought to assert a lien against the malpractice settlement. The lawyer and his malpractice insurer were not third parties within the meaning of the Workers' Compensation Act.

4. Workers' Compensation— related legal malpractice claim—separate actions

An employer who settled a workers' compensation claim did not have an attorney-client relationship with the employee's attorney, who failed to timely file a negligence action against a third party. There would have been a clear conflict had the attorney also been deemed the employer's attorney; moreover, the attorney was hired by the employee to represent him and his malpractice did not impede the employer's ability to sue the third party. The malpractice claim is separate from the workers' compensation claim.

Appeal by plaintiff from judgment entered 2 June 2000 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 23 August 2001.

Morris York Williams Surles & Barringer, L.L.P., by John F. Morris and Christa C. Pratt, for plaintiff appellant.

Williamson, Dean, Williamson, Purcell & Sojka, L.L.P., by Nickolas J. Sojka, Jr., and Andrew G. Williamson, Jr., for Dennis M. Ward defendant appellee.

Dean & Gibson, L.L.P., by Rodney Dean and Susan L. Hofer for W. Philip McRae and Lawyers Mutual Insurance Company of North Carolina defendant appellees.

McCULLOUGH, Judge.

Defendant Dennis Ward was employed as a construction worker at Grant Construction Company (Grant) in Scotland County, North Carolina. Grant hired subcontractors to complete work on various parts of its construction jobs. One such subcontractor was Formco Concrete Forming (Formco), which was responsible for erecting, maintaining, and disassembling scaffolding it used at Grant's construction site. On 22 March 1993, Ward stepped onto Formco's scaffolding and was seriously injured when the plywood walkway he stood on collapsed. Prior to Ward's injury, Formco had removed the shoring from the scaffolding, but left the wooden walkway in place.

Ward suffered serious and permanent injuries from his fall, and brought a valid workers' compensation claim against Grant for medical expenses, permanent injuries, and lost wages, pursuant to the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1, *et. seq.* Ward hired Attorney W. Philip McRae to represent him in the workers' compensation suit against Grant. Grant ultimately paid Ward over $10,000.00 in workers' compensation benefits. On 23 February 1994, Ward signed an Agreement of Final Settlement and Release, which ended his relationship with Grant and gave Grant a lien on any settlement or recovery Ward could win in a civil lawsuit against Formco. The Agreement was approved by the North Carolina Industrial Commission on 4 March 1994.

McRae continued to represent Ward during Ward's personal injury claim against Formco. However, McRae failed to file a civil action against Formco within the three-year statute of limitations prescribed by N.C. Gen. Stat. § 1-52 (1999). After Ward learned that McRae negligently failed to file suit, he sued McRae for legal malpractice. The malpractice lawsuit was settled on behalf of McRae by

Lawyer's Mutual Insurance Company (Lawyer's Mutual) for the sum of $26,000.00.

On 8 March 1999, Grant filed suit against McRae, Lawyer's Mutual, and Ward for negligence and breach of contract, arguing that Grant's subrogation lien on any proceeds from a lawsuit between Ward and Formco should extend to the proceeds that arose from the legal malpractice settlement between Ward and Lawyer's Mutual. On 2 June 2000, the trial court found that Grant's complaint failed to state a claim upon which relief could be granted, and therefore allowed defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999). Grant appealed.

[1] On appeal, Grant brings forth six assignments of error, all of which revolve around Grant's contention that the trial court erred in finding that its complaint failed to state a claim upon which relief could be granted. For the reasons set forth, we disagree with Grant's arguments and affirm the trial court's dismissal of Grant's complaint.

When a party files a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6),

> [t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). In general, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Id.* at 185, 254 S.E.2d at 615, *quoting* 2A Moore's Federal Practice, § 12.08, pp. 2271-74 (2d ed. 1975) (emphasis original).

Harris v. NCNB, 85 N.C. App. 669, 670-71, 355 S.E.2d 838, 840 (1987). *See also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The sole purpose of a motion to dismiss is to test the legal sufficiency of the complaint, and the trial court should not allow a motion to dismiss unless it is clear that a plaintiff cannot present any set of facts which would entitle him to relief. *Sinning v. Clark*, 119 N.C. App. 515, 517, 459 S.E.2d 71, 73, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995). With this standard of review firmly in mind, we turn to Grant's complaint.

Grant maintains that it possessed a subrogation lien which extended to any proceeds Ward recovered from his attorney mal-

practice lawsuit against McRae. Grant's right to assert a subrogation lien originates in N.C. Gen. Stat. § 97-10.2 (1999), part of the North Carolina Workers' Compensation Act. Our determination of whether Grant may pursue recovery on a subrogation lien theory turns on the language of the statute itself; we will therefore examine several of its key provisions in turn.

Generally speaking, an employer must pay workers' compensation benefits to an employee if that employee suffers a compensable work injury and notifies the employer of his workers' compensation claim. *See* N.C. Gen. Stat. § 97-22 (1999). If the employee is injured by a third party, the non-negligent employer must still pay workers' compensation benefits, but can claim a subrogation lien on any proceeds the employee wins in a subsequent lawsuit against the third party. *See* N.C. Gen. Stat. § 97-10.2(f)(1). The employer's right to a lien on a recovery from the third-party tortfeasor is "mandatory in nature." *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997).

To understand workers' compensation law, one must be familiar with the relevant parties and their interactions. Beyond the basic employer-employee relationship, there are other parties who may share liability or owe money to each other. Though an employer is initially responsible for paying workers' compensation benefits to an injured employee, it may recover some or all of the money it pays from a third party who was at fault for the employee's accident. N.C. Gen. Stat. § 97-10.2(a) explains the relationships of the parties, and defines a "third party" as follows:

> The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused *under circumstances creating a liability in some person other than the employer* to pay damages therefor, such person hereinafter being referred to as the *"third party."* The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

Id. (emphasis added).

N.C. Gen. Stat. § 97-10.2(h) describes the nature of a party's lien in the context of a workers' compensation case. The statute states, in pertinent part:

In any proceeding against or settlement with the third party, every party to the claim for compensation *shall have a lien to the extent of his interest* under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and *such lien may be enforced against any person receiving such funds.* Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party *without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein;* provided, that this sentence shall not apply:

(1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or

(2) If either party follows the provisions of subsection (j) of this section.

Id. (emphasis added).

Once a party shows that it is entitled to a lien, that amount must still be calculated. N.C. Gen. Stat. § 97-10.2(j) explains that

[n]otwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated

> amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

Though Grant recognizes these statutory provisions do not expressly extend its lien to encompass Ward's recovery for attorney malpractice related to the third-party claim against Formco, it maintains that N.C. Gen. Stat. § 97-10.2 should be liberally construed to best serve the legislative intent of the statute. We disagree.

Our Supreme Court has noted that

> [t]he purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers. Section 97-10.2 and its statutory predecessors were designed to secure prompt, reasonable compensation for an employee and simultaneously to permit an employer who has settled with the employee to recover such amount from a third-party tort-feasor.

Radzisz, 346 N.C. at 89, 484 S.E.2d at 569 (citations omitted). The *Radzisz* Court also stated that "statutory interpretation properly commences with an examination of the plain words of a statute." *Id.* "An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Thus,

> "[w]hen language used in [a] statute is clear and unambiguous, [the Court] must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning."

Hieb v. Lowery, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996), (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)).

We have found no North Carolina cases which address the question of whether an employer's subrogation lien under N.C. Gen. Stat. § 97-10.2 extends to proceeds from an attorney malpractice lawsuit.

After careful examination of the statute and our prior case law, we agree with defendants that the language of N.C. Gen. Stat. § 97-10.2 is clear and unambiguous, and does not contemplate recovery in a situation such as this. We therefore hold that Grant cannot assert a subrogation lien upon the proceeds Ward received from his malpractice lawsuit against Attorney McRae.

Our decision is based in large part on the definition of a "third party" in N.C. Gen. Stat. § 97-10.2(a). According to subsection (a), Grant, as the employer, may assert a subrogation lien if it pays workers' compensation benefits when the employee's injury "was caused under circumstances creating a liability *in some person other than the employer* to pay damages therefor, such person hereinafter being referred to as the 'third party.' " *Id.* Plainly read, the third party must be one who caused an injury to the employee. Prior case law has defined a third party as "any other person or party who is a stranger to the employment but whose negligence contributed to the injury." *Warner v. Leder*, 234 N.C. 727, 732, 69 S.E.2d 6, 9 (1952), *overruled on other grounds by Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) and *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). The term "injury" is defined by N.C. Gen. Stat. § 97-2(6) (1999) as follows: "Injury.—'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

After considering the facts of this case, we conclude that the only injury Ward suffered by accident during the course of his employment was his fall from Formco's scaffolding at the job site. Since Formco was in charge of maintaining its scaffolding and failed to do so, it is the only third party in this lawsuit which caused an injury to Ward. While Attorney McRae failed to file Ward's lawsuit against Formco and caused Ward to suffer pecuniary losses, McRae himself did not cause an injury to Ward as that term is defined under the Workers' Compensation Act.

We agree with Grant that the Legislature intended non-negligent employers to be reimbursed for monies they pay to employees who are injured by a negligent third party. *Johnson v. Southern Industrial Constructors*, 347 N.C. 530, 538, 495 S.E.2d 356, 360-61 (1998). However, we disagree with Grant's argument that the proceeds of the attorney malpractice lawsuit were meant to be included as part of these recoverable amounts. Despite Grant's efforts to characterize its case as being predicated on a third-party action, we do not find its

arguments persuasive. The Workers' Compensation Act speaks in terms of injury to the employee, then to recovery. Here, the attorney malpractice lawsuit was an entirely separate action from the underlying tortious conduct of Formco. We do not interpret N.C. Gen. Stat. § 97-10.2 to extend to entirely separate actions which did not injure the employee as herein discussed. Thus, Grant cannot claim a right of subrogation to the proceeds of Ward's lawsuit against McRae.

[2] Grant also argues that allowing Ward to keep the entire proceeds from his legal malpractice lawsuit against Attorney McRae, without giving Grant its subrogation lien, would effect a double recovery for Ward, in direct contravention of N.C. Gen. Stat. § 97-10.2. To remedy this problem, Grant maintains that it should receive a subrogation lien upon the proceeds of Ward's lawsuit against McRae, such that Ward is made whole from his workers' compensation benefits and *part* of his award from his legal malpractice lawsuit. We disagree. Pursuant to subsection (j), a superior court judge has discretion to award a plaintiff a double recovery at the expense of the employer. Since the language of N.C. Gen. Stat. § 97-10.2(j) is clear and unambiguous, the Legislature intended this possible result. *Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 449 (1991).

In any event, Ward did not receive a double recovery. Lawyer's Mutual paid $26,000.00 to settle Ward's claim, but first reduced their award by the amount of money Ward received from Grant in workers' compensation benefits. Lawyer's Mutual's money paid Ward for McRae's legal malpractice, and Grant's payment constituted Ward's rightful workers' compensation benefits. Ward was simply compensated pursuant to two different causes of action which arose from one precipitating event.

[3] With regard to Ward's recovery, Grant also argues that the trial court had the authority to determine the amount of the subrogation lien and then distribute any third-party recovery. Again, we disagree. Under N.C. Gen. Stat. § 97-10.2(j), the trial court's authority vests only after one of two triggering events occurs:

> [I]n the event that a judgment is obtained by the employee [1] in an action against a third party, or [2] in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the . . . superior court judge . . . to determine the subrogation amount.

We again note that McRae and Lawyer's Mutual are not third parties within the meaning of the Workers' Compensation Act. Ward's settlement of the legal malpractice claim with Lawyer's Mutual was therefore neither a judgment against the third party nor a settlement with the third party. Thus, neither of the statutorily prescribed events could ever occur, and Grant cannot recover. We also do not agree with Grant that the settlement proceeds should have gone to the Industrial Commission under N.C. Gen. Stat. § 97-10.2(j). For money to properly be placed with the Industrial Commission, the money must come from a third-party tortfeasor, who is paying because of the injury. *See Montgomery v. Bryant Supply*, 91 N.C. App. 734, 735, 373 S.E.2d 299, 300 (1988), *disc. review denied*, 324 N.C. 248, 377 S.E.2d 755 (1989).

[4] Grant next argues that Attorney McRae's failure to file suit against Formco directly harmed its ability to recover from Formco as well. Grant bases part of its argument on the contention that McRae had an attorney-client relationship with both Grant and Ward at the same time. However, we find that this is impossible as a matter of law. Rule 1.7 of the Revised Rules of Professional Conduct states that

> (a) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and
>
> (2) each client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.

In this case, Attorney McRae was hired by Ward to represent him in both his workers' compensation proceeding and against Formco. There would have been a clear conflict had McRae also been deemed Grant's attorney, because it would have been impossible for McRae to represent Grant against Formco and also against itself on the issue of workers' compensation. McRae's representation of Ward during the workers' compensation proceeding was directly adverse to Grant's position in that matter as the employer. As for the third-party action and the subrogation lien, McRae could not have argued both that Ward was entitled to the full amount and that Grant was entitled to a portion of Ward's recovery. Clearly, then, McRae was not an attorney for both Ward and Grant simultaneously.

It was also erroneous for Grant to have relied upon McRae to protect its interest against Formco. Grant could have initiated its own lawsuit against Formco under N.C. Gen. Stat. § 97-10.2(c), which states that

> [i]f settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then *either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings* . . . .

Id. (emphasis added). In short, McRae's legal malpractice directly interfered with Ward's right to pursue a civil action against Formco, but did not similarly impede Grant's ability to sue Formco. We decline to assist Grant on appeal when its own inaction caused its right to sue to lapse.

We further note that under N.C. Gen. Stat. § 97-10.2(b), Ward had three years from the date of his injury to file suit against Formco; the last day he could file suit was 22 March 1996. Under N.C. Gen. Stat. § 97-10.2(c), Grant's statute of limitations during which it could file suit against Formco expired sixty days before Ward's statute of limitations; the last day Grant could file suit was 22 January 1996.

Grant brings forth other arguments for relief, stating that its right to recover on a subrogation lien theory is valid because this case is predicated on the third-party action and the damages recovered from the malpractice lawsuit are the same damages that Ward would have recovered in the third-party action. Because we determine that the malpractice lawsuit is separate from the workers' compensation claim, we deem Grant's arguments to be meritless. We therefore reject Grant's assertion that it was a third-party beneficiary to the attorney-client contract between Ward and his attorney, McRae.

Grant has also assigned error to the sufficiency of notice it received for Ward's motion to dismiss. However, Grant did not raise this issue in the court below, and also failed to advance any argument or cite any authority to support this argument, and has thus waived this assignment of error. *See State v. Nobles*, 350 N.C. 483, 503, 515 S.E.2d 885, 898 (1999); and N.C.R. App. P. 28(b)(5) (1999). Because we conclude that all of Grant's arguments are without merit, we hereby affirm the trial court's dismissal of Grant's complaint.

Affirmed.

Judges MARTIN and BIGGS concur.

STATE OF NORTH CAROLINA v. STANLEY MARION VARDIMAN

No. COA00-701

(Filed 2 October 2001)

1. Constitutional Law— double jeopardy—habitual impaired driving statute

The habitual impaired driving statute under N.C.G.S. § 20-138.5 does not violate the principles of double jeopardy because: (1) habitual impaired driving is a substantive offense and a punishment enhancement, recidivist, or repeat offender offense; and (2) while prior convictions of driving while impaired are the elements of the offense of habitual impaired driving, the statute does not impose punishment for the previous crimes but merely enhances punishment for the latest offense.

2. Motor Vehicles— habitual driving while impaired—constitutionality

The trial court did not unconstitutionally apply N.C.G.S. § 20-138.5 in an habitual impaired driving case even though two of defendant's misdemeanor driving while impaired convictions that were used in defendant's first habitual impaired driving conviction were used again in defendant's second habitual impaired driving conviction, because defendant was punished only one time for his most recent offense rather than being punished three times for each of the two misdemeanor driving while impaired convictions.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 15 February 2000 by Judge Dennis J. Winner in Superior Court, Buncombe 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.

Elmore, Elmore and Williams, P.A., by George Mason Oliver, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Stanley Marion Vardiman (defendant) was convicted of driving while impaired on 19 January 1990, 12 July 1991, and 22 July 1994. For each of these convictions he was sentenced with fines, imprisonment, and/or supervised probation. On 6 March 1995, following a fourth offense of driving while impaired, defendant was indicted for habitual impaired driving, having three prior driving while impaired convictions within the previous seven years. He pled guilty on 20 April 1995 and was sentenced to thirty months in the North Carolina Department of Correction.

On 7 December 1998, defendant was again indicted for habitual impaired driving based on his arrest on 25 July 1996 for driving while impaired after receiving three prior driving while impaired convictions in the previous seven years. After pleading guilty, defendant was sentenced to an imprisonment of twelve to fifteen months in the North Carolina Department of Correction.

On 10 January 2000, Judge Dennis J. Winner issued an order granting defendant a hearing on his motion for appropriate relief challenging the constitutionality of the habitual impaired driving statute. The hearing began on 1 February 2000, but recessed on 14 February 2000, when Judge Winner denied the motion and signed an order captioned "Certification of Appealability." The order asked this Court to issue a writ of certiorari in order to consider whether the habitual impaired driving statute is unconstitutional on its face, and whether the habitual impaired driving statute was unconstitutionally applied to defendant by the trial court. A writ of certiorari was granted by this Court.

The two issues presented in this appeal are: (I) whether North Carolina General Statutes section 20-138.5 (1999), the habitual impaired driving statute, violates the principles of double jeopardy under the United States and North Carolina Constitutions; (II) if North Carolina General Statutes section 20-138.5 is constitutional,

whether it was unconstitutionally applied in this case. We hold the statute to be constitutional on its face and as applied.

[1] Defendant argues that the habitual impaired driving statute is unconstitutional because it violates principles of double jeopardy. The habitual impaired driving statute provides that "a person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a)(1999).

It is well settled that "the Double Jeopardy Clause of the North Carolina and United States Constitutions protect against . . . multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986); *See also Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 193 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 665 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989); *Green v. United States*, 355 U.S. 184, 188, 2 L. Ed. 2d 199, 204 (1957).

It is also well settled that recidivist statutes, or repeat-offender statutes, survive constitutional challenges in regard to double jeopardy challenges because they increase the severity of the punishment for the crime being prosecuted; they do not punish a previous crime a second time. *See e.g*, *Monge v. California*, 524 U.S. 721, 728, 141 L. Ed. 2d 615, 624 (1998)("[a]n enhanced sentence imposed on a persistent offender thus 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' ") (quoting *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 2d 1683, 1687 (1948)); *Nichols v. United States*, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 754 (1994) (the Supreme Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant").

Relying on *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994), defendant argues that section 20-138.5 violates principles of double jeopardy, because it is a substantive offense that is capable of supporting a criminal sentence, not merely a status offense. Status offenses, such as North Carolina General Statutes section 14-7.1, the habitual felon statute, are not separate criminal offenses and do not run counter to double jeopardy concerns. *See e.g*, *State v. Allen*, 292 N.C. 431, 233

S.E.2d 585 (1977); *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed*, 346 N.C. 165, 484 S.E.2d 525 (1997).

Defendant asserts that cases consistently draw a distinction between a substantive and a status offense in assessing double jeopardy concerns, concluding that a substantive offense implicates double jeopardy concerns whereas a status offense does not. Indeed, numerous cases throughout our nation's appellate court system seem to stand for this proposition. *See e.g, Baker v. Duckworth*, 752 F.2d 302, 304 (7th Cir. 1985), *cert. denied*, 472 U.S. 1019, 87 L. Ed. 2d 618 (1985) (Indiana's habitual offender statute "does not create a separate crime . . . . Thus, an habitual criminal who receives an enhanced sentence pursuant to an habitual offender statute does not receive additional punishment for his previous offenses."); *Sudds v. Maggio*, 696 F.2d 415, 417 (5th Cir. 1983) ("Under the Texas habitual offender statute . . . the prior conviction is used only for enhancement of the sentence, not as an element of the subsequent crime. This statute does not violate the prohibition against double jeopardy."); *Davis v. Bennett*, 400 F.2d 279, 282 (8th Cir. 1968), *cert. denied*, 395 U.S. 980, 23 L. Ed. 2d 768 (1969) ("It has therefore uniformly been held that since habitual criminal statutes do not constitute separate offenses, they do not violate double jeopardy as to prior convictions."); *People v. Dunigan*, 650 N.E.2d 1026, 1029 (Ill. 1995) ("habitual criminal statutes do not define a new or independent criminal offense . . . . The Act does not punish a defendant again for his prior felony convictions, nor are those convictions elements of the most recent felony offense[.]"); *State v. Torrez*, 687 P.2d 1292, 1294 (Ariz. Ct. App. 1984) ("Statutes authorizing the infliction of more serious penalties on one who is a persistent offender do not create a new, separate, distinct, independent or substantive offense."). In arguing that a substantive/status distinction is the answer to the issue of the case *sub judice*, however, defendant is oversimplifying the issue.

Habitual impaired driving is a substantive offense. *See Priddy*, 115 N.C. App. at 548, 445 S.E.2d at 612. *Priddy* holds that habitual impaired driving is a substantive offense because the statute:

> explicitly provides that '[a] person commits the offense of habitual impaired driving if. . . .' and contains two elements which the State must prove beyond a reasonable doubt: (1) that the defendant drives while impaired . . . and (2) that the defendant has been convicted of three or more offenses involving impaired driving. . . . By comparison, the habitual felon statute, which is solely a penalty enhancement statute, states, in relevant part:

> '[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon.' Because G.S. § 14-7.1 simply defines certain persons to be habitual felons, who, as such, are subject to greater punishment for criminal offenses, our Supreme Court has held that being an habitual felon is not a crime and cannot support, standing alone, a criminal sentence. Rather, being an habitual felon is a status justifying an increased punishment for the principal felony. By contrast, the legislature chose the specific language to define the crime of habitual impaired driving as a separate felony offense, capable of supporting a criminal sentence.

Priddy at 548-49, 445 S.E.2d at 612 (1994) (citation omitted).

In *Priddy*, the Court concluded that "the legislature must not have intended to make habitual impaired driving *solely* a punishment enhancement status." *Priddy* at 549, 445 S.E.d at 612 (emphasis added). We emphasize the word "solely" because it contextualizes the mistake defendant makes in arguing that habitual impaired driving is a substantive offense rather than a status offense. Statutes criminalizing behavior such as theft and murder, which are substantive offenses, are subject to double jeopardy analysis. Habitual impaired driving, however, is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense.

It is not disputed that the habitual impaired driving statute is a recidivist statute. Of the aforementioned cases that draw a distinction between substantive and status offenses, none hold a recidivist statute unconstitutional for double jeopardy reasons. Throughout the country, recidivist statutes are routinely upheld against double jeopardy concerns. The more authentic distinction to be drawn in assessing double jeopardy concerns is between recidivist and non-recidivist statutes, not between substantive and status offenses. While most recidivist statutes are set out in language that makes them classifiable as status offenses, the difference between a status offense and the habitual impaired driving statute, a substantive offense, is merely one of form, not substance. Prior convictions of driving while impaired are the elements of the offense of habitual impaired driving, but the statute "does not impose punishment for [these] previous crimes, [it] imposes an enhanced punishment" for the latest offense. *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 521 (2000).

Relying on *Priddy*, this Court in *Smith* also held North Carolina General Statutes section 14-33.2, the habitual misdemeanor assault

statute, to be a substantive offense and not "merely a status." *Id.* at 212, 533 S.E.2d at 521. The *Smith* Court reasoned that the habitual misdemeanor assault statute was congruent in form to the habitual driving while impaired statute such that both were substantive and not "merely" status offenses. *Id.* at 213, 533 S.E.2d at 520. However, in determining whether the habitual misdemeanor assault statute withstood constitutional scrutiny in regard to the prohibition against *ex post facto* laws, the fact that the statute was a sentence enhancement statute, not the fact that it was a substantive offense, was dispositive. The *Smith* Court compared the habitual misdemeanor assault statute to the habitual felon statute, concluding that because neither statute "impose[s] punishment for previous crimes, but imposes an enhanced punishment . . . because of the repetitive nature of such behavior," neither statute violated the prohibition on *ex post facto* laws. *Id.* at 214-15, 533 S.E.2d at 521. It follows in the case at bar, then, that the habitual driving while impaired statute does not violate the prohibition on double jeopardy, because it enhances punishment for present conduct rather than repunishing for past conduct. We hold that the habitual impaired driving statute does not punish prior convictions a second time, but rather punishes the most recent conviction more severely because of the prior convictions. We therefore uphold the constitutionality of the habitual impaired driving statute.

Defendant further argues that because section 20-138.5 encompasses prior driving while impaired convictions as *elements* of the crime of habitual driving while impaired, the statute unconstitutionally violates the double jeopardy clause. Again, this argument does not survive a double jeopardy analysis. Defendant cites a litany of cases that seem to stand for the proposition that "when a criminal offense *in its entirety* is an essential element of another offense a defendant may not be punished for both offenses." *State v. Williams*, 295 N.C. 655, 659, 249 S.E.2d 709, 713 (1978)(emphasis added). The United States Supreme Court, however, distinguishes *prior convictions* as elements of a crime from other elements of a crime, holding that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)(emphasis added). *Apprendi* is in line with our conclusion in the case *sub judice*, that whether a statute survives a double jeopardy constitutional analysis does not depend on whether the statute is called substantive or status, or whether the statute is com-

prised of elements or sentencing factors, but what the statute accomplishes in reality. The point that "[l]abels do not afford an acceptable answer . . . applies as well . . . to the constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.' " *Apprendi* at 494, 147 L. Ed. 2d at 457 (citation omitted) (alteration in original). "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect[.]" *Id.* The effect of section 20-138.5 is that a defendant is punished more severely for a recent crime based on having committed previous crimes. Consequently, section 20-138.5 does not violate the United States and North Carolina Constitutions.

[2] Defendant's other argument on appeal is that section 20-138.5 is unconstitutional as applied to defendant in the case at bar. This argument is without merit. Two of defendant's misdemeanor driving while impaired convictions that were used in defendant's first habitual impaired driving conviction were used again in defendant's second habitual impaired driving conviction. Defendant argues that this placed him twice in jeopardy for the same crime. We have already decided that the habitual impaired driving statute is not unconstitutional on its face because it is a recidivist statute that punishes the most recent offense more severely. Rather than being punished three times for each of the two misdemeanor driving while impaired convictions, as defendant argues, defendant was punished only one time for his most recent offense, though more severely.

Based on the foregoing, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judge JOHN concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

Because I believe prosecution for habitual impaired driving violates the prohibition against double jeopardy, I respectfully dissent.

If "a criminal offense in its entirety is an essential element of another offense[,] a defendant may not be punished for both offenses," as punishment for both offenses violates the prohibition against double jeopardy. *State v. Williams*, 295 N.C. 655, 659, 249

S.E.2d 709, 713 (1978). Because habitual impaired driving is a substantive offense, not a status, *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 612, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994), and because convictions for three or more offenses involving impaired driving are necessary elements of the habitual impaired driving offense, N.C.G.S. § 20-138.5(a) (1999), the defense of double jeopardy bars the prosecution for habitual impaired driving, *see State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986) (double jeopardy barred prosecution of defendant for both first-degree kidnapping and underlying sexual offense); *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 567 (1979) (defendant convicted of first-degree murder under the felony-murder rule cannot also be convicted of the underlying felony), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980).

CAPITAL OUTDOOR, INC., PETITIONER/APPELLANT/CROSS-APPELLEE v. GUILFORD COUNTY BOARD OF ADJUSTMENT, RESPONDENT/APPELLEE/CROSS-APPELLANT

No. COA00-969

(Filed 2 October 2001)

Zoning— revocation of billboard permit—standard of review

The superior court's decision to uphold a county board of adjustment's decision to revoke petitioner's building permit for the construction of a billboard and to deny petitioner's request for a variance is reversed and remanded because: (1) it cannot be determined what standard of review was utilized for the issues presented; and (2) it cannot be determined whether the superior court properly applied this standard to the findings and conclusions of the board.

Judge GREENE dissenting.

Appeals by petitioner and respondent from judgment entered 26 April 2000 by Judge Marcus L. Johnson in Guilford County Superior Court. Heard in the Court of Appeals 14 August 2001.

Wilson & Waller, P.A., by Betty S. Waller, for petitioner.

Guilford County Attorney's Office, by County Attorney Jonathan V. Maxwell and Assistant County Attorney Mercedes O. Chut, for respondent.

BRYANT, Judge.

Capital Outdoor, Inc. is engaged in the business of outdoor advertising. In August 1998 Capital entered an agreement to lease a tract of land near N.C. Highway 68 in Guilford County for the purpose of constructing a billboard. On 15 December 1998, Capital filed a site plan with the Guilford County Planning Department to acquire the necessary construction permit. The plan stated that there was "no residential zoning within 300.0' of the proposed sign".

The Department issued a building permit for the proposed site on 20 April 1999, and the billboard was constructed on or around 6 July 1999. However, on 9 July 1999, the Department revoked the permit because it was issued in violation of Development Ordinance § 6-4.24. Development Ordinance §6-4.24 prohibits placement of billboards within three hundred feet of "any residentially zoned property". A zoning officer interpreted residentially zoned property to include agriculturally zoned property for purposes of the ordinance. The zoning officer found the site to be within three hundred feet of an agricultural zone, and therefore in violation of Development Ordinance §6-4.24.

Capital appealed the zoning officer's interpretation to the Guilford County Board of Adjustment on 19 August 1999. In the alternative, Capital requested a variance pursuant to Development Ordinance § 9-5.8(D). After a hearing on 7 September 1999, the Board affirmed the interpretation of the zoning officer and denied Capital's request for a variance.

On 7 October 1999 Capital petitioned the Guilford County Superior Court for writ of certiorari. Capital alleged that the orders issued by the Board were:

> arbitrary, capricious, in excess of its authority, not supported in law or in fact, not supported by competent evidence, violative of [Capital's] constitutionally protected rights of free speech, due process and equal protection under the law, and operate as a taking of [Capital's] private property rights without payment of just compensation as required by the United States and North Carolina Constitutions.

Capital also asserted that the Board was equitably estopped from revoking the permit.

By judgment filed 27 April 2000, the superior court found the Board's interpretation "of 'residentially zoned property' was reasonable, did not constitute error of law, and should be affirmed; that the Board of Adjustment did not abuse its discretion and made appropriate findings when it denied the variance; [and] that Guilford County is not equitably estopped from revoking the permit for the subject billboard . . . ."

The superior court, however, ruled that "[Capital] should be afforded an opportunity to recoup its expenses in applying for and seeking the permit . . . ." The matter was remanded to the Board for a finding of the costs Capital incurred in applying for the permit. Capital and the Board appeal the decision of the trial court.

On appeal, this Court must determine whether the superior court utilized and correctly applied the appropriate standard of review in evaluating the decision of the Board. Based on the following reasons, we reverse and remand this case with instructions and will not address the Board's cross appeal.

All decisions from the Board are subject to certiorari review by superior court proceedings. N.C.G.S. § 153A-345(e) (2000). When the superior court reviews the decisions from the Board, it sits as a court of appeal. *See Avant v. Sandhills Ctr. for Mental Health*, 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999)("[W]hen a superior court reviews an agency decision pursuant to the Administrative Procedure Act ("APA"), the court essentially functions as an appellate court.").

Depending on the nature of the review, the superior court is obligated to determine whether: 1) the Board committed any errors in law; 2) the Board followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the Board's decision was supported by competent evidence in the whole record; and 5) whether the Board's decision was arbitrary and capricious. *See CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 36, 411 S.E.2d 655, 658 (1992).

De novo review is proper if a petitioner asserts the Board's decision was based on an error of law. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000), *rev. allowed by*, 353 N.C. 398, 547 S.E.2d 42 (2001). However, if a petitioner argues the Board's decision was unsupported by the evidence or was arbitrary and capricious, then

the superior court must apply the whole record test. *See Id.* The "[superior] court *may even utilize more than one standard of review* if the nature of the issues raised so requires". *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993).

When this Court reviews appeals from the superior court, our scope of review is twofold, and is limited to determine: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard. *McCrary*, 112 N.C. App. at 166, 435 S.E.2d at 363.

Capital's petition for writ of certiorari in superior court alleged, in part, that the Board's judgment was arbitrary, capricious, not supported in fact, and contained errors of law. These allegations raise different standards of review. The judgment of the superior court states "that the decisions of the Board of Adjustment are supported by competent material and substantial evidence and are not affected by error of law". However, this Court cannot readily ascertain whether the superior court applied the appropriate standard of review to each allegation.

The superior court was under a duty to "apply the appropriate standard of review to the findings and conclusions of the underlying tribunal". *Avant*, 132 N.C. App. at 545, 513 S.E.2d at 82. As this Court cannot determine what standard of review was utilized, we further cannot determine whether the superior court properly applied this standard to the findings and conclusions of the Board. For this Court to speculate which standard of review the superior court utilized presents a dangerous path which we are not inclined to travel. *See Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 349, 543 S.E.2d 169, 176 (2001) (stating although the trial court noted the proper standard of review, the trial court failed to delineate which standard it used in resolving each issue raised, therefore, on remand "[w]e direct the trial court to (1) advance its own characterization of the issues presented by petitioner and (2) clearly delineate the standards of review, detailing the standards used to resolve each distinct issue raised").

In *In re Appeal of Willis*, 129 N.C. App. 499, 503, 500 S.E.2d 723, 726-27 (1998) the Court noted that:

> while the [trial] court's order in effect set out the applicable standards of review, it failed to delineate which standard the

> court utilized in resolving each separate issue raised . . . [therefore] this Court is unable to make the requisite threshold determination that the trial court 'exercised the appropriate standard of review' . . . and we decline to speculate in that regard. It follows that we likewise are unable to determine whether the court properly conducted its review . . . .

The *Willis* Court then remanded the matter to the trial court to set forth the issues presented and what standard of review was applied in resolving those issues. *Id.*

In the case *sub judice*, the judgment is reversed and this matter is remanded to the superior court with instructions to characterize the issues before the court and clearly delineate the standard of review used to resolve each issue raised by the parties.

REVERSED and REMANDED.

Judge CAMPBELL concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

The majority holds the standard of review utilized by the Guilford County Superior Court cannot be determined and thus this case must be reversed and remanded. I disagree. The superior court stated in its judgment that the Guilford County Board of Adjustment's (the Board) "interpretation . . . of 'residentially zoned property' was reasonable [and] did not constitute [an] error of law." Whether the superior court utilized a whole record review or a *de novo* review in reaching this conclusion is immaterial, "[s]ince [it] specifically concluded that the . . . Board did not commit an error of law." *Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 833, 467 S.E.2d 398, 402 (1996). In any event, an appellate court's obligation to review a superior court order for errors of law, *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997), can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court. *See, e.g., Grooms v. State of N.C. Dept. of State Treasurer*, 144 N.C. App. 160, 550 S.E.2d 204 (2001); *Barrett v. N.C. Psychology Bd.*, 132 N.C. App. 126, 510 S.E.2d 189 (1999) (for appellate courts addressing issues of

law presented to agency and superior court without discussing the scope of review employed by the superior court).

The dispositive issue in this case is whether the Board erred in interpreting the Guilford County Development Ordinance (the Ordinance). *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102-03, 535 S.E.2d 415, 417 (2000) (proper construction of ordinance presents a question of law and is reviewable *de novo*).

Ordinance § 6-4.24 prevents the placement of a billboard within "three hundred (300) feet [of] any residentially zoned property." Guilford County, N.C., Guilford County Development Ordinance § 6-4.24 (Nov. 19, 1990). In early 1999, Capital Outdoor, Inc. (Capital) applied for and received a permit from the Guilford County Planning Department (the Department) to place a billboard in Guilford County. After the billboard was constructed, the Department revoked the permit because the billboard was located within 300 feet of land zoned "Agricultural."

The underlying issue is whether property zoned "Agricultural" is "residentially zoned property" within the meaning of section 6-4.24. The Board argues that because residences are permitted within "Agricultural" zoned areas, property zoned "Agricultural" is "residentially zoned property." I disagree. Although residences are permitted in an "Agricultural" district, such a district "is primarily intended to accommodate uses of an agricultural nature," Ordinance § 4-2.1(A), and in any event, is not *zoned* "Residential." There are two districts which are *zoned* "Residential": Ordinance § 4-2.1(B) covers a Single-Family Residential district, and Ordinance § 4-2.1(C) covers a Multi-Family Residential district. Because the language of Ordinance § 6-4.24 is plain 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'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1976). In the Ordinance, there is no provision prohibiting the location of a billboard within 300 feet of property zoned "Agricultural." The prohibition is only against the location of billboards within 300 feet of property zoned as either Single-Family Residential or Multi-Family Residential. Accordingly, the Board committed an error of law in construing the Ordinance otherwise and erred in revoking Capital's permit. Likewise, the superior court erred in affirming that revocation. I would reverse the order of the superior court and

remand to that court for remand to the Board for reinstatement of the billboard permit.

STATE OF NORTH CAROLINA v. BERNARD WILLIAM JONES, DEFENDANT

No. COA00-1146

(Filed 2 October 2001)

1. **Confessions and Incriminating Statements— invocation of rights to silence and counsel–detective's testimony—no plain error**

The trial court did not commit plain error in a trafficking in heroin case by allowing a detective's testimony regarding the fact that defendant had invoked his right to remain silent and to have counsel present during questioning, because: (1) defendant failed to show a different result would have been reached but for the error when there was evidence that a detective saw defendant passing a baggie to his coparticipant, the coparticipant testified that defendant passed him a plastic bag full of heroin, and the detective testified that a plastic bag full of heroin was found on the coparticipant; and (2) the admission of the testimony did not result in a miscarriage of justice or denial of a fair trial.

2. **Constitutional Law— effective assistance of counsel—failure to object**

A defendant was not denied effective assistance of counsel in a trafficking in heroin case based on his counsel's failure to object to a detective's testimony regarding the fact that defendant had invoked his right to remain silent and to have counsel present during questioning, because defendant has failed to show that there is a reasonable probability that the result of the proceedings would have been different but for his counsel's failure to object.

3. **Drugs— trafficking in heroin—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in heroin under N.C.G.S. § 90-95(h)(4) based on alleged insufficient evidence regarding the amount of heroin, because there is substantial evidence that

the large bag of heroin attributed to defendant contained at least 4.0 grams exclusive of its packaging or weighing papers.

Appeal by Defendant from judgment entered 4 May 2000 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 22 August 2001.

Attorney General Roy Cooper, by Mark J. Pletzke, Assistant Attorney General, for the State.

Clifford, Clendenin, O'Hale & Jones, L.L.P., by Walter L. Jones, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions for trafficking in heroin by transportation and trafficking in heroin by possession. We overrule all assignments of error.

The evidence presented at trial that is pertinent to this appeal is as follows. On 10 August 1999, Defendant was contacted by Don Ray Hicks, Jr., a heroin addict who had purchased drugs from Defendant on many occasions over the preceding two years. Although Hicks had no money, he hoped to obtain heroin from Defendant on credit. Defendant and Hicks arranged to meet, and Defendant picked Hicks up in his car. Defendant sold Hicks on credit a small bag containing heroin ("the small bag"); the bag was made by heating and compressing the corner of a ziploc bag.

While Defendant and Hicks were driving, Defendant's car was spotted by Detective Kyle Evan Shearer of the Vice/Narcotics Unit of the Greensboro Police Department. Detective Shearer's suspicions were aroused by the fact that Defendant appeared to show him a lot of attention as Detective Shearer drove by Defendant's vehicle. Detective Shearer noted Defendant's license plate number and had his secretary run it. Detective Shearer's secretary discovered that Defendant's license had been suspended.

Defendant had noticed Detective Shearer, who was not in uniform and was driving an unmarked vehicle, and suspected that he was a policeman. As Defendant drove away from the area, Detective Shearer followed him; Defendant became nervous, began to speed, and his driving grew erratic. Defendant then ceased speeding, but made several lane changes without signaling. According to Hicks, Defendant was attempting to determine whether Detective Shearer

was following him; Defendant concluded that Detective Shearer was a policeman.

Detective Shearer radioed for assistance because he was driving an unmarked car and was not in uniform, and Officer Hafkemeyer responded to the call. Defendant turned abruptly into an IHOP parking lot and stopped the car. Detective Shearer pulled up next to Defendant and identified himself as a police officer. Detective Shearer observed Defendant attempting to shove something made of baggie-type material into Hicks' hand. According to Hicks, Defendant forced him to take a bag of heroin and told him to go into the bathroom and flush it. This bag ("the large bag") was later determined to contain nine smaller baggies of heroin. Hicks left the car, followed by Officer Hafkemeyer. Hicks put the large bag that Defendant had given him into his pocket as he walked briskly into the IHOP. Hicks was carrying the small bag of heroin in his hand.

After arresting Defendant for driving while his license was revoked or suspended, Detective Shearer entered the IHOP, where he found Officer Hafkemeyer subduing Hicks on the floor. When Hicks was brought to his feet, Detective Shearer noticed a small heat-sealed baggie containing an off-white powder lying on the floor. Hicks admitted that the powder was heroin. Detective Shearer searched Hicks and found a sandwich bag containing nine individual baggies of off-white powder and a syringe for injecting heroin.

Hicks was charged with possession of heroin. At the police station, Hicks waived his *Miranda* rights and gave a written statement. Hicks later pled guilty to the possession offense pursuant to a plea agreement requiring his truthful testimony against Defendant. After Defendant was informed of his rights, he requested an attorney; although Defendant told officers that he wanted to make a statement, Detective Shearer explained that he could not talk with Defendant until Defendant's attorney arrived. Defendant made a spontaneous statement, however, claiming that the drugs belonged to Hicks.

Detective Shearer weighed the large bag of heroin and determined that it weighed 4.7 grams, including the packaging. As a result, he charged Defendant with trafficking in heroin. Agent H.T. Raney of the State Bureau of Investigation later determined that the large bag contained a total of 4.04 grams of heroin.

[1] In his first assignment of error, Defendant argues that the trial court erred by allowing Detective Shearer's testimony regarding the

fact that Defendant had invoked his right to remain silent and to have counsel present during questioning. Specifically, Defendant objects to the following colloquy between the prosecutor and Detective Shearer:

> Q. Let me show you what has previously been marked as State's Exhibit 15, and I'll ask you whether or not this is the document that you used for Mr. Jones?
>
> A. This is the exact same document. It's a Greensboro Police Department Advisement of Rights and Waiver Form, and, uh, this indicates, and as I recall, I advised Mr. Jones of his rights. He verbally answered "yes" to all his rights, stating he understood his rights, and he placed his signature, which is Bernard Jones.
>
> Q. And you recognize State's 15 to be the same document and in the same condition as when it was completed back on the date of the arrest?
>
> A. Yes, it is.
>
> . . . .
>
> Q. Tell me what happened after that.
>
> A. Mr. Jones, as I said, he carried himself well. He understood his rights. He stated he wanted an attorney before he said anything to us. Uh, however, then he would sit there and say he wanted to tell us what happened. He repeatedly said he wants to tell us what had happened, but he wants an attorney. Uh, I explained to him, since he already invoked his rights wishing an attorney, you know, that I wasn't going to talk to him.
>
> . . . .
>
> Q. Flipping to the last page, then, of your report, tell me about the exchange between you and Mr. Jones.
>
> A. Mr. Jones?
>
> Q. Yes.
>
> A. Mr. Jones, like I said, he continued to say that he wanted to talk to us but he wanted an attorney. I advised him that there was probably nothing else we could talk about, and as I was going out the door, uh, he basically said that, uh, let's see where I can start here. That he, uh, wanted to speak to us with an attorney. However, Mr. Jones continued to state that he wanted to tell me

what had happened, and that all the dope that was found out there belonged to the white boy. And that was basically the gist of what he had said in the interview room. That was the extent of it.

. . . .

Q. And his demeanor from there, then?

A. Like I say, he was very polite. Uh, he kept saying he wanted to talk to me, but he had already told me he wanted an attorney and, you know, once they say that, there's no reason for us to continue on with any conversation.

Defendant concedes that his counsel did not object at trial to the admission of this testimony. Because counsel failed to object to the testimony at trial, we review any error under a plain error standard. *See State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (applying plain error standard even when alleged error was constitutional).

Our Supreme Court has held that the State may not introduce at trial evidence that a defendant exercised his constitutional rights. *See id.* ("Defendant is correct in her assertion that the exercise of her constitutionally protected rights to remain silent and to request counsel during interrogation may not be introduced as evidence against her by the State at trial."); *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994) ("The defendant correctly points out that a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial."); *State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E.2d 164, 171-72 (1983) (holding that the trial court erred in admitting into evidence a defendant's statement that included invocation of his right to counsel).

Citing *State v. Williams*, 305 N.C. 656, 674, 292 S.E.2d 243, 254-55, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), the State argues that the admission of the testimony here was not error because the testimony was not "used to infer guilt." In *Williams*, a police officer testified that he had advised the defendant of his rights, then indicated that he wished to discuss a robbery and shooting with the defendant; the officer further testified that the defendant denied committing the crime and then asked for a lawyer, at which point the officer's questioning stopped. *See id.* at 673, 292 S.E.2d at 254. Our Supreme Court distinguished these facts in *Williams* from cases in which a defendant's silence in the face of an accusation is used to

imply guilt, and concluded that the statements at issue were admissible because the defendant's request for a lawyer was not used by the State to infer guilt, and the defendant's statements were made voluntarily after a knowing and intelligent waiver of his rights. *See id.* at 674, 292 S.E.2d at 254-55. *Williams* preceded *Ladd*, however, in which our Supreme Court held that the admission of a defendant's statement in which he invoked his right to counsel was error. *See Ladd*, 308 N.C. at 284, 302 S.E.2d at 172. Thus, to the extent that *Williams* holds that a defendant's statement in which he invokes his right to counsel may be admissible, we find that it has been superseded by the holding in *Ladd*.

The State also asserts that the testimony at issue here should be admissible in order to show that Defendant knowingly and intelligently waived his rights in speaking with Detective Shearer. In support of this assertion, the State cites *State v. White*, 298 N.C. 430, 436-37, 259 S.E.2d 281, 285 (1979), and *State v. Crawford*, 83 N.C. App. 135, 138, 349 S.E.2d 301, 303 (1986), *cert. denied*, 319 N.C. 106, 353 S.E.2d 115 (1987). However, in these cases, the issue was whether statements made after the defendant had waived his rights were admissible, not whether a defendant's statements invoking his rights were admissible. Indeed, in *White* and *Crawford*, evidence regarding whether the defendants had knowingly and intelligently waived their rights was introduced on *voir dire*, not before the jury, and hence, the issue before us in this case was not presented. *See White*, 298 N.C. at 437, 259 S.E.2d at 286; *Crawford*, 83 N.C. App. at 136, 349 S.E.2d at 301.

Although we agree with Defendant that the admission of the testimony was error, *see Ladd*, 308 N.C. at 284, 302 S.E.2d at 172, Defendant has failed to show that it was plain error. Under the plain error standard, Defendant must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. Defendant has not met this burden. There was compelling evidence of Defendant's guilt introduced at trial, including Detective Shearer's testimony that he saw Defendant passing a baggie to Hicks; Hicks' testimony that Defendant passed him a plastic bag full of heroin; and Detective Shearer's testimony that a plastic bag full of heroin was found on Hicks. We conclude that it is not probable that a different result would have been reached had the testimony of Detective Shearer regarding Defendant's invocation of his rights been excluded.

We also conclude that the admission of the testimony did not result in a miscarriage of justice or denial of a fair trial. Accordingly, this assignment of error is overruled.

[2] In his second assignment of error, Defendant argues that he was denied effective assistance of counsel because his counsel failed to object to the testimony at issue in the first assignment of error. A defendant claiming ineffective assistance of counsel must demonstrate that his counsel's performance was defective and that this defective performance prejudiced the defense. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To show prejudice a defendant must show there is a "reasonable probability" that "absent counsel's deficient performance, the result of the proceeding would have been different." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987). Here, based on the evidence discussed above regarding the first assignment of error, we conclude that Defendant has failed to show that there is a reasonable probability that the result of the proceedings would have been different but for his counsel's failure to object to Detective Shearer's testimony. Accordingly, this assignment of error is overruled.

[3] In his third and final assignment of error, Defendant argues that the trial court erred in denying his motion to dismiss the charges of trafficking in heroin due to insufficiency of the evidence regarding the amount of heroin that was attributed to Defendant. Section 90-95(h)(4) of the North Carolina General Statutes provides that "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . ., including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin.' " N.C. Gen. Stat. § 90-95(h)(4) (Supp. 2000). Based on the testimony of the State's expert witness, Agent H.T. Raney, Defendant contends that the 4.04 grams reported as the weight of the heroin in the large bag, which was attributed to him, included the packaging and/or weighing papers, so that the evidence was insufficient to show that the heroin attributed to Defendant weighed at least 4.0 grams.

On review of the trial court's denial of Defendant's motion to dismiss for insufficiency of the evidence on the drug amount, we must review the evidence introduced at trial in the light most favorable to the State to determine if there is " 'substantial evidence' " of this element of the offense. *State v. Baldwin*, 141 N.C. App. 596, 604, 540

S.E.2d 815, 821 (2000) (quoting *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion" that this element of the offense has been proven. *Id.*

After a careful examination of Agent Raney's testimony, we conclude that there is substantial evidence that the large bag of heroin attributed to Defendant contained at least 4.0 grams, exclusive of its packaging or weighing papers. Agent Raney was asked on direct examination whether his analysis reflected the "total contents" of the nine smaller bags, and he answered in the affirmative, verifying that the total contents, which was heroin, weighed 4.04 grams. Agent Raney explained that the powder from each of the nine bags was removed from the smaller plastic corner packets and combined to obtain a total weight. During defense counsel's cross-examination, after Agent Raney explained that he combined the contents of all nine smaller bags in the same weighing tray to obtain a total weight, defense counsel asked, "All of the glassine envelopes; is that what you're saying?", and Agent Raney clarified, "The contents of each one of those; yes, sir." We believe that on the basis of this testimony, a reasonable juror would have concluded beyond a reasonable doubt that the large bag contained at least 4.0 grams of heroin, exclusive of packaging or weighing papers. Accordingly, this assignment of error is overruled.

No prejudicial error.

Judges WALKER and McGEE concur.

INTERNET EAST, INC., STEVEN I. COHEN, AND ANTONIO MARIE, III, PLAINTIFF-APPELLEES V. DURO COMMUNICATIONS, INC., DEFENDANT-APPELLANT

No. COA00-1154

(Filed 2 October 2001)

1. Appeal and Error— appealability—denial of arbitration

An order denying arbitration was interlocutory but immediately appealable because it involved a substantial right which might be lost if appeal was delayed.

2. Arbitration and Mediation— license agreement—arbitration clause—mandatory

The trial court erred by interpreting an arbitration provision as permissive rather than mandatory where the provision stated that "Unless the parties shall agree otherwise, all claims, disputes and other matters . . . shall be decided by arbitration . . . ." The plain meaning of the phrase is that all claims, disputes, and other matters shall be arbitrated unless the parties form a contrary agreement.

3. Arbitration and Mediation— license agreement—arbitration and forum selection clauses—not inconsistent

The trial court erred by denying a motion to stay proceedings and compel arbitration where a forum selection clause and an arbitration provision in a license agreement did not conflict. Both North Carolina and federal statutes authorizing arbitration contemplate that the courts will retain jurisdiction, so that there is nothing inherently inconsistent in an agreement with both clauses, and the agreement in these cases may be interpreted as triggering the forum selection clause only when a court is needed to intervene and when the parties have agreed to take a particular dispute to court rather than to arbitration.

Appeal by defendant from judgment entered 30 August 2000 by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 23 August 2001.

McLawhorn & Associates, by Charles L. McLawhorn, Jr., for plaintiff-appellees.

Harris, Shields, Creech and Ward, P.A., by C. David Creech, W. Gregory Merritt; and Goodwin Procter, LLP, by Anthony S. Fiotto, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from the trial court's order allowing plaintiffs' motion to stay arbitration and denying defendant's motion to compel arbitration and to stay proceedings. Based upon the record before us, it appears that on 25 May 1998, plaintiffs Steven I. Cohen and Antonio Marie, III, entered into a pre-incorporation agreement in which they agreed to form the corporation known as "Internet East, Inc." Their business was to involve the operation of an internet access provider

service, computer sales and services, and other computer and internet related services. As part of setting up the company, on 1 June 1998, Marie executed a license agreement with Internet of Greenville, Inc. (Licensor), an internet provider in Pitt County, North Carolina, under the name of "Internet of New Bern" (Licensee). According to the license agreement, Internet of New Bern licensed from Internet of Greenville, Inc., "the entire right, title and interest in and to the trade name and other related proprietary marks of Internet of Greenville, Inc." In addition, the license agreement states that Internet of New Bern "wish[ed] to obtain a license from Licensor for the purpose of operating an Internet access, electronic mail and personal web page services business within a defined and limited territory as set forth herein, with the use of Licensor's unique system, trade names and marks." Since the parties contemplated that Internet of Greenville, Inc., would license the trade names to other companies, the parties agreed that Internet of New Bern would have the exclusive right to the trade name only within a defined geographic area. In addition, the Agreement provides that the ". . . Licensee agrees that Licensor shall be its exclusive provider of Internet access, electronic mail and electronic news facilities and services." Thereafter, the license agreement was assigned from Internet of New Bern to plaintiff Internet East, Inc.

The license agreement contains both an arbitration provision and a forum selection clause. The forum selection clause is found in paragraph 17.01 of the agreement and states in relevant part:

> . . . The parties herewith stipulate that the State courts of North Carolina shall have sole jurisdiction over any disputes which arise under this agreement or otherwise regarding the parties hereto, and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina.

In paragraph 17.04 of the agreement, the arbitration clause states:

> Unless the parties shall agree otherwise, all claims, disputes and other matters in question between the parties that arise out of or are related to this Agreement or the breach hereof, shall be decided by arbitration in accordance with the Commercial Rules of the American Arbitration Association then obtaining. The foregoing agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and a judgment may be entered upon it

in accordance with applicable law in any court having jurisdiction thereof . . . .

Defendant Duro Communications, Inc. (Duro), was organized in 1999 in the State of Delaware and obtained a certificate of authority to operate in the State of North Carolina. Duro operates an internet subscriber and network access business in various parts of North Carolina and elsewhere in the United States. In 1999, Duro acquired the assets of Internet of Greenville, Inc., and assumed the assignment of the license agreement between Internet of Greenville, Inc. and Internet East, Inc. Prior to acquiring Internet of Greenville, Inc., Duro had purchased CoastalNet, Inc., which is another internet subscriber company.

According to plaintiffs, when Duro acquired CoastalNet's assets, it became a competitor of Internet East and that when Duro acquired Internet of Greenville's assets, it inherited an obligation not to compete with Internet East within the designated territory. Consequently, on 2 March 2000 plaintiffs filed a lawsuit in Pitt County Superior Court alleging, among other things, that Duro, as Licensor, violated the license agreement based on the alleged competition. Duro removed the action to federal court and filed a demand for arbitration and motion to dismiss plaintiffs' complaint. On 6 June 2000, the United States District Court for the Eastern District of North Carolina held that removal was improper because the court lacked jurisdiction over the dispute due to the forum selection clause contained in the license agreement. The case was remanded to superior court.

On 12 June 2000, plaintiffs filed an amended complaint and on 22 June 2000, they filed a motion to stay arbitration. Defendant filed a motion to stay the proceedings and compel arbitration on 31 July 2000. On 30 August 2000, the trial court granted plaintiffs' motion to stay arbitration and denied defendant's motion to stay the proceeding and compel arbitration. The trial court concluded that the language of the arbitration and forum selection clauses were in conflict and that the preface phrase in paragraph 17.04 of arbitration provision which reads, "Unless the parties shall agree otherwise" demonstrates the parties' intent to render the otherwise mandatory language of paragraph 17.04 of the license agreement permissive and non-mandatory. The court held that the forum selection clause nullified the arbitration provision and as a result, the license agreement did not contain a viable arbitration agreement. Therefore, the trial court concluded that plaintiffs had a common law right to litigation pursuant to the

North Carolina Constitution and Section 1-2 of the North Carolina General Statutes. Defendant appeals.

Defendant contends the trial court erred in allowing plaintiffs' motion to stay arbitration and in denying defendant's motion to stay the proceedings and compel arbitration. Defendant argues that the arbitration and forum selection clauses do not irreconcilably conflict; therefore, both provisions can and should be given effect. Further, defendant contends that its motion to stay the proceedings and compel arbitration should have been granted in accordance with the arbitration provision of the license agreement. For the following reasons, we reverse the trial court's order.

[1] Initially, we note that the order from which defendant appeals is not a final judgment; rather it is interlocutory. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). Generally, interlocutory orders are not appealable. However, an "order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). Therefore, this appeal is properly before us. Our standard of review is *de novo* since the order appealed from is based upon contract interpretation and therefore presents a question of law. *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 474 (9th Cir. 1991), *cert. denied*, 503 U.S. 919, 117 L. Ed. 2d 516 (1992).

[2] The trial court concluded that the prefatory phrase of the arbitration provision which reads, "Unless the parties shall agree otherwise, all claims, disputes and other matters . . . shall be decided by arbitration . . ." demonstrated the parties' intent to render the arbitration provision permissive and non-mandatory. We believe this conclusion was reached in error.

"Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract." *Montgomery v. Montgomery*, 110 N.C. App. 234, 238, 429 S.E.2d 438-39, 441 (1993). In addition, when a court construes a contract, it must give ordinary words their ordinary meanings. *Biggers v. Evangelist*, 71 N.C. App. 35, 321 S.E.2d 524 (1984), *disc. review denied*, 313 N.C. 327, 329 S.E.2d 384 (1985). The plain meaning of the prefatory phrase of the arbitration provision is that unless the parties form a contrary agreement, all claims, disputes, and other matters "shall" be arbitrated. The word "shall" is defined as "must" or "used in laws, regula-

tions, or directives to express what is mandatory." Webster's Collegiate Dictionary 1081 (9th ed. 1991). The word "unless" is defined as "except on the condition that" or "under any other circumstances than." *Id.* at 1292. Therefore, the arbitration provision should be interpreted as arbitration is "mandatory" "except on condition that" the parties "agree otherwise."

Plaintiffs argue that the parties to the contract had already otherwise agreed to the sole jurisdiction of the state courts by including the forum selection clause in paragraph 17.01 of the license agreement. However, we find this argument unpersuasive. A stronger, more logical course of reasoning is that the parties intended for both the forum selection clause and the arbitration provision to be given effect. The parties must have considered the two provisions together since they were both located on the same page and within the same Article of the license agreement. In addition, if, when drafting the contract, the parties had "agree[d] otherwise," it is unlikely that they would have included a superfluous arbitration provision which was to be given no effect. Thus, we hold the trial court erred in interpreting the arbitration provision as permissive rather than mandatory.

[3] After determining that the arbitration provision is mandatory unless the parties otherwise agree, we must turn to the issue of whether the arbitration provision and the forum selection clause conflict. It is well established that "each and every part of the contract must be given effect if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable." *Davis v. Frazier*, 150 N.C. 447, 451, 64 S.E. 200, 201-02 (1909). In the present case, the arbitration provision and the forum selection clause may be given effect without conflict.

First, an arbitration provision and a forum selection clause are not inherently in conflict. The arbitration process does not operate completely free of involvement from the courts since both state and federal arbitration statutes contemplate that courts will retain limited jurisdiction over disputes being arbitrated. Under North Carolina's Uniform Arbitration Act (UAA), N.C. Gen. Stat. §§ 1-567.1 to 1-567.20, an arbitration provision may be used to limit but not exclude judicial intervention in their disputes. *Henderson v. Herman*, 104 N.C. App. 482, 409 S.E.2d 739 (1991), *disc. review denied*, 330 N.C. 851, 413 S.E.2d 551 (1992). The UAA "provides parties with a means to bypass

the morass of judicial litigation, while still maintaining the judicial doors ajar for recalcitrant disputes." *Id.* at 485, 409 S.E.2d at 741. When an arbitration agreement exists, the court still has jurisdiction to enforce the agreement and to enter judgment on an award resulting from arbitration. N.C. Gen. Stat. § 1-567.17.

Likewise, the Federal Arbitration Act also provides for courts to maintain jurisdiction over disputes in arbitration. For instance, the FAA provides for courts to maintain jurisdiction over motions to compel or stay arbitration and to confirm, vacate, or modify arbitration awards. *See* 9 U.S.C. §§ 3, 4, 9, 10, and 11. Therefore, since both statutes authorizing parties to resolve their disputes by arbitration contemplate that the courts will retain limited jurisdiction, there is nothing inherently inconsistent in an agreement that contains both an arbitration provision and a forum selection clause.

Moreover, the particular arbitration provision and forum selection clause at issue in this case are not inconsistent. As stated earlier, both provisions must be given effect if this can be done by a fair or reasonable interpretation. *Davis*, 150 N.C. at 451, 64 S.E. at 201-02. In addition, "contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible." *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 639, 217 S.E.2d 682, 693, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975).

Applied to the facts of this case, under a reasonable interpretation of the licensing agreement, the two provisions do not conflict. The forum selection clause should be read to be triggered only when a court is needed to intervene for those judicial matters that arise from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration. For instance, if a dispute arose and the parties agreed to take the dispute to court instead of placing it in arbitration, the dispute could only be heard by the state courts located in Pitt County, North Carolina. If there were no agreement to take the dispute to court, the parties would be required to resolve the dispute through arbitration. If the dispute were arbitrated, the state courts in Pitt County, North Carolina would have jurisdiction to enforce both the agreement to arbitrate and the arbitration award. Such an interpretation would give effect to both the arbitration provision and the forum selection clause. In addition, the arbitration provision itself provides that the parties may resort to courts for certain issues, such as the enforcement of the arbitration agreement and confirming an arbitration award as a judgment. The

arbitration clause's allusion to the parties' resorting to a judicial forum is further evidence that the parties intended the clauses to be read together with no inconsistency.

Plaintiffs contend our Supreme Court's decision in *Johnston County v R. N. Rouse & Co., Inc.*, 331 N.C. 88, 414 S.E.2d 30 (1992), implies that an arbitration provision should be found to be in conflict with a true forum selection clause, such as the one contained in the license agreement at issue here. We conclude that *Rouse* does not control the outcome of this case. In *Rouse*, the issue was whether a consent to jurisdiction clause and an arbitration provision conflicted. In its analysis, the Court focused on the distinction between a consent to jurisdiction and a forum selection clause. The Court determined that the clause in question was a consent to jurisdiction clause and not a true forum selection clause. The Court held that the agreement to arbitrate was not obviated by the consent to jurisdiction provision.

Plaintiffs suggest that if the provision in *Rouse* had been a true forum selection clause, then the arbitration provision would have been nullified. We are not persuaded by this argument. First, the *Rouse* Court never specifically stated how it would have ruled if the provision had been a true forum selection clause. The Court simply was not faced with that issue and therefore did not rule on it. Moreover, even if such an inference could be drawn from *Rouse*, the issue in the principal case would not necessarily be answered since the proper resolution of this case depends on the particular language used by the parties in their contract, and the location in the contract of the two provisions at issue.

Finally, we are further persuaded to interpret the contract in a manner that gives effect to the arbitration provision by North Carolina's strong public policy favoring the settlement of disputes by arbitration and requiring that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *Rouse* at 91, 414 S.E.2d at 32.

We conclude that the forum selection clause and the arbitration provision do not conflict under a reasonable interpretation of the license agreement. In addition, North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Therefore, both provisions should be given effect. We reverse the trial court's order denying defendant's motion to stay the proceedings and compel arbitration and allowing plaintiffs' motion to stay arbitration.

Reversed.

Judges McCULLOUGH and BIGGS concur.

ROBERT NORTON, JR., PLAINTIFF v. WASTE MANAGEMENT, INC., EMPLOYER; AND CNA INSURANCE COMPANY, CARRIER, DEFENDANTS

COA00-1024

(Filed 2 October 2001)

1. Workers' Compensation— findings—supported by competent evidence

There was competent evidence in a workers' compensation action to support findings that plaintiff was sprayed by sewage as he was unloading a pump truck.

2. Workers' Compensation— chronic fatigue syndrome—causation—expert testimony

There was competent and sufficient evidence in a workers' compensation action to support the Commission's finding that being sprayed with raw sewage caused plaintiff's chronic fatigue syndrome in medical testimony from the director of a facility specializing in the research, evaluation and treatment of chronic fatigue syndrome. The witness had previously worked with the Centers for Disease Control and the National Institute of Health in developing definitions for chronic fatigue syndrome and based his diagnosis here on a physical examination of plaintiff and a comprehensive review of his medical history.

Appeal by defendants from an Opinion and Award entered 20 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 August 2001.

The Anderson Law Firm, P.L.L.C., by Richard J. Hollar, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Maura K. Gavigan and Jennifer S. Jerzak, for defendants-appellants.

WYNN, Judge.

Waste Management and CNA Insurance Company appeal the North Carolina Industrial Commission's decision that Robert D. Norton developed chronic fatigue syndrome and fibromyalgia as a result of injury by accident arising out of and in the course of his employment on 4 April 1995. We uphold the decision.

As a tank truck operator for Waste Management, Mr. Norton collected and transported raw sewage. While pumping sewage from his truck on 4 April 1995, Mr. Norton was sprayed with raw sewage which caused abrasions to his arms and stomach. A piece of wire pierced him and the raw sewage sprayed into his eyes and mouth. He reported the incident to his supervisor. Over the next two to three weeks, Mr. Norton suffered flu-like symptoms including nausea, vomiting, diarrhea, severe pressure headaches, stiff neck, swollen lymph nodes and blood in the urine. Several medical care providers treated him.

In May and June 1995, Mr. Norton visited Dr. Gary Ross complaining of "facial pressure, cough, congestion, hematuria, [blood in the urine] and chest pain since being sprayed with raw sewage while working on a septic tank." Dr. Ross noted that Mr. Norton's "urinalysis confirmed hematuria and his examination was consistent with purulent sinusitis."

In June 1995, Dr. Paul Kamitsuka, an infectious disease expert treated Mr. Norton and diagnosed him with chronic fatigue syndrome and fibromyalgia. Dr. Kamitsuka could not determine the etiology of Mr. Norton's condition but he did not rule out the 4 April 1995 incident as the cause of Mr. Norton's injury.

Likewise, Dr. Ralph Corey, an infectious disease expert and associate professor at Duke University Medical Center, examined Mr. Norton but was unable to determine a definitive cause of his condition; however, he did not rule out the 4 April 1995 incident as the cause of his injury. In a letter dated 2 August 1996, Dr. Corey wrote:

> Mr. Norton has a history of chronic psoriasis, [and was] treated previously with methotrexate, he was in fairly good health and working until he was sprayed in the face, abdomen, and arms with septic affluence in April of 1995. The week after this, his symptoms of chronic fatigue, headaches, diarrhea, and abdominal pain developed. Though they have waxed and waned, they have not completely abated since April of 1995.

In July 1996, Dr. Woodhall Stopford, a specialist in occupational diseases, evaluated Mr. Norton and noted that "his symptoms included diarrhea, projectile vomiting, persistent fatigue, and perspiration whenever he tries to do physical activities." He assessed that Mr. Norton had "accidental sewage exposure by skin abrasions, puncture wound, and by mouth" and "persistent fatigue."

In December 1997, Mr. Norton was examined by Dr. Charles Lapp, who diagnosed Mr. Norton as suffering from chronic fatigue syndrome and fibromyalgia. Dr. Norton testified that it was his opinion to a reasonable degree of medical certainty that Mr. Norton's chronic fatigue syndrome and fibromyalgia were caused by the industrial accident in April 1995.

Following a deputy commissioner's opinion that Mr. Norton had not sustained an occupational disease as a result of his injury by accident, the full Commission unanimously reversed by concluding that:

> 1. Plaintiff experienced a compensable injury by accident arising out of and in the course of the employment on 4 April 1995. N.C. Gen. Stat. § 97-2(6).
>
> 2. As a result of the injury by accident which occurred on or about April 4, 1995, plaintiff suffers from chronic fatigue syndrome and fibromyalgia. *Id.*
>
> 3. The plaintiff is entitled to permanent disability compensation at the rate of $384.02 per week, since he is unable to earn wages because of his compensable chronic fatigue syndrome and fibromyalgia. N.C. Gen. Stat. § 97-29.
>
> 4. Plaintiff is entitled to payment by defendant of all medical expenses incurred as a result of his April 4, 1995, injury by accident to the extent that the same are reasonably required to effect a cure, give relief or lessen his disability. N.C. Gen. Stat. § 97-25.

From that Opinion and Award, Waste Management and CNA Insurance Company appeal to this Court.

The issues on appeal are: (I) Whether there was competent evidence from which the full Commission could find that Mr. Norton suffered a compensable injury and (II) whether the accident caused Mr. Norton's chronic fatigue syndrome.

"The Commission is the fact-finding body under the Workmen's Compensation Act." *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976). We review the full Commission's Opinion and Award to determine if the record shows any competent evidence to support the Commission's findings of fact; and if so, whether the conclusions of law are supported by those findings. *See Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676 (1980); *Lowe v. BE&K Construct.*, 121 N.C. App. 570, 468 S.E.2d 396 (1996).

[1] First, Waste Management and CNA Insurance Company argue that Mr. Norton failed to present any competent evidence that his contact with the sewage caused him injury. We disagree because at the deputy commissioner's hearing, all parties stipulated that,

> on or about April 4 1995, the plaintiff was employed as a truck driver with the defendant-employer, at which time he was sprayed with raw sewage from a pressurized valve. The plaintiff was acting within the course of employment at the time of the incident, and he sustained abrasions to his arm and stomach as a result of this accident.

Furthermore, testimonial evidence showed that on 4 April 1995, Mr. Norton unloaded raw sewage in the course and scope of his employment; sustained injuries; ingested raw sewage through his mouth and eyes; sustained abrasions on his arms; and suffered a puncture wound to his stomach. Indeed, there is competent evidence to support the following findings of facts:

> 3. The plaintiff began working for the defendant-employer in 1993. He drove the pump truck, dug up septic tanks, opened the tanks, pumped out the tanks and sealed it. He also pumped out grease traps at restaurants and portable toilets.
>
> 4. On April 4 1995, the plaintiff was carrying a load of grease, septic tank and portable toilet sewage. As he began to off-load the truck, the plaintiff was sprayed in the face, chest and arm by the sewage. He rinsed off with the contents of his tea jug.
>
> 5. Plaintiff reported being sprayed by sewage to his employer, who offered to send him to a doctor. Plaintiff sustained abrasions to his arms, a small puncture wound from a piece of wire and the spraying of the sewage mixture into his eyes and mouth. Plaintiff went home to clean himself and treat his injuries.

Therefore, this assignment of error is without merit.

[2] In their final argument, Waste Management and CNA Insurance Company contend that there was no competent evidence to show that the accident caused Mr. Norton's chronic fatigue syndrome.[1] We disagree.

"Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Deese v. Champion Int'l. Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). "[I]n reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate . . . '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 v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998) (quoting *Sanders v. Broyhill Furniture Indus.*, 124 N.C. App. 637, 641, 478 S.E.2d 223, 226 (1996)).

Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (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." *Adams v. AVX Corp.*, 349 N.C. at 681, 509 S.E.2d at 414.

In the present case, the Commission made the following relevant findings of facts:

> 6. The plaintiff went to work the next day [after the accident] and pumped two jobs, but then went home because of pain in his arm. The plaintiff began developing flu-like symptoms in the following weeks, but thought he was just coming down with the flu since his abdomen and arm were beginning to heal. Plaintiff tried to work through it thinking it would get better, but his symptoms continued to get worse. Plaintiff began to experience nausea, vomiting, diarrhea, and severe pressure headaches. The plaintiff sought medical treatment from Dr. Gary Ross due to his symptoms continuing to worsen.

1. The defendants do not challenge in their appeal the Commission's conclusion that the accident caused Mr. Norton's fibromyalgia.

7. The office notes from the May 22, 1995 office visit with Dr. Ross state that, "the patient came in complaining of facial pressure, cough, congestion, hematuria, and chest pain since being sprayed with sewage while working in a septic tank. His urinalysis confirmed hematuria and his examination was consistent with purulent sinusitus."

8. Plaintiff returned to Dr. Ross on May 31, 1995 and June 12, 1995 with complaints of myalgias and lethargy, in addition to the symptoms.

9. In June 1995, plaintiff saw Dr. Paul Kamitsuka, an infectious disease expert in Wilmington, North Carolina. Dr. Kamitsuka's notes of June 27, 1995 state that, "Mr. Norton presents for f/u a day earlier because of symptoms of nausea and several episodes of vomiting two days ago with persistent fatigue. He has had no fever. Has had continued watery diarrhea." Dr. Kamitsuka diagnosed plaintiff with chronic fatigue syndrome and fibromyalgia, but stated that he was unable to determine the etiology. Dr. Kamitsuka also stated that he could not rule out the April 4, 1995 accident as the cause of plaintiff's condition.

10. Dr. Ralph Corey, associate professor of medicine and infectious diseases at Duke University, saw plaintiff and was unable to determine the etiology of plaintiff's condition. In an August 2, 1996 letter, Dr. Corey related that, "Though (plaintiff) has a history of chronic psoriasis, treated previously with methotrexate, he was in fairly good health and working until he was sprayed in the face, abdomen, and arms with septic system effluence in April of 1995. The week after this, his symptoms of chronic fatigue, headaches, diarrhea, and abdominal pain developed. Though they have waxed and waned, they have not completely abated since April of 1995."

[The full Commission's findings of facts skipped from number 10 to number 13].

13. Plaintiff was seen on December 16, 1997 by Dr. Charles Lapp, director of the Hunter-Hopkins Center in Charlotte, North Carolina, which is a facility specializing in the research, evaluation, and treatment of chronic fatigue syndrome and fibromyalgia. Dr. Lapp, who is internationally regarded as an expert in this area, diagnosed the plaintiff as suffering from chronic fatigue syndrome and fibromyalgia. Dr. Lapp noted that the plaintiff had all

18 of the tender points associated with fibromyalgia.

14. Dr. Lapp also testified that to diagnose chronic fatigue syndrome, one must follow the Center for Disease Control criteria which requires taking a medical history, establishing the patient has had fatigue for at least four of the eight typical symptoms of chronic fatigue syndrome as established by the Center for Disease Control. Dr. Lapp testified, and the Full Commission finds as fact, that the plaintiff has met the criteria as set forth above for diagnosis of chronic fatigue syndrome.

15. When asked about causation, Dr. Lapp testified and the Full Commission finds as fact that, "there was no evidence in medical records prior to that accident that he was having the kind of symptoms that developed following the accident. And as you know, the accident was associated with significant viral-like illness with high fevers, infections, diarrhea, vomiting, and he just never recovered from that. So, from a causative standpoint or temporal standpoint, I think that the industrial accident appeared to be the cause of the chronic fatigue syndrome."

16. Dr. Lapp, in his 12/9/97 independent medical examination of the plaintiff states that, "The subject is unable to even perform sedentary work for more than a few minutes without prolonged rest, and even mild to moderate activity on a regular basis is out of the question. He would have difficulty dealing with other workers due to irritability, and would perform poorly under even minimal stresses. He is able to manage his own finances, but due to cognitive problems he would not be reliable to handle mathematical problems or money in business. Based on my considerable experience with CFS/FM and epidemiological data from CDC, it is medically certain that this condition would not improve significantly in the next twelve months."

The record shows that Mr. Norton was examined by Dr. Charles Lapp, the Director of the Hunter-Hopkins Center in Charlotte, North Carolina—a facility that specializes in the research, evaluation and treatment of chronic fatigue syndrome. Dr. Lapp serves as a member of the American Association for Chronic Fatigue Syndrome and has previously worked with the Centers for Disease Control and National Institute of Health in developing definitions for chronic fatigue syndrome. Dr. Lapp's diagnosis of chronic fatigue syndrome was based in part on his physical examination of Mr. Norton and comprehensive review of Mr. Norton's medical history. He testified that Mr. Norton

met the 1994 criteria for chronic fatigue syndrome as established by the Center for Disease Control and 1990 criteria established by the American College of Rheumatology. Dr. Lapp pointed out in his deposition that approximately seventy to eighty percent of chronic fatigue syndrome cases have a specific flu-like beginning, five percent of other cases occur after a traumatic event, another five percent follow surgery, and two percent follow severe stress. He concluded that Mr. Norton actually experienced a trauma at the time of the accident and a flu-like illness immediately following the accident. Significantly, at his deposition, Dr. Lapp testified as follows:

> Q. Dr. Lapp, . . . Is it your opinion that Mr. Norton's chronic fatigue syndrome was caused by his industrial accident?
>
> A. Yes, sir.
>
> Q. The opinion you have rendered to us previously as to the cause of Mr. Norton's chronic fatigue syndrome, is that your opinion to a reasonable degree of medical certainty?
>
> A. Yes, sir, it is.

Most assuredly, Dr. Lapp's expert testimony satisfies the concerns of our Supreme Court in *Young v. Hickory Business Furn.*, 353 N.C. 227, 538 S.E.2d 912, 915 (2000), regarding speculative and conjectural causal evidence. Unlike the medical expert in *Young*, Dr. Lapp's testimony unequivocally demonstrated his ability to express an opinion to a reasonable degree of medical certainty as to the cause of Mr. Norton's illness. We therefore hold that this evidence, was competent and sufficient to support the Commission's findings of fact. Accordingly, the Opinion and Award of the Commission is,

Affirmed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. DREW ALLEN TARLTON, JR.

No. COA00-761

(Filed 2 October 2001)

1. **Search and Seizure— driver's license checkpoint—findings—supported by evidence**

The trial court did not err in an impaired driving prosecution by denying defendant's motion to suppress evidence obtained as a result of a driver's license checkpoint where there was evidence to support the trial court's findings that the troopers were aware of the Highway Patrol policies for driver's license checks, that they called a supervisor who gave them permission, that the roadblock was conducted with patrol vehicles with blue lights operating, and that they checked every vehicle in both directions except when they were writing citations.

2. **Appeal and Error— preservation of issues—hearsay—no objection—same information on cross-examination**

The defendant in an impaired driving prosecution waived any hearsay objection to testimony that a Highway Patrol supervisor had approved a license checkpoint where defendant did not object and elicited the same information on cross-examination.

3. **Search and Seizure— driver's license checkpoints—requirements**

There is no constitutional mandate requiring law enforcement officers to obtain permission from a supervising officer before conducting a driver's license checkpoint; furthermore, written guidelines are not required and the legislature did not intend for N.C.G.S. § 20-16.3A to apply to all license checks.

Appeal by defendant from judgment entered 22 March 2000 by Judge Orlando Hudson in Orange County Superior Court. Heard in the Court of Appeals 16 May 2001.

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

Loftin and Loftin, by John D. Loftin; and Martin & Martin, by J. Matthew Martin, for the defendant-appellant.

BIGGS, Judge.

This appeal arises from the trial court's denial of defendant's motion to suppress evidence obtained as a result of a license checkpoint stop. Based on the reasoning stated herein, we affirm the decision of the trial court.

On 9 April 1999, Troopers Kubas and Slemenda of the North Carolina State Highway Patrol conducted a driver's license checkpoint on Orange Grove Road in Orange County. Drew Allen Tarlton (defendant) was stopped at the checkpoint and Trooper Kubas (Kubas) checked his license and registration. While doing so, Kubas noticed that defendant had a "mild odor of alcohol about him." Kubas asked defendant to step out of his vehicle in order to further investigate the odor. At that time, Kubas noticed that defendant's eyes were "red and glassy." When defendant failed to properly say his alphabets as requested, Kubas administered an Alcosensor test which indicated that defendant was impaired. Defendant was subsequently charged with driving while impaired in violation of N.C.G.S. § 20-138.1 (1999).

On 6 January 2000, in Orange County District Court, defendant was found guilty of driving while impaired. He appealed to the Orange County Superior Court, and on 20 March 2000, filed a motion to suppress evidence obtained pursuant to the license checkpoint stop alleging that the checkpoint was unconstitutional. The trial court denied his motion. Reserving his right to appeal, defendant pled guilty to the charge of driving while impaired.

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[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress evidence obtained as a result of his stop and detention by the troopers in that the troopers did not follow the proper procedures mandated in the wake of *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979). Defendant maintains that the State failed to prove the constitutionality of the checkpoint because there was no competent evidence that the officers had obtained authorization from a supervisor and the written policy by which the checkpoint was conducted was not admitted into evidence. We disagree.

In *Delaware v. Prouse*, the United States Supreme Court held that random stops of vehicles by law enforcement officers to check for licenses and registrations violate the Fourth Amendment. *Prouse*, 440

U.S. at 663, 59 L. Ed. 2d at 673; *See also, United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L. Ed. 2d 607 (1975); *State v. Grooms*, 126 N.C. App. 88, 483 S.E.2d 445 (1997). To withstand constitutional scrutiny, such stops must be supported by at least "articulable and reasonable" suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or occupant is otherwise subject to seizure for violation of the law. *Prouse,* 440 U.S. at 663, 59 L. Ed. 2d at 673. The Court in *Prouse* reasoned:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

Prouse, 440 U.S. at 661, 59 L. Ed. 2d at 672 (citation omitted).

Notwithstanding, the Court in *Prouse*, held that an investigative stop at a traffic check is constitutional, without the need to find reasonable suspicion, if law enforcement systematically stops all oncoming traffic. *Id.*; *See also State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d. 280, 283 (2000). The Court further stated that nothing in its holding precluded states from developing methods for "spot checks that . . . do not involve the unconstrained exercise of discretion." *Prouse*, 440 U.S. at 663-64, 59 L. Ed. 2d at 673.

In the wake of *Prouse*, this Court has consistently upheld roadblock-type stops where every car passing through the roadblocks is stopped. *See State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (troopers, following guidelines established by their agency, selected a location and time during daylight hours for a license check and detained every vehicle passing through the checkpoint); *State v. Barnes*, 123 N.C. App. 144, 145-46, 472 S.E.2d 784, 785 (1996) (roadblock at highway patrol checking station was permissible under the Fourth Amendment where the troopers detained every automobile that passed through the checkpoint); *Grooms*, 126 N.C. App. at 90, 483 S.E.2d. at 446 (roadblock was constitutional where

every vehicle crossing through a specified point of the roadblock was stopped for the purpose of locating people who had outstanding arrest warrants, making a license check of the operators of the vehicles passing by, and checking for stolen vehicles).

Defendant correctly asserts that in a suppression hearing, the State has the burden to demonstrate the admissibility of the challenged evidence. *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E.2d 857, 859 (1985). In the case *sub judice*, defendant challenged the admission of the evidence obtained pursuant to the checkpoint stop. The State had the burden to demonstrate that the checkpoint stop was valid. The trial court found that the State had met its burden and the checkpoint in the present case was constitutional.

In reviewing the trial court's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law. *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d. 172, 176 (1996); *Pulliam*, 139 N.C. App. at 439-40, 533 S.E.2d. at 282. If findings of fact support the court's conclusions of law, the conclusions are binding on appeal. *Grooms*, 126 N.C. App. at 90, 483 S.E.2d at 446 (citation omitted).

In the case *sub judice*, the trial court made the following pertinent findings of fact:

- That on the date and time . . . Troopers Kubas and Slemenda were on preventive patrol, which is regular patrol in the community.
- That they had made up their minds to do a license check in the Orange Grove Road area in Orange County, but had not yet received permission to do so from their supervisor.
- That both troopers were aware that the North Carolina Highway Patrol had established policies for driver's license checks, that Kubas believed that policy required the check to be conducted by at least two troopers, by a non-random method, and it required a blue light on a vehicle at the time. That the policy did not require the on site presence of the supervisor.
- Kubas called his supervisor, who gave him permission to do the license check on Orange Grove Road, to be completed before dark.

- That Troopers Kubas and Slemenda conducted the roadblock on April 9, 1999 in the daylight. They positioned their patrol vehicles so that the blue lights were operating on both vehicles.

- That they checked every vehicle in both directions except when they were writing citations.

We find that these findings of fact were supported by competent evidence in the record.

[2] The defendant argues that the finding by the court that Kubas was given permission by a supervisor is based on inadmissible hearsay and further that its admission was prejudicial error. We find that defendant has waived any objection to this testimony.

It is well settled that a defendant waives objection to the admission of testimony when testimony of the same import is admitted without objection. *State v. Ayers*, 92 N.C. App. 364, 366, 374 S.E.2d 428, 429 (1988) (citation omitted); *See also State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983) (citations omitted). Not only did the defendant allow evidence that the troopers received permission from the supervisor on direct examination without objection; his attorney's questioning of Kubas on cross-examination elicited the same information in greater detail.

First defendant allowed the trooper to testify as follows without objection:

> Myself and Trooper Slemenda were on preventive patrol, and determined we would like to hold a checking station, so [we] contacted our supervisor and determined to see if it would be all right with him to check driver's licenses.

It was later when the following exchange occurred that the defendant objected:

> Q. When you contacted your supervisor, what did you do as a result of that conversation?
>
> A. I spoke with him and asked him if it would be all right if we checked driver's licenses, and he asked which spot—
>
> MR. LOFTIN: Objection.
>
> THE COURT: Overruled.

Moreover, the defendant on cross examination asked the following:

> Q. And you don't know who the supervising officer was that you purportedly called to get permission to do this license check?
>
> A. No, sir. They rotate shifts as well as us, so it's common for a supervisor not to be on the same shift as you at all times.
>
> Q. To the best of your knowledge, did the guidelines that were in effect on April 9, 1999 require a supervising officer to be present at the license check?
>
> A. No, sir.
>
> . . . .
>
> Q. So tell me the conversation, the complete conversation that you had with this supervising officer.
>
> A. I—I can't recall exactly what the words were. We asked him for permission to check driver's licenses, and they usually ask when and where, and then they okay it or deny it.

We conclude that defendant has waived his right to contest this testimony on appeal.

[3] Assuming *arguendo* that the trial court did err in allowing Trooper Kubas' testimony regarding supervisory permission, we find that such error is harmless. There is no constitutional mandate requiring officers to obtain permission from a supervising officer before conducting a driver's license checkpoint. Neither the holding in *Prouse*, which addresses the constitutionality of license checks, nor this Court's holding on license checks, require such permission. *Prouse*, 440 U.S. at 663, 59 L. Ed. 2d at 673; *Sanders*, 112 N.C. App. at 480, 435 S.E.2d at 844. Further, we do not agree with the contention that the State's failure to introduce the Highway Patrol guidelines into evidence required the court to find the stop unconstitutional. While the Supreme Court in *Prouse* stated that its "holding does not preclude [states] from developing [systematic plans] for spotchecks", there is nothing in *Prouse* or subsequent cases of this Court that require written guidelines to conduct such license checks. *Prouse*, 440 U.S. at 673, 59 L. Ed. 2d at 673. Finally, defendant's contention that this license check is governed by N.C.G.S. § 20-16.3A (1999) is incorrect. The following language of this section makes clear that the legislature did not intend for it to cover all license checks:

> This section does not limit the authority of a law-enforcement officer or agency to conduct a license check independently or in conjunction with the impaired driving check, to administer psychophysical tests to screen for impairment, or to utilize roadblocks or other types of vehicle checks or checkpoints that are consistent with the laws of this State and the Constitution of North Carolina and of the United States.

G.S. § 20-16.3A.

Accordingly, we find that the trial court properly denied defendant's motion to suppress.

Having established that supervisory approval for a license checkpoint is not a constitutional requirement, nor is a written plan, we decline to address the remaining assignments of error.

Affirmed.

Judges WYNN and CAMPBELL concur.

BART HAWLEY, PLAINTIFF v. WAYNE DALE CONSTRUCTION; AND NORTH CAROLINA FARM BUREAU INSURANCE COMPANY, DEFENDANTS

No. COA00-976

(Filed 2 October 2001)

1. Workers' Compensation— settlement negotiations—existence of Form 21 admitted—terms not disclosed

The Industrial Commission did not improperly consider evidence of settlement negotiations in a worker's compensation action where the deputy commissioner allowed the existence of a Form 21 to be introduced in rebuttal but did not allow the terms of the form to be disclosed. The evidence was relevant to an issue raised by plaintiff and there is no indication it had any bearing on the Full Commission's final decision.

2. Workers' Compensation— attorney fees—failure to stipulate to medical report

The Industrial Commission did not err in a worker's compensation action by assessing attorney fees against plaintiff's attor-

ney under Rule 612(2) of the Workers' Compensation Rules for not stipulating to a medical report. Rule 612(2) is entirely consistent with the Workers' Compensation Act and aids in carrying out the provisions and manifest purpose of the Act by allowing the Commission to assess costs against an attorney or party who slows the litigation process by refusing to stipulate to medical records where authenticity is not an issue. Stipulating to the record's authenticity is not the same as stipulating to the accuracy of the diagnosis or prognosis.

3. Workers' Compensation— attorney fees—failure to stipulate to medical report—deposition ordered but not taken

Workers' Compensation Rule 612(2) applied where plaintiff did not stipulate to a medical report, a deposition was ordered, and time and effort were spent preparing for a deposition. The fact that a deposition was never taken has no bearing on the applicability of Rule 612(2).

4. Workers' Compensation— attorney fees—failure to stipulate to a medical report—no abuse of discretion

The Industrial Commission did not abuse its discretion by imposing costs and attorney fees against plaintiff's attorney in a workers' compensation action where plaintiff's attorney initially refused to stipulate to a doctor's report and then failed to notify defense counsel when he changed his mind; defense counsel continued to try to locate the doctor in Arizona and spent more time and money scheduling the deposition; and defense counsel only learned that plaintiff had agreed to the stipulation when she contacted plaintiff's counsel to arrange a deposition. The Commission's decision was supported by the facts and is valid under Rule 612(2).

5. Workers' Compensation— attorney fees—calculation

The Industrial Commission did not err in ordering plaintiff's attorney to pay $1,000 in costs and attorney fees incurred in scheduling a deposition after plaintiff's attorney failed to stipulate to a medical record and to timely notify defendant's counsel of his change in position when only $680 in attorney and paralegal fees were billed to defendant for scheduling the deposition. There is no requirement that the amount of attorney fees set by the Commission in its discretion under Rule 612 equal any set formula and this $1,000 fee was not unreasonable.

Appeal by plaintiff from opinion and award entered 15 May 2000 by Commissioner Thomas J. Bolch of the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 2001.

Brenton D. Adams for the plaintiff-appellant.

Young, Moore and Henderson, by Dawn M. Dillon, for the defendant-appellees.

THOMAS, Judge.

Plaintiff, Bart W. Hawley, appeals from a ruling by the North Carolina Industrial Commission (Commission) awarding him a 10% permanent impairment rating and ordering his attorney to pay $1,000 to defense counsel for the costs and attorney fees incurred in connection with scheduling a deposition.

Plaintiff contends the Commission erred by considering evidence of settlement negotiations in making its decision as to the impairment rating. He also contends the Commission erred by imposing costs and attorney fees where his counsel initially refused to stipulate to a medical report and then later failed to notify defendants' counsel of his willingness to enter into the stipulation.

For the reasons discussed herein, we affirm the Commission's opinion and award.

Plaintiff's injury occurred when he broke his right foot doing carpentry work in the course and scope of his employment with defendant, Wayne Dale Construction. He was examined by three orthopaedic surgeons. Dr. Ronald Levey (Levey) initially assessed no permanent impairment, Dr. Mark Brenner assessed a 20% impairment rating and Dr. Paul Schricker assessed the impairment rating at 3%.

The parties were unable to settle on an amount plaintiff was to receive for his permanent impairment, with plaintiff subsequently filing a request with the Commission for his claim to be assigned for hearing. The parties were then unable to settle on what should constitute the pre-trial agreement. Defendants insisted Levey's opinions should be included as evidence. Plaintiff, however, refused to stipulate to Levey's report. Because of that refusal, Deputy Commissioner Lorrie L. Dollar ordered that Levey be deposed at plaintiff's expense.

Prior to the deposition, plaintiff's counsel, Brenton D. Adams (Adams), received a Form 25R from Levey indicating that Levey had modified plaintiff's permanent impairment rating to 10%. Because of that change, Adams decided he would stipulate to Levey's evaluation and wrote a letter to that effect to Deputy Commissioner Dollar. Adams included a "cc" line on the letter denoting a copy to defendant's counsel, Dawn M. Dillon (Dillon), but then failed to actually send the copy to Dillon. Unaware of plaintiff's change of position, Dillon spent attorney and paralegal time locating Levey at his new home in Arizona, obtaining certified copies of plaintiff's medical records and scheduling the deposition. In all, 3.3 hours of attorney time billed at $115 per hour and 4.4 hours of paralegal time billed at $70 per hour were expended on trying to schedule the deposition.

In a 17 November 1999 opinion and award, Deputy Commissioner Dollar awarded plaintiff permanent partial disability compensation based on a 10% permanent impairment rating. In addition, Deputy Commissioner Dollar ordered Adams to pay "an attorney's fee" of $2,000 to defendants as a sanction for his failure to stipulate to Levey's evaluation, and his later failure to timely notify defense counsel of his change of position.

Plaintiff appealed to the Full Commission. The Full Commission, in a 15 May 2000 opinion and award, determined plaintiff was entitled to permanent partial disability compensation based on a 10% rating to his right foot. As a result of the failure to "timely notify defendants prior to their efforts to schedule an out-of-state deposition necessitated by plaintiff's counsel," the Commission also ordered Adams to pay $1,000 to Dillon for costs and attorney fees related to the failure to initially stipulate and then timely notify defendants' counsel of the change in position. From the Full Commission's opinion and award the plaintiff appeals.

[1] By his first assignment of error, plaintiff argues the Commission improperly considered evidence of settlement negotiations. We disagree.

Rule 408 of the North Carolina Rules of Evidence states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admis-

> sible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

N.C.R. Evid. 408. At the hearing before Deputy Commissioner Dollar, the only information about compromise negotiations was testimony that plaintiff's claims adjuster sent a Form 21 (offer to pay compensation) to plaintiff's counsel, who never responded. Although Deputy Commissioner Dollar did not allow the terms of the form to be disclosed, she did allow evidence of the form's existence to be introduced as rebuttal after plaintiff claimed defendants refused to pay according to the treating physician's evaluation. Therefore, the evidence was directly relevant to an issue plaintiff himself raised and was not improperly admitted.

There is no indication, in fact, that this evidence had any bearing on the Full Commission's decision. The Commission, while noting other refusals on the part of Adams to respond to defendants' inquiries, found:

> plaintiff's counsel's refusal to reply to the carrier's repeated requests for settlement and Form 33 demanding settlement were within his legal rights. However, instead of merely not replying, a better route would have been for plaintiff's counsel to communicate to the carrier the fact that the proffered settlement was not acceptable to plaintiff.

In judicially reviewing the opinion and award of the Commission, this Court determines as a matter of law whether the finding of facts support the Commission's conclusions, and whether they justify the awards. *McRae v. Wall*, 260 N.C. 576, 578, 133 S.E.2d 220, 222 (1963). The Commission's findings will not be disturbed on appeal if they are supported by competent evidence even if there is contrary evidence in the record. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 530 S.E.2d 549 (2000); *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986). However, the Commission's conclusions of law are reviewable *de novo* by this Court. *See Grantham v. R.G. Barry Corp.*,

127 N.C. App. 529, 491 S.E.2d 678 (1997), *rev. denied*, 347 N.C. 671, 500 S.E.2d 659 (1998).

In the case at bar, three orthopaedic surgeons examined plaintiff in an attempt to determine the degree of permanent impairment. The three permanent impairment ratings were: (1) plaintiff's primary treating physician, Levey, assigned a 10% rating; (2) Dr. Mark Brenner assessed a 20% impairment rating; and (3) Dr. Paul Schricker assessed the impairment rating at 3%. The Commission may weigh the evidence and believe all, none or some of the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The Commission thus had the authority to primarily believe Levey without stating a reason, as long as it considered all of the evidence. The competent evidence clearly supports the finding that plaintiff sustained a 10% impairment. Accordingly, we reject plaintiff's first assignment of error.

[2] By his second assignment of error, plaintiff argues the Commission committed error as a matter of law in assessing fees based on Adams' refusal to stipulate to a medical report. His contentions are that: (1) Rule 612(2) is invalid as a matter of law because it is contrary to North Carolina law; (2) Rule 612(2) does not apply here; and (3) the Commission abused its discretion. We disagree as to all three.

We first address plaintiff's contention that Rule 612(2) of the Workers' Compensation Rules is invalid as a matter of law. The Commission "may make rules, not inconsistent with this Article [the North Carolina Workers' Compensation Act (Act)], for carrying out the provisions of this Article." N.C. Gen. Stat. § 97-80(a) (1999). Pursuant to this authority granted by the North Carolina Legislature, the Commission promulgated Rule 612(2), which states:

> In cases where a party, or an attorney for either party, refuses to stipulate medical reports and the case must be reset or depositions ordered for testimony of medical witnesses, a Commissioner or Deputy Commissioner may in his discretion assess the costs of such hearing or depositions, including reasonable attorney fees, against the attorney or his client who refused the stipulation.

Workers' Comp. R. of N.C. Indus. Comm'n 612(2).

We therefore must review whether Rule 612(2) is inconsistent with the Act, and then whether it aids in carrying out the provisions

of the Act. There is nothing in the Act that prohibits a Commissioner or Deputy Commissioner from assessing attorney fees against a party when a deposition might be scheduled after that party refuses to stipulate to medical records. In fact, there is support for Rule 612(2) in the Act:

> The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, to administer or cause to have administered oaths, to preserve order at hearings, to compel the attendance and testimony of witnesses, and to compel the production of books, papers, records, and other tangible things.

N.C. Gen. Stat. § 97-80(b) (1999). In light of the foregoing Act provision, Rule 612(2) is entirely consistent with the Act.

Additionally, we hold that Rule 612(2) does aid in carrying out the provisions of the Act. The manifest purpose of the Act is to provide a swift and certain remedy to an injured worker. *See Radzidz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 484 S.E.2d 566 (1997). Rule 612(2) allows the Commission to assess costs against an attorney or party who slows the litigation process by refusing to stipulate to medical records, thus requiring the added expense and time of a deposition. Thus, where the authenticity itself is not at issue, Rule 612(2) aids in carrying out the provisions and manifest purpose of the Act. Therefore, it is not inconsistent with North Carolina law.

We note that stipulating to the record's authenticity is not the same as stipulating to the accuracy of the diagnosis or prognosis. A stipulation under these circumstances does not preclude taking a deposition, calling the author as a witness or introducing contrary evidence. Unlike the cases cited by plaintiff, there is no denial of the constitutional right to cross-examine witnesses or other deprivation of plaintiff's right to have his case fully determined. We accordingly hold Rule 612(2) is valid as a matter of law.

[3] Plaintiff next argues Rule 612(2) does not apply here because the initial refusal to stipulate did not require the hearing to be reset or depositions to be taken. We reject plaintiff's argument, however, because under the plain language of Rule 612(2), attorney fees may be awarded when depositions are "ordered." At the 8 July 1999 hearing, Deputy Commissioner Dollar "ordered" Levey's deposition be taken. Dillon thereafter expended time and effort. The fact the deposition was never taken has no bearing on the applicability of Rule 612(2).

[4] Lastly, plaintiff contends the Full Commission abused its discretion in imposing costs and attorney fees. The standard of review for an award of attorney fees by the Commission is abuse of discretion. *Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 385, 514 S.E.2d 545, 550 (1999) (*citing Childress v. Trion, Inc.*, 125 N.C. App. 588, 590, 481 S.E.2d 697, 698, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997)). The Commission had the authority under Rule 612(2) to assess attorney fees against plaintiff's counsel for failing to stipulate to Levey's evaluation. Additionally, the Commission has authority, generally, to assess sanctions, including reasonable attorney fees, under Rule 802(1), which states:

> Upon failure to comply with any of the aforementioned rules, the Industrial Commission may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or his counsel whose conduct necessitates the order.

Workers' Comp. R. of N.C. Indus. Comm'n 802.

In the instant case, Adams initially refused to stipulate to Levey's report. When counsel did change his mind, he failed to notify Dillon. Defense counsel therefore continued to try to locate Levey in Arizona and then spent even more time and money scheduling the deposition. Only when defense counsel contacted plaintiff's counsel to arrange a deposition time did defense counsel learn that he had agreed to stipulate. The Commission did not abuse its discretion in assessing attorney fees. Its decision is supported by the facts and is valid under Rule 612(2), although we note Rule 802(1) is not directly applicable because the action taken by the Commission is fully within the scope of Rule 612(2). We therefore reject this argument.

[5] Plaintiff also argues that the time and fee calculation (3.3 hours at $115 per hour and 4.4 hours at $70 per hour) only equals $680, not the $1,000 awarded. Although his mathematical total is approximately correct, there is no requirement that the amount of attorney fees set by the Commission in its discretion under Rule 612 equal any set formula of time or expenditure. We hold the $1,000 attorney fee is not unreasonable and reject plaintiff's second assignment of error.

Accordingly, we affirm the decision of the Commission.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

HAROLD ROWELL D/B/A AMERICAN BUILDERS, PLAINTIFF v. NORTH CAROLINA EQUIPMENT COMPANY, DEFENDANT

No. COA00-1138

(Filed 2 October 2001)

1. Statute of Limitations— breach of contract—fraud—contract for repairs

The trial court properly entered summary judgment in favor of defendant on the breach of contract and fraud claims arising out of the parties' contract to repair plaintiff's loader because: (1) the undisputed facts establish that the contract between the parties was for repairs; and (2) plaintiff failed to meet the three-year statute of limitations for breach of contract and fraud claims provided under N.C.G.S. § 1-52.

2. Statute of Frauds— contract for repairs—inapplicable

The trial court properly entered summary judgment in favor of defendant on the statute of frauds claim arising out of the parties' contract to repair plaintiff's loader because: (1) the statute applies to the sale of general intangibles such as bilateral contracts and royalty rights; and (2) the contract between these parties was for repairs. N.C.G.S. § 25-1-206.

3. Unfair Trade Practices— contract for repairs—summary judgment

The trial court properly entered summary judgment in favor of defendant on the unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1 arising out of the parties' contract to repair plaintiff's loader, because there is insufficient evidence to support this claim.

4. Conversion— contract for repairs—summary judgment

The trial court properly entered summary judgment in favor of defendant on the conversion claim arising out of the parties' contract to repair plaintiff's loader because defendant had legal

authority under N.C.G.S. §44A-4 to sell the loader for unpaid repair fees.

5. Mechanics' Liens–sale of property— failure to comply with notice requirements–damages

A defendant's failure to substantially comply with the notice requirements under N.C.G.S. § 44A-4 before it sold plaintiff's loader in order to recoup unpaid repair fees entitles plaintiff to actual damages in addition to the $100 statutory penalty awarded by the trial court, and the actual damages are to be determined by a jury.

Appeal by plaintiff from judgment entered 14 April 2000 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 22 August 2001.

Harold Rowell, Pro Se-appellant.

Moore & Van Allen, P.L.L.C., by Joseph W. Eason and Paula L. Hopper, for defendant-appellee.

TYSON, Judge.

Harold Rowell d/b/a American Builders appeals the trial court's entry of summary judgment and denial of plaintiff's motion for relief from judgment or order under N.C. R. Civ. P. 60(b).

I. Facts

In late May or early June of 1994, Harold Rowell d/b/a American Builders ("plaintiff") entered into a contract with North Carolina Equipment Company ("defendant") for repairs to his Dresser 125-E Track Loader ("loader"). The original estimate for repairs was $3,500.00. Plaintiff's machine was disassembled, and defendant advised plaintiff that further repairs were needed. Plaintiff later agreed to the additional repairs that increased the estimate to $5,000.00. On 6 June 1994, plaintiff went to defendant's shop and offered to pay $5,000.00 in advance. Defendant explained to plaintiff that the final cost would be based on "time and materials" and that the final amount would not be known until defendant completed the work.

On 18 September 1994, plaintiff paid $500.00 towards the repair costs. On 13 October 1994, defendant told plaintiff that the repairs totaled $8,131.08 and that plaintiff could not remove the loader until

he paid the bill in full. Plaintiff refused to pay the total bill, but did pay an additional $500.00. Plaintiff paid an additional $2,000.00 on 25 January 1995 and another $500.00 on 22 May 1995, totaling $3,500.00. All payments were accepted by defendant and credited to the balance owed.

Defendant sent plaintiff letters in February, May, and June of 1995 informing plaintiff that his account was overdue and that failure to settle the account would result in a public auction of the loader. On 22 October 1995, plaintiff forwarded a check in the amount of $3,500.00, marked "paid in full", to defendant. Defendant, in a letter to plaintiff dated 26 October 1995, stated that it would not accept the check as payment in full and that failure to settle the account by 10 November 1995 would result in a public auction of the loader. Defendant failed to return plaintiff's check. The letter did not specify a sale date.

On 10 January 1996, defendant's counsel sent plaintiff a letter via certified mail that defendant was prepared to sell the loader. On 1 February 1996, defendant's counsel sent plaintiff a notice of public sale via certified mail. Plaintiff did not receive either the letter or the notice. Plaintiff testified in his deposition that it was his policy not to accept certified mail.

On 14 February 1996, defendant sold the loader at public auction, to enforce its statutory lien, for $8,500.00. Defendant deducted $5,784.96 for the balance due, $500.00 for attorney fees, $154.80 for sale expenses, and deposited $2,060.24 with the Clerk of Court. Plaintiff was notified by letter of the sale and deposit with the Clerk on or about 22 February 1996. Plaintiff commenced this action on 15 February 1999 alleging: (1) breach of contract, (2) fraud, (3) conversion, (4) unfair and deceptive trade practices, N.C. Gen. Stat. Sec. 75-1.1, and (5) improper notice of sale under N.C. Gen. Stat. Sec. 44A-4(e). On 14 April 2000, the trial court entered summary judgment in favor of plaintiff for claims that defendant violated N.C. Gen. Stat. Sec. 44A-4 and awarded plaintiff the statutory penalty in the amount of $100.00 pursuant to N.C. Gen. Stat. Sec. 44A-4(g). The trial court entered summary judgment in favor of defendant on all other claims. Plaintiff appeals. Defendant did not cross-appeal. We affirm in part and vacate and remand in part the judgment of the trial court.

II. Issues

Plaintiff argues that the trial court erred in granting summary judgment, because there are genuine issues of material facts.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. Sec. 1A-1, Rule 56(c) (1999). The evidence must be reviewed in the light most favorable to the party opposing summary judgment. *GATX Logistics, Inc. v. Lowe's Companies, Inc.*, 143 N.C. App. 695, 698, 548, S.E.2d 193, 196 (2001) (citing *Massengill v. Duke Univ. Med. Ctr.*, 133 N.C. App. 336, 515 S.E.2d 70 (1999)).

Defendant asserts that plaintiff's claims for breach of contract, fraud, conversion, and unfair and deceptive trade practices are barred by the statute of limitations. "Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984) (citing *Ports Authority v. Roofing Co.*, 294, N.C. 73, 240 S.E.2d 345 (1978)). However, where the statute of limitations is properly pled and the facts are not in conflict, the issue becomes a matter of law, and summary judgment is appropriate. *Blue Cross and Blue Shield of N.C. v. Odell Assoc., Inc.*, 61 N.C. App. 350, 356, 301 S.E.2d 459, 462 (1983) (citations omitted).

A. Breach of Contract and Fraud

[1] N.C. Gen. Stat. Sec. 1-52 (1999) provides a three year statute of limitations for breach of contract and fraud claims. The statute of limitations begins to run when plaintiff's right to maintain an action for the alleged wrong accrues. *F.D.I.C. v. Loft Apartments, L.P.*, 39 N.C. App. 473, 476, 250 S.E.2d 693, 695 (1979).

Plaintiff argues that this contract is governed by Chapter 25, Uniform Commercial Code, and a four year statute of limitations. N.C. Gen. Stat. Sec. 25-2-725 (1999). This statute applies to the sale of goods. N.C. Gen. Stat. Sec. 25-2-102 (1999). The undisputed facts establish that the contract between the parties was for repairs. Plaintiff's action, therefore, was barred by the three year statute of limitations.

Plaintiff testified in his deposition that the breach of the repair contract occurred on 13 October 1994 when defendant informed him that the total cost of repairs was $8,131.08. Plaintiff alleged in his amended complaint that defendant engaged in fraud by making misrepresentations concerning necessary repairs. All repairs were com-

pleted by 13 October 1994. Plaintiff filed this action on 15 February 1999. The trial court properly entered summary judgment for the defendant as to the breach of contract and fraud claims.

B. Statute of Frauds

[2] Plaintiff argues that this contract is governed by Chapter 25, Uniform Commercial Code, requiring a written contract. A contract for the sale of goods of $500.00 or more must be in writing to be enforceable pursuant to N.C. Gen. Stat. Sec. 25-2-201 (1999). This statute applies to the sale of goods. A contract for the sale of personal property over $5,000.00 must be in writing to be enforceable pursuant to N.C. Gen. Stat. Sec. 25-1-206 (1999). This statute applies to the sale of general intangibles such as bilateral contracts, royalty rights, or the like. We have previously determined that the contract between these parties was for repairs; therefore, these statutes do not apply. We overrule this assignment of error.

C. Unfair and deceptive trade practices

[3] Plaintiff argues that the trial court erred in concluding as a matter of law that defendant did not commit an unfair and deceptive trade practice. In order to prove an unfair and deceptive trade practice, plaintiff must show that defendant engaged in "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. Sec. 75-1.1 (1999). This Court has previously stated:

> [w]hether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers . . . . In essence, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.

Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 600, 394 S.E.2d 643, 650 (1990) (citations omitted). We have conducted an extensive review of the case law and the record and do not find evidence that is sufficient to support a claim for unfair and deceptive trade practices.

D. Conversion

[4] We also hold that defendant had legal authority to sell the loader for unpaid repair fees pursuant to N.C. Gen. Stat. 44A-4. Be-

cause defendant had legal authority to sell, plaintiff has no claim for conversion. *See Drummond v. Cordell*, 73 N.C. App. 438, 439, 326 S.E.2d 292, 293 (1985), superseding 72 N.C. App. 262, 324 S.E.2d 301 (1984), *aff'd*, 315 N.C. 385, 337 S.E.2d 850 (1986) (because lienor had authority to sell the vehicle to collect storage charges pursuant to G.S. 44A-4, plaintiff has no claim for conversion). Summary judgment was also proper as to this claim.

E. Chapter 44A statutory liens

[5] Defendant sold plaintiff's loader on 14 February 1996. Plaintiff received notice that the loader had been sold on or about 22 February 1996. Plaintiff's claim for a violation of N.C. Gen. Stat. 44A was timely filed.

There is no dispute that defendant failed to comply with N.C. Gen. Stat. Sec. 44A-4(b), which gives defendant the right to enforce its statutory lien by selling the loader. N.C. Gen Stat. Sec. 44A-4(b)(2) (1999) provides that the lienor shall issue notice to the person having legal title to the property and specifies what the notice shall contain. The record reveals that defendant failed to: (1) provide plaintiff with notice; (2) state the general nature of the services performed and the amount of the lien; (3) inform plaintiff of the right to a judicial hearing; and, (4) that plaintiff had 10 days to request a hearing.

There is also no dispute that defendant failed to comply with N.C. Gen. Stat. Sec. 44A-4(e)(1). The record reveals that defendant failed to (1) provide notice to the person having legal title to the property and (2) publish notice of the sale once a week for two consecutive weeks in a newspaper of general circulation in the same county. N.C. Gen. Stat. Sec. 44A-4(e)(1)(a1)-(b) (1999).

An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 2d 865, 873 (1950). "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." *Id.* "The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.*

This Court held that a determination of whether a defendant failed to substantially comply with the provisions of either 44A-4(c) or 44A-4(e) is a factual issue reserved for the jury. *Drummond* at 441, 326 S.E.2d at 293 (lienor did not cause notice to be mailed to the person having legal title and did not advertise the sale by posting a copy at the courthouse door). In *Drummond*, the case went to trial and we held that the trial court erred in failing to submit the issue that defendant failed to substantially comply with the provisions of 44A-4(e) to the jury. *Id.*

In considering a motion for summary judgment, the trial court, as the finder of fact, found that defendant failed to substantially comply with the provisions of 44A-4(e). Defendant concedes that it did not fully comply with 44A-4(e). Defendant did not appeal the entry of summary judgment on this issue.

Since defendant failed to substantially comply with N.C. Gen. Stat. Sec. 44A-4, plaintiff is entitled to actual damages, if any, in addition to the $100.00 statutory penalty awarded by the trial court. *Id.* N.C. Gen. Stat. 44A-4(g) provides:

> "[i]f the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00) . . . . **in addition to actual damages** to which any party is otherwise entitled."

N.C. Gen. Stat. Sec. 44A-4(g) (1999) (emphasis supplied). This Court also held that the determination of actual damages, if any, is reserved for the jury. *Id.* The measure of actual damages would be the difference between the fair market value of the loader at the time of the sale and the amount for which the loader was actually sold. *Id.*

We vacate the order in part and remand to the trial court for the jury to determine whether plaintiff suffered actual damages.

Affirmed in part and vacated and remanded in part.

Judges WYNN and HUNTER concur.

IN RE LAMBERT-STOWERS

[146 N.C. App. 438 (2001)]

IN THE MATTER OF: OMAR JAMAL LAMBERT-STOWERS, MINOR CHILD

No. COA00-1188

(Filed 2 October 2001)

Termination of Parental Rights— dispositional order—statement of standard of proof required

An order terminating parental rights was reversed and remanded where the court did not state that the findings as to neglect or any of the other grounds were made by clear, cogent and convincing evidence. The trial court must recite the standard of proof in the adjudicatory order and the trial court's statement of the standard of proof in the dispositional order did not cure the defect.

Appeal by respondents from judgment entered 21 December 1999 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 6 June 2001.

Howard C. McGlohon for respondent-appellant father, Kenneth Stowers.

The Moore Law Firm, by George W. Moore for respondent-appellant mother, Robin Lambert.

Lisa M. Morrison for petitioner-appellee Buncombe County Department of Social Services.

Judy N. Rudolph for guardian ad litem-appellee, Betty Wiese.

THOMAS, Judge.

This is an appeal from an order terminating the parental rights of respondents, Kenneth Stowers (Stowers) and Robin Lambert (Lambert).

The trial court made findings that both parents had neglected Omar Jamal Lambert-Stowers (the child) and had wilfully left him in foster care for more than twelve months without showing reasonable progress on correcting the conditions which led to removal. Additionally, as to Stowers, the trial court found that he failed to pay a reasonable portion of the cost of out-of-home care for a continuous period of six months preceding the filing of the petition, despite an ability to pay some amount.

For the reasons discussed herein, we reverse the trial court's order and remand for further determination.

The facts are as follows: The child was born on 3 October 1997. The Buncombe County Department of Social Services (petitioner) opened a Child Protective Services investigation into the welfare of the child three days later. Lambert's "hyperactive" behavior in the hospital was of concern, as well as the fact she appeared "mentally limited." Petitioner proceeded to provide In-Home Family Preservation services to Lambert and Stowers, who was Lambert's boyfriend and the father of the child. Petitioner also assisted the family in securing stable housing. Lambert further participated in eight weeks of parenting education through the Buncombe County Health Department. The health department's maternal outreach worker had actually begun helping Lambert several months before the child's birth. Because of bruises found on Lambert both before and after the child was born, an In-Home Family Preservation worker from the Blue Ridge Center counseled Lambert and Stowers throughout February 1998 regarding domestic violence.

Petitioner, meanwhile, had referred Stowers to the Blue Ridge Center for a substance abuse assessment due to a history of alcohol abuse. He failed to comply.

The child remained in the custody of Lambert and Stowers during that time, but stopped physically growing. On 28 April 1998, the child was admitted to Memorial Mission Hospital for a series of tests after his pediatrician, Dr. Peter Chu, diagnosed him as a "failure to thrive" child. He had dropped below the fifth percentile for his age as to weight, length and head circumference.

Stowers, however, became irate when informed the child would need to remain in the hospital longer than originally planned. While intoxicated and threatening hospital employees not to interfere, he removed the child from the hospital on 3 May 1998 against medical advice. Petitioner filed a petition alleging neglect two days later, obtained non-secure custody and placed the child in foster care. He weighed less at that point than he had in March 1998.

The adjudicatory hearing determining whether the child was neglected was held on 24 July 1998 and 3 August 1998. The trial court concluded, by clear, cogent and convincing evidence, that the child was neglected "in that he did not receive the proper care and supervision and lived in an environment injurious to his welfare due to the

inability of his parents to provide the minor child with the proper nutrition and care."

At disposition, the trial court ordered custody with petitioner and twice-a-week visitation for the parents. The visits were to be supervised at petitioner's offices.

Review hearings were held on 7 December 1998, 15 March 1999 and 27 April 1999. Custody remained with petitioner because of a lack of progress in alleviating the conditions which led to the initial removal. The visits remained supervised and, after the March hearing, were videotaped.

The petition to terminate parental rights was filed on 11 May 1999. A judgment finding adequate grounds was entered on 11 December 1999. A separate dispositional judgment was filed on 21 December 1999, in which the trial court found termination of parental rights to be in the child's best interests. From those judgments, respondents appeal. They argue the grounds for termination were not proven by clear and convincing evidence and the trial court abused its discretion in finding the best interests of the child required termination of respondents' parental rights.

We note at the outset that both respondents and petitioner framed the issues and arguments in their briefs as to grounds for termination by reference to N.C. Gen. Stat. § 7B-1111. However, since the petition for termination was filed *prior to 1 July 1999*, the correct reference would be to Chapter 7A. Nonetheless, pursuant to Rule 2, we review these assignments of error. N.C.R. App. P. 2.

The trial court in the present case held the adjudicatory and dispositional hearings on different days and entered separate orders as to each. While that is not required, the two stages in a termination of parental rights proceeding are distinct.

The first is the adjudicatory stage, where the petitioner has the burden to prove by clear, cogent and convincing evidence the existence of at least one of the grounds for termination listed in N.C. Gen. Stat. § 7A-289.32 (now codified as section 7B-1111). The standards of "clear and convincing" and "clear, cogent and convincing" are synonymous and used interchangeably in Chapters 7A and 7B. *See In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). If the burden is met and a ground established by "clear, cogent and convincing" evidence, the trial court must proceed to the second stage and hold a dispositional hearing. Unless the trial court then determines that the

best interests of the child require otherwise, the termination order shall be issued. N.C. Gen. Stat. § 7A-289.31(a) (1998) (now codified as section 7B-1110(a)). *See also In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001); *In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

Accordingly, we review respondents' first assignment of error. They argue that none of the grounds set out in N.C. Gen. Stat. § 7B-1111 (formerly codified as section 7A-289.32) were proven by clear and convincing evidence.

Neglect of the child by respondents was the first ground found by the trial court. However, the trial court did not state the findings as to neglect, or any of the other grounds, were made by "clear, cogent and convincing evidence." This Court has held that the trial court must recite the standard of proof in the adjudicatory order and that a failure to do so is error.

> Although the termination statute does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized. Furthermore, we note the legislature has specifically required the standard of proof utilized by the trial court be affirmatively stated in the context of delinquent, undisciplined, abuse, neglect and dependent proceedings. Because termination proceedings and delinquent, undisciplined, abuse, neglect, and dependent proceedings are all contained in a single chapter of the General Statutes and relate to the same general subject matter, we construe these statutes together to determine legislative intent. Accordingly, we read section 7A-289.30(e) (now section 7B-1109(f)) to require the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding.

In re Church, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000) (citations omitted).

We note the trial court makes findings in the dispositional order based on "clear, cogent and convincing evidence." However, in determining best interests, there is no burden of proof at disposition. The trial court's finding in the separate dispositional order did not cure the defect in the adjudicatory order, even though the adjudicatory

findings were incorporated by reference and considered for the purpose of determining best interests.

Accordingly, we reverse and remand the matter to the trial court with instructions to determine whether the evidence in the adjudicatory hearing satisfies the required standard of proof.

REVERSED AND REMANDED.

Judges WALKER and McCULLOUGH concur.

LARRY KING AND WIFE, BETTY KING, PLAINTIFFS v. CHARLES KING AND ALBERT KING, DEFENDANTS

No. COA00-1282

(Filed 2 October 2001)

1. **Easements— ambiguous description—extrinsic evidence**

The trial court erred by granting defendant's motion to enforce the terms of a consent judgment entered into between plaintiffs and defendant directing plaintiffs to convey to defendant an easement over the pertinent property, because: (1) the description of the easement is ambiguous; and (2) the case must be reversed and remanded to the trial court to ascertain the location of the easement after consideration of extrinsic evidence.

2. **Appeal and Error— preservation of issues—failure to include transcript or other evidence**

Although plaintiffs contend the trial court erred by entering findings of fact and conclusions of law concerning damages to plaintiffs' property that were allegedly not supported by the evidence, this assignment of error is overruled because plaintiffs failed to include a transcript of evidence from the hearing or any other evidence to enable the Court of Appeals to make a determination.

Appeal by plaintiffs from order filed 6 July 2000 by Judge Laura J. Bridges in Transylvania County District Court. Heard in the Court of Appeals 11 September 2001.

McGuire, Wood & Bissette, P.A., by Heather Whitaker Goldstein, for plaintiff-appellants.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, for defendant-appellees.

GREENE, Judge.

Larry King and Betty King (collectively, Plaintiffs) appeal an order filed 6 July 2000 granting the motion of Charles King[1] (Defendant) to enforce the terms of a consent judgment entered into between Plaintiffs and Defendant.

The record shows Plaintiffs filed a complaint against Defendant and Albert King (King) on 4 December 1997 alleging trespass and wrongful cutting. On 11 January 2000, after motion by Plaintiffs, summary judgment was entered against King. Defendant and Plaintiffs entered into a consent judgment on 28 January 1998 (the consent judgment). The consent judgment provided, in pertinent part: Defendant would pay for any damages to Plaintiffs' property caused by Defendant; and Plaintiffs would convey to Defendant:

> an Easement Appurtenant over and across a twenty (20) foot Right of Way leading from the public road known as East Fork Road to [Defendant's] property as described in Deed Book 255 Page 484 and Deed Book 412 Page 465 of the Transylvania County Registry [(the easement)]. . . . The twenty (20) foot Right of Way shall include a Right of Way twenty (20) feet in width over the existing logging road and a twenty (20) foot Right of Way over and along a road constructed or to be constructed as described in Deed Book 255 Page 484 and Deed Book 412 Page 465 of the Transylvania County Registry.

Deed Book 255 Page 484 reveals a grant of land from Reba G. King (the Grantor) to Defendant. In addition to the land conveyed, the Grantor conveyed to Defendant:

> a non-assignable easement and right-of-way for road purposes over and across the existing logging road bed which runs from the above described property over and along the remaining property of the Grantor to its point of intersection with the driveway now serving the house which has been constructed by [King] on property of the Grantor and continuing along the

1. Albert King was not a party to Defendant's motion.

said [King] driveway through property of the Grantor to the East Fork Road . . . .

Deed Book 412 Page 465 is a deed from the Grantor to Defendant of land fully "depicted on that certain plat found in Plat File No. 6 at Slide No. 396."

After entering into the consent judgment, Plaintiffs failed to convey to Defendant the easement and Defendant subsequently moved the trial court to enter an order to enforce the consent judgment on 24 May 2000. The hearing on Defendant's motion was held on 5 June 2000, at which time neither party tendered any evidence. On 6 July 2000, the trial court entered an order enforcing the consent judgment and directing Plaintiffs to convey to Defendant the easement as described in the consent judgment. The trial court further found as fact "[t]hat Richard Fry presented a damage report to [Defendant] . . . showing damages in the amount of $19,491.00" and "[t]hat [Plaintiffs] paid for a partial survey at a cost of $1,000.00." The trial court ordered Defendant to pay damages to Plaintiffs in the amount set out in a damage report and Plaintiffs "shall be given a credit for $1,000.00 already given to surveyor Robert Hafler."

The issues are whether: (I) the location of the easement can be ascertained from the consent judgment; and (II) the trial court's findings of fact concerning damages to Plaintiffs' property are supported by competent evidence.

I

[1] Plaintiffs argue the trial court erred in enforcing the consent judgment when the description of the easement is ambiguous. We agree.

A consent judgment is a court-approved consensual contract between the parties which creates a final determination of their rights and duties. *Price v. Dobson*, 141 N.C. App. 131, 134, 539 S.E.2d 334, 336 (2000). In order for an agreement to constitute a valid contract, the parties' " 'minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.' " *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (quoting *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921)); *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). The description of an easement "must either be certain in itself or capable of being

reduced to a certainty by a recurrence to something extrinsic to which it refers," but "[t]here must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942). If the description of an easement is "in a state of absolute uncertainty, and refer[s] to nothing extrinsic by which it might possibly be identified with certainty," the agreement is patently ambiguous and therefore unenforceable. *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E.2d 269, 273 (1964). If, however, the description is "insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made," the agreement is latently ambiguous. *Id.* In the case of a latent ambiguity, the party seeking to enforce an easement "may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property," and the other party "may offer such evidence with reference thereto tending to show impossibility of identification." *Id.*

In this case, we are unable to determine the parties' agreement as to the location of the proposed easement.[2] The description of the easement, however, does point to extrinsic evidence by which identification of the easement might possibly be made and is therefore latently ambiguous. Accordingly, this case must be reversed and remanded to the trial court to ascertain the location of the easement after consideration of extrinsic evidence. *See Allen v. Duvall*, 311 N.C. 245, 251, 316 S.E.2d 267, 271 (1984) ("[w]hen the terms . . . leave it uncertain what property is intended to be embraced . . . , [extrinsic] evidence is admissible to fit the description to the land [but not] to create description").

II

[2] Plaintiffs also argue the trial court erred in entering findings of facts and conclusions of law concerning damages to Plaintiffs' property that were not supported by the evidence. Because Plaintiffs have failed to include a transcript of evidence from the hearing in this matter or any evidence which would enable this Court to determine whether the trial court's findings of fact are supported by competent evidence, we overrule this assignment of error. *See Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997) (it is generally the

2. We note the consent judgment and the order enforcing the consent judgment did not purport to serve as an easement, but merely direct Plaintiffs to convey the easement. Nevertheless, before Plaintiffs can be directed to convey the easement consistent with the consent judgment, the exact location of the easement must be ascertained.

"appellant's duty and responsibility to see that the record is in proper form and complete" and this Court will not presume error by the trial court when none appears on the record to this Court). Accordingly, the trial court's findings of fact and conclusions of law concerning damages to Plaintiffs' property are affirmed.

Reversed in part, affirmed in part, and remanded.

Judges CAMPBELL and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

2 OCTOBER 2001

ARTHUR v. ATC PETROLEUM, INC. No. 00-784	Ind. Comm. (No. 500689) (No. 436436)	Affirmed
BENNETT v. HARMON No. 00-1055	Wake (98CVS13072)	Affirmed
CAMPBELL v. G. M. HELMS CONSTR., INC. No. 00-1325	Mecklenburg (99CVS11992)	Affirmed
DILLARD v. MERCHANTS, INC. No. 00-906	Ind. Comm. (No. 706202)	Remanded
HILL v. HILL No. 00-1071	Henderson (99CVS67)	Affirmed
SHAMMA v. ALKHALDI No. 00-1178	Durham (99CVS4277)	Affirmed
STATE v. BLAKE No. 00-1060	Chatham (99CRS2618) (99CRS2621)	No error
STATE v. CARVER No. 00-769	Graham (98CRS22) (98CRS23) (98CRS24)	No error
STATE v. DAVIS No. 00-1040	New Hanover 98CRS031531)	No error
STATE v. GRIMES No. 00-991	Watauga (98CRS4257)	No prejudicial error
STATE v. GUITON No. 00-1080	Gaston (98CRS4658) (98CRS4659) (98CRS4661) (98CRS4662) (98CRS4663) (98CRS4664) (98CRS4665) (98CRS4666)	No Error
STATE v. JOHNSON No. 00-699	Gates (98CRS788) (98CRS925)	No error

STATE v. KEYS No. 00-954	Watauga (98CRS4264) (98CRS4265)	Affirmed
STATE v. LYLES No. 00-1147	Beaufort (98CRS7542) (98CRS7543) (98CRS7540) (98CRS7541)	In *State v. Lyles*, Nos. 98CRS7542, 7543, no error. In *State v. Crandle*, Nos. 98CRS7540, 7541, no error.
STATE v. PARKER No. 00-1074	Wilson (99CRS56275)	No error
STATE v. PEMBERTON No. 00-1044	Guilford (00CRS23047)	Affirmed
TURNER v. AMOCO FABRICS & FIBERS CORP. No. 00-1118	Ind. Comm. (No. 682059)	Affirmed
WILKERSON v. MACCLAMROCK No. 00-1308	Rutherford (99CVD225)	Appeal dismissed

WHITESIDE ESTATES, INC., PLAINTIFF v. HIGHLANDS COVE, L.L.C., DEFENDANT

No. COA00-1378, COA00-1005

(Filed 16 October 2001)

1. Nuisance— corporate—interference with use and enjoyment of land—sufficiency of evidence

The trial court did not err in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by denying defendant's motion for a directed verdict, its motion for judgment notwithstanding the verdict, or alternatively a new trial based on alleged insufficient evidence for a corporate nuisance claim, because: (1) the record supports the jury's finding that substantial evidence exists that defendant intentionally caused and allowed colloidal material to flow into plaintiff's creek and lake to such a degree as to substantially and unreasonably interfere with plaintiff's use and enjoyment of its land; and (2) the evidence was sufficient for the jury to conclude that the injury to plaintiff's property was substantial and significant to recover damages.

2. Trespass— land disturbing activities—sufficiency of evidence

The trial court did not err in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by denying defendant's motion for a directed verdict, its motion for judgment notwithstanding the verdict, or alternatively a new trial based on alleged insufficient evidence for a trespass claim, because there is sufficient evidence for the jury to conclude that defendant's land disturbing activities caused sediment to unlawfully enter upon plaintiff's property causing damage and injury.

3. Environmental Law— Sedimentation Pollution Control Act—sufficiency of evidence

The trial court did not err in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by denying defendant's motion for a directed verdict, its motion for judgment notwithstanding the verdict, or alternatively a new trial based on alleged insufficient evidence of

defendant's violation of the Sedimentation Pollution Control Act under N.C.G.S. § 113A-66(a)(4), because even though no statutory notices of violation were issued and the inspector testified that defendant had done as good a job as it could do, substantial evidence proves that sediment left defendant's site and caused injury to plaintiff.

4. Damages— reasonable cost to repair and restore property—prenuisance condition

The issue of damages for the repairing and restoration of plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property is remanded to the trial court because: (1) plaintiff's evidence failed to establish, with as much certainty as the nature of the circumstances permit, the reasonable estimate of the cost to repair and restore plaintiff's lake and creek to its prenuisance condition; and (2) no evidence at trial established with reasonable certainty plaintiff's costs to control, on plaintiff's property, the source of sediment coming off defendant's property.

5. Damages— requested jury instruction—condition of lake

The trial court did not err in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by refusing to give defendant's requested jury instruction concerning evidence from plaintiff corporation's shareholders regarding the condition of the lake as evidence of damage sustained by defendant, because the testimony about the condition of the lake goes directly to the question of injury sustained to the property.

6. Damages— requested jury instructions—preventive measures—aesthetic injury—increased sedimentation

The trial court did not err in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by refusing to give defendant's requested jury instructions that preventive measures may not be considered as any measure of damage suffered by plaintiff, there has been no evidence of a valuation or amount of damage caused by the aesthetic injury, and the sediment being deposited on plaintiff's property is no more than the amount in the past, because: (1) the trial court instructed the jury that any evidence offered by plaintiff with

respect to adequately detaining the source of sediment leaving defendant's property is not necessarily evidence of preventive measures; (2) there was sufficient evidence of defendant's injury to sustain an award for damages; and (3) the amount of sediment affecting plaintiff's property goes to the issue of reasonableness of the interference or invasion and the significance of the injury.

7. Evidence-scientific— turbidity samples from lake and creek water

The trial court did not abuse its discretion in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by allowing the introduction of turbidity samples from the lake and creek water into evidence, because: (1) the trial court found plaintiff's expert testimony about turbidity sampling was reliable under N.C.G.S. § 8C-1, Rules 702 and 703, defendant offered no evidence of turbidity readings, and defendant failed to offer evidence that the measurements were inaccurate; and (2) five jars of water with different turbidity levels were introduced for illustrative purposes only to assist the jury in determining different levels of turbidity.

8. Costs— attorney fees—apportionment—same nucleus of operative facts

The trial court was not required to apportion attorney fees in plaintiff's actions under the Sedimentation Pollution Control Act, common law nuisance, and trespass even though attorney fees are generally not recoverable for plaintiff's common law nuisance and trespass claims, because: (1) the allowance of attorney fees under the Sedimentation Act is expressly in the discretion of the trial court under N.C.G.S. § 113A-66(c); and (2) all of plaintiff's claims arise from the same nucleus of operative facts and each claim was inextricably interwoven with the other claims.

9. Costs— attorney fees—reasonableness

The trial court did not abuse its discretion by awarding attorney fees in plaintiff's actions under the Sedimentation Pollution Control Act, common law nuisance, and trespass, because: (1) the trial court made the appropriate 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; (2) plaintiff's counsel amended its motion to reduce its invoice for legal fees

for unrelated matters; and (3) defendant has not argued that the hourly fee or time expended was unreasonable.

10. Costs— expert witness fees—Sedimentation Pollution Control Act—failure to subpoena witness

The trial court erred by awarding expert witness fees to plaintiff under N.C.G.S. § 7A-314 based on plaintiff's claim under the Sedimentation Pollution Control Act, because the statute provides the requirement that all witnesses must be subpoenaed before they are entitled to compensation, and there is no evidence in the record that plaintiff's expert witnesses appeared under subpoena.

Appeal by defendant from judgment entered 6 March 2000 and order entered 30 May 2000 by Judge J. Marlene Hyatt in Jackson County Superior Court. Both appeals heard in the Court of Appeals 15 August 2001.

Roberts & Stevens, P.A., by William Clarke, for plaintiff-appellee.

Creighton W. Sossomon, and Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Elizabeth B. Partlow and Keith E. Coltrain, for defendant-appellant.

TYSON, Judge.

Highlands Cove, L.L.C. ("defendant") appeals from judgment entered upon the verdict of the jury, the trial court's order denying motion for judgment notwithstanding the verdict and/or new trial, and the trial court's order awarding attorney and expert witness fees. We affirm the judgment and remand for a new trial on damages only, and we affirm the trial court's order awarding fees in part and reverse in part.

At the outset we note that the appeal from the judgment and the trial court's order denying defendant's motion for judgment notwithstanding the verdict and/or new trial, COA00-1378, was filed separate from the appeal of the order awarding attorney and expert witness fees, COA00-1005. These inter-related appeals were consolidated for hearing *ex mero motu*. *See* N.C.R. App. P. 40. Both appeals are decided within this opinion.

I. Facts

Defendant purchased approximately 400 acres of real property that adjoins and is upstream from property owned by Whiteside Estates, Inc. ("plaintiff") in March of 1998. Defendant acquired its property to construct residential units and a golf course.

Plaintiff, a corporation whose sole shareholders are O.E. Young, Jr. ("Young"), his wife Mary Lou Young, and their five children, owns approximately 265 acres. Plaintiff's property is directly downstream from defendant's development. In 1957, Young constructed a dam on Grassy Camp Creek ("creek") which ran through the property, forming an eighteen-acre lake known as Young Lake ("lake"). The creek traverses both defendant's and plaintiff's property.

The Land Quality Section of the North Carolina Department of Environment and Natural Resources ("DENR") issued defendant a Sedimentation and Erosion Control permit and approved their plan to develop its property on or about 29 July 1998. Defendant began construction shortly thereafter.

The evidence tended to show that significant rainfall caused sediment from defendant's land-disturbing activities to flow into the creek in October 1998. Plaintiff's lake and creek collected colloidal material after that first rainfall and every subsequent rainfall, impacting the lake water's quality, damaging the creek, and invading plaintiff's use and enjoyment thereof.

The North Carolina Division of Land Resources ("NCDLR") inspected the project almost weekly during defendant's construction, compiling numerous reports. Although no statutory "Notices of Violation" were issued pursuant to G.S. § 113A-61.1, several reports indicated that: (1) defendant's activities utilized "insufficient measures to retain sediment on site," (2) defendant failed "to take reasonable measures," on site during construction, and (3) defendant's site was not in compliance with the Sedimentation Pollution Control Act ("Sedimentation Act").

Plaintiff sought and obtained a temporary restraining order. At the return hearing on the order, plaintiff sought to enjoin defendant's project. The trial court denied the injunction. Plaintiff then filed a complaint seeking damages for nuisance, trespass, and violation of the Sedimentation Act on 31 March 1999. Defendant answered denying all allegations and counterclaimed for abuse of process. At the close of plaintiff's evidence and again at the close of all the evidence,

defendant moved for a directed verdict. Both motions were denied. The jury returned a verdict in plaintiff's favor of $500,000.00 on 6 March 2000. The jury's verdict did not segregate the damages between plaintiff's three claims. The trial court entered judgment thereon. Defendant moved for judgment notwithstanding the verdict, or in the alternative, a new trial. The trial court denied the motion on 30 May 2000. Defendant appeals.

Plaintiff's counsel subsequently moved for attorney fees in the amount of $67,246.50, expenses in the amount of $3,500.16, and expert witness fees in the amount of $37,353.13 pursuant to G.S. § 113A-66(c). Copies of counsel's invoices for legal services, an affidavit of William Clarke, plaintiff's counsel, copies of invoices for plaintiff's three expert witnesses, and an affidavit of J. David Young, managing agent for plaintiff, were filed in support of the motion.

Plaintiff amended its motion for attorney and expert witness fees by reducing the amount requested for attorney fees by $7,700.00, for work involving the same parties but for another matter, on 8 May 2000. The amendment included a second affidavit of William Clarke setting forth the hourly rates for the legal services rendered, the fact that the hourly rates charged were commensurate with the type of work involved, and are within the range of such fees and charges customarily charged in the community.

On 30 May 2000, the trial court entered an order awarding plaintiff attorney fees in the amount of $58,546.50, less than plaintiff's requested amount, and expert witness fees in the amount of $37,353.13. Defendant appeals.

II. Issues

Defendant assigns the following errors on appeal: (1) the trial court erred in denying defendant's motions for a directed verdict and its motion for judgment notwithstanding the verdict or, alternatively, a new trial because the evidence was insufficient to sustain a judgment on plaintiff's three claims for relief; (2) the trial court erred when it rejected defendant's proposed jury instructions; (3) the jury verdict was excessive and reflected a disregard for the jury instructions and was influenced by passion; (4) the trial court erred by admitting into evidence the testimony of two plaintiff witnesses and certain demonstrative evidence; and (5) the trial court erred in granting plaintiff's attorney and expert witness fees.

III. Sufficiency of the Evidence

A. Nuisance

[1] Defendant argues that plaintiff presented no evidence that it interfered with corporate plaintiff's use and enjoyment of its property.

"To recover in nuisance, plaintiffs must show an unreasonable interference with the use and enjoyment of their property." *Jordan v. Foust Oil Co., Inc.*, 116 N.C. App. 155, 167, 447 S.E.2d 491, 498 (1994) (citation omitted). The interference or invasion which subjects one to liability may be intentional or unintentional. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953).

Unintentional nuisance occurs when defendant's conduct is negligent, reckless, or ultrahazardous. *Id.* Intentional nuisance, on the other hand, focuses on the unreasonableness of the interference. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 617, 124 S.E.2d 809, 813 (1962); *see also* David A. Logan & Wayne A. Logan, *North Carolina Torts*, § 28.10, at 605 n.13 (1996) (A private nuisance may be created or maintained without negligence). "A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury." *Morgan*, 238 N.C. at 194, 77 S.E.2d at 689 (citations omitted); *Parker v. Barefoot*, 130 N.C. App. 18, 502 S.E.2d 42 (1998), *rev. on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999) (A defendant's use of state-of-the-art technology or the fact that he was not negligent in the design or construction of his facility are not defenses to a nuisance claim).

An intentional invasion or interference occurs when a person acts with the purpose to invade another's interest in the use and enjoyment of their land, or knows that it will result, or will substantially result. *Morgan*, 238 N.C. at 194, 77 S.E.2d at 689 (citations omitted).

An intentional invasion or interference, however, is not always unreasonable. *Watts*, 256 N.C. at 618, 124 S.E.2d at 814. In *Watts*, our Supreme Court listed factors to be considered in assessing whether an intentional interference is unreasonable:

> the surroundings and conditions under which defendant's conduct is maintained, the character of the neighborhood, the nature, utility and social value of defendant's operation, the nature, util-

> ity and social value of plaintiffs' use and enjoyment which have been invaded, the suitability of the locality for defendant's operation, the suitability of the locality for the use plaintiffs make of their property, the extent, nature and frequency of the harm to plaintiffs' interest, priority of occupation as between the parties, and other considerations arising upon the evidence. No single factor is decisive; all the circumstances in the particular case must be considered.

Id. (citations omitted); *See also Pendergrast v. Aiken* 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977).

To be actionable, "[t]he interference must be substantial and unreasonable. *Substantial* simply means a significant harm to the plaintiff and *unreasonably* means that it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 88, at 626 (5th ed. 1984) (emphasis supplied).

Once plaintiff establishes that the invasion or intrusion is unreasonable, plaintiff must prove the invasion caused substantial injury to its property interest. *Watts*, 256 N.C. at 619, 124 S.E.2d at 814; *Rudd v. Electrolux Corp.*, 982 F.Supp. 355 (M.D.N.C. 1997) (need to install wells to monitor water quality presented jury question whether defendant's invasion was substantial). "An upper riparian landowner's unreasonable use of water quantity or diminution of its quality permits a lower riparian owner to maintain a civil action in nuisance or trespass to land." *Biddix v. Henredon Furniture Industries, Inc.*, 76 N.C. App. 30, 35, 331 S.E.2d 717, 721 (1985) (citations omitted). "The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem." N.C. Gen. Stat. § 113A-51 (1975). " 'The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation.' " *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 21, 431 S.E.2d 828, 838 (1993) (quoting Prosser, *supra*, § 87, at 619 (footnote omitted)).

Here, it is uncontroverted that the plaintiff is the owner of the property, and that defendant engaged in land-disturbing activity. Plaintiff presented evidence that defendant began clearing its property in July of 1998. The evidence tended to show that after significant rainfall, sediment from those activities flowed into plaintiff's creek

and lake, despite defendant's State-approved erosion control measures. Plaintiff entered into evidence numerous photographs of the lake's condition before and after defendant's land-disturbing activity. Before defendant's development began the lake was crystal clear. After defendant's development commenced the lake had the appearance of coffee with cream. There is substantial evidence that defendant's activities were the major, if not the sole, source of the runoff.

Plaintiff offered expert testimony that described the decreased level of water quality in the lake as well as increased levels of erosion and sediment in its creek. Water sampling test results tended to show that turbidity levels (a measurement of the amount of light bouncing off suspended particles in water) dramatically increased. Dr. Ken Wagner ("Wagner") also testified that defendant's sedimentation and erosion control plan was inadequate, "causing high turbidity" in plaintiff's creek and lake. He also described the harm caused to aquatic life in the lake.

Inspector Mike Goodson ("Goodson") inspected defendant's project for compliance with its plan, and testified as defendant's witness that sedimentation had left the site and entered into the creek. Goodson also testified that although he did inspect defendant's property, he never "walk[ed] to the property boundary" to see if the sediment that left defendant's property damaged plaintiff's property. He further testified that he never sampled the water quality in plaintiff's lake.

Plaintiff's shareholders testified that for forty years the lake and creek had been used for fishing, swimming, boating, and other recreational uses. After defendant's land-disturbing activities started, the water became polluted with sediment and the lake was unfit for such activities. Defendant contends that corporate plaintiff presented no evidence of harm to the corporation: "Plaintiff offered no testimony of impairment of business relationships, lost rentals, lost sales, or lost revenues of any kind . . . Plaintiff put forth no evidence that the fair market value of its asset had depreciated because of the alleged injuries." Defendant asserts that the evidence failed to support a corporate nuisance claim. We disagree.

Plaintiff's corporate charter lists as one of its purposes and objects to "buy, sell, exchange . . . water rights and privileges; to build, construct, operate, maintain, . . . reservoirs to impound water, ..." Sedimentation deposits and collodial suspended material

substantially damage water quality and impact the above mentioned corporate use.

A plaintiff need not establish loss of fair market value in the property or lost rentals, sales, or revenues to show sufficient injury to support damages in nuisance. These items are one method of measuring damages after substantial injury is proven, not a method for determining injury. Plaintiff must show that the injury was substantial or significant. *Watts*, 256 N.C. at 619, 124 S.E.2d at 814. Here, plaintiff's shareholders testified that the injury to its lake and creek was substantial and significant.

The record supports the jury's finding that substantial evidence exists that defendant intentionally caused and allowed colloidal material to flow into plaintiff's creek and lake to such a degree as to substantially and unreasonably interfere with plaintiff's use and enjoyment of its land. The evidence was also sufficient for the jury to conclude that the injury to plaintiff's property was substantial and significant to recover damages.

B. Trespass

[2] Defendant argues that the evidence failed to support a claim for trespass because no suspended solids were deposited on the land, "but rather continued downstream as water in the lake was released." Defendant asserts that since there was no evidence that sediment settled in the lake, and that "there is no property right in any particular particle of water or in all of them put together" there can be no trespass. *Smith v. Town of Morganton*, 187 N.C. 801, 802, 123 S.E.2d 88, 89 (1924). Defendant also contends that if there is sediment on plaintiff's property there is no evidence that defendant caused it.

A fuller contextual quotation from *Smith v. Town of Morganton* reveals defendant's error with respect to property rights in water.

> the right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor. (citation omitted) . . . [A] riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and

> unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors. (citations omitted).

Id. at 803, 123 S.E.2d at 89.

Defendant's argument that since there was no evidence that any suspended material in the lake settled bars recovery in trespass is misplaced. First it fails to address the evidence that there was sediment in and about plaintiff's creek caused by defendant's land-disturbing activity. Second, Wagner testified that "there is a fine coating of sediment on the bottom [of the lake]. It's not much . . . but that fine stuff could get resuspended by wind . . . and cause high turbidity."

"The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession." *Foust Oil Co., Inc.*, 116 N.C. App. at 166, 447 S.E.2d at 498 (citing *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952)).

Viewing the evidence in the light most favorable to the plaintiff, we hold that there is sufficient evidence for the jury to conclude that defendant's land disturbing activities caused sediment to unlawfully enter upon plaintiff's property causing damage and injury.

C. Sedimentation Pollution Control Act

[3] Although we find that the nuisance and trespass claims are sufficient to show damages, we address defendant's assignment of error regarding the statutory claim. The Sedimentation Act contains an attorney fee and expense shifting clause. N.C. Gen. Stat. § 113A-66(a)(4) (1999). The trial court awarded plaintiff attorney and expert witness fees following the jury's finding that defendant violated the Sedimentation Act.

Defendant argues that it did not violate the Sedimentation Act nor did it cause damage or injury to plaintiff's property. We disagree.

The act expressly authorizes a private action for damages:

> "[a]ny person injured by a violation of [the Sedimentation Act] . . . or by the initiation or continuation of a land-disturbing activity for which an erosion control plan is required other than

> in accordance with the terms, conditions, and provisions of an approved plan, may bring a civil action [seeking damages] against the person alleged to be in violation . . . ."

N.C. Gen. Stat. § 113A-66(a) (1999).

Defendant correctly argues that "[t]o be recoverable, the damages sought by the plaintiffs must be 'caused by the violation.' " *Huberth v. Holly*, 120 N.C. App. 348, 353, 462 S.E.2d 239, 243 (1995). This Court in *Holly* found no violation of the Sedimentation Act because there was no evidence that the violation *caused* the loss of trees or groundcover. *Id.* (emphasis supplied).

Here, we find there was sufficient evidence for the jury to conclude that defendant's violation of the Sedimentation Act caused sediment to damage plaintiff's creek and lake. Although no statutory "Notices of Violation" were issued and Inspector Goodson testified that defendant had "done as good a job as they can do," substantial evidence proves that sediment left defendant's site and caused injury to plaintiff.

Goodson testified that "there were times when I felt like they weren't meeting the plan and steps were taken to correct that." Goodson stated that he would "scream and yell" at the contractors to correct the problems. Goodson also testified that during at least one inspection a "basin had filled up and some sediment had gone . . . into grassy camp [creek]." He further testified that he never walked to the plaintiff's property to see if sediment that migrated into the creek on defendant's property traveled through the creek or lake onto plaintiff's property.

An inspection report dated 6 October 1998 stated that there were "[i]nsufficient measures to retain sediment on site, G.S. 113A-57(3)." This report also cited defendant's "[f]ailure to take all reasonable measures, 15A NCAC 4B.0005" and that the site was not in compliance with the Sedimentation Act and the rules. Goodson noted defendant's need to "install measures to retain sediment within property boundaries. Install silt fence per approved plan." The report stated that "access bridges across 13 & 14 fairways are not adequately protected and stabilized, silt fence . . . not properly toed in, sediment is leaving site at end of #15 fairway." The report concluded that these items must be addressed immediately.

A report on 7 December 1998 noted that the site is not currently in compliance with the Sedimentation Act and the rules. The devel-

opment had failed "to follow approved plan, G.S. 113A-61.1." The report required defendant to "install measures per approved plan" as corrective actions needed. Additional comments noted that "[s]ediment trap #SP18FR2 has not been installed per plan . . . Areas in PH.I have not been stabilized per construction schedules discussed on 12/4/98."

Another report dated 16 December 1998 also concluded that the development was not in compliance with the Sedimentation Act and rules. The report found that (1) the site had an "inadequate buffer zone, G.S 113A-57(1);" (2) it failed "to maintain erosion control measures, 15A NCAC 4B.0013;" (3) there were "insufficient measures to retain sediment on site, G.S. 113A-57;" (3) and that sedimentation damage has occurred since the last inspection. The report required the defendant to "re-install buffer-zone at bridge site on #10." The report noted that the "silt fence . . . is in disrepair at #10 bridge site. Need to seed and mulch around this area to reestablish buffer."

Viewed in the light most favorable to the plaintiff, we hold that there was sufficient evidence to find defendant violated the Sedimentation Act and damaged plaintiff.

IV. Verdict Amount

[4] Defendant argues that the $500,000.00 jury verdict was excessive, reflected a disregard for the trial court's jury instructions, and based on passion or prejudice. Defendant contends that evidence of the cost of repair was speculative, conjectural, and lacked reasonable certainty. Defendant requests that we modify the judgment to $20,000.00, "the maximum amount that could properly have been awarded." Alternatively, defendant requests that we reverse judgment and order a new trial.

The trial court's jury instruction included the following: "In this case you will determine actual damages by determining the reasonable costs to the plaintiff of expenses shown by the evidence necessary for repairing or restoring the plaintiff's property. You may not speculate in regard to future damages, if any."

Once liability is established for an abatable or temporary nuisance, the remedy includes money damages. *Phillips v. Chesson*, 231 N.C. 566, 569-70, 58 S.E.2d 343, 346 (1950). For an abatable nuisance, plaintiff may only recover damages up to the time of the complaint or trial. *Id.; see also Webb v. Virginia-Carolina Chemical Co.*, 170 N.C. 662, 666, 87 S.E. 633, 635 (1916). Future damages must be recovered

in successive actions. *Id.* "The continued migration of contaminants remains a nuisance and when each contaminant crosses onto an adjoining property, there is a new trespass and injury." *Electrolux Corp.*, 982 F.Supp at 369. "The kinds of damages recoverable include: diminished rental value; reasonable costs of replacement or repair; restoration of the property to its pre-nuisance condition; and other added damages for incidental losses." *Id.* at 372 (citing *Phillips*, 231 N.C. at 571-72, 58 S.E.2d at 348). "Some commentators indicate that incidental losses might include, under appropriate circumstances, recovery of plaintiff's reasonable costs incurred to prevent future injury or abate the nuisance or its harmful effects." *Id.* at n.12 (citing Prosser, *supra*, § 89 at 640). "Where the nuisance is the kind that does more or less tangible harm to the premises, the cost of repair or restoration may be the appropriate measure of damages, ..." Prosser, *supra*, § 89, at 639 (quoting Dobbs, *Remedies*, 1973, 332-35).

Plaintiff is entitled to compensation to the extent that he has established damages " 'with as much certainty as the nature of the tort and the circumstances permit.' " *Largent v. Acuff*, 69 N.C. App. 439, 444, 317 S.E.2d 111, 114 (1984) (citation omitted). Proof of damages requires " 'that the plaintiff adduce some relevant datum from which a 'just and reasonable' estimate of the amount might be drawn . . . [This] does not require proof of damages with mathematical precision.' " *Id.*

At bar, plaintiff offered expert testimony of the cost to repair and restore its creek and lake. All of the approaches assumed that the source, defendant's activities, would be adequately controlled. If not controlled, repairing and restoring plaintiff's property would be ineffective.

Wagner testified that cleaning the lake would cost $20,000.00. He explained that "of course, you only want to do that once you've controlled the source."

Controlling the source involved repairing and restoring the creek and controlling the amount of sedimentation emanating from defendant's property. Wagner discussed two procedures to restore the creek. One approach would cost between $75,000.00 and $150,000.00. The other approach would "be, roughly, double the cost of the other approach." The evidence adduced to repair and restore the lake and creek on plaintiff's property ranged from $95,000.00 to $320,000.00. We conclude that plaintiff's evidence has failed to establish, with as

much certainty as the nature of the circumstances permit, the reasonable estimate of the cost to repair and restore plaintiff's lake and creek to its pre-nuisance condition.

Wagner testified concerning the cost of adequate detention to control the erosion coming off defendant's property. He testified that adequate detention would cost between $1,400,000.00 and $4,000,000.00. Defendant argues that Wagner's testimony about controlling and detaining the source on defendant's property was evidence of defendant's preventing injuries or "at most evidence of costs defendant should have incurred" and "irrelevant to the issue of how much plaintiff was entitled to recover" in damages. We agree that Wagner's testimony about the cost of controlling the sedimentation coming off defendant's property was evidence of defendant's costs on his property. We note that the evidence about controlling the erosion coming off defendant's property, however, was not irrelevant to the determination of plaintiff's damages. Plaintiff was entitled to the cost to control that source only if necessary to repair and restore the creek and lake. No evidence at trial established with reasonable certainty plaintiff's costs to control, on plaintiff's property, the source of sediment coming off defendant's property.

Wagner testified that defendant's sedimentation and erosion control plan was inadequate. He also testified that if nothing were done to prevent and control sediment coming down the creek from defendant's property, the repairs of the lake and creek on plaintiff's property would be ineffective. The jury could have reasonably concluded that in order to restore and repair plaintiff's lake and creek, plaintiff would have to take adequate and reasonable measures to control the source on its property.

The only testimony regarding the cost to control the source of sedimentation was testimony by Wagner. He testified that "they [defendant] need a lot more detention and they need some sort of auxiliary system to remove the colloidal material that are causing high turbidity." He estimated defendant's cost between 1,400,000.00 and 4,000,000.00.

We hold that there is insufficient evidence in the record of the reasonable estimate of costs to repair and restore the creek and lake to its pre-nuisance condition with as much certainty as the circumstances require. The record contains no evidence regarding the plaintiff's cost to control the source on its property. We remand for a new trial on damages only. N.C. Gen. Stat. § 1-297 (1969).

V. Jury Instructions

Defendant contends the trial court erred by refusing to give defendant's four additionally requested jury instructions. We disagree.

When a party's requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction. The instructions need not be given exactly as submitted, but they must be given in substance. *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976); *Haymore v. Thew Shovel Co.*, 116 N.C. App. 40, 49, 446 S.E.2d 865, 871 1994 (citation omitted). The trial court has discretion to refuse instructions based on erroneous statements of the law. *State v. Agnew*, 294 N.C. 382, 395-96, 241 S.E.2d 684, 692 (citations omitted), *cert denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978).

A. Corporate Plaintiff

[5] Defendant asked the trial court to instruct the jury as follows:

> there has also been evidence offered by the individuals O.E. Young, David Young and Mary Lou Young tending to show that they have lost the use of the lake for swimming, fishing, frogging, boating and the general pleasure of enjoying the view of the lake and its use by themselves and their friends, relatives and guests. I charge you in this regard that the corporation may not recover for any personal loss by these individuals, or any other individuals. Their testimony should be considered by you only in connection with the history of the lake or its general fitness for use for these purposes, if at all, unless they were, in so using the lake, doing so in pursuit of some corporate purpose.

The trial court did not give this instruction. Defendant argues that any evidence from plaintiff's shareholders regarding the condition of the lake was not evidence of damage sustained by the plaintiff. This argument is without merit. Plaintiff's shareholder's testimony about the condition of the lake goes directly to the question of injury sustained to the property. Any relevant evidence establishing injury to the plaintiff's property was appropriate.

B. Preventive Measures by Defendant

[6] Defendant requested the trial court charge the jury that "preventive measures may not be considered by you as any measure of damage suffered by plaintiff." The trial court's instruction included the

following: "In this case you will determine actual damages by determining the reasonable costs to the plaintiff of expenses shown by the evidence necessary for repairing or restoring the plaintiff's property. You may not speculate in regard to future damages, if any." Any evidence offered by the plaintiff with respect to adequately detaining the source of sediment leaving defendant's property is not necessarily evidence of preventive measures. Plaintiff would be entitled to costs for controlling the source of sediment on defendant's property when it impacts plaintiff's property if necessary to repair and restore the creek and lake. If defendant does not adequately detain sediment from leaving its property or prevent injury to plaintiff's property, plaintiff can take reasonable measures to protect its property in order to repair and restore its lake and creek.

C. Aesthetic Damages

Defendant requested that the trial court instruct the jury in part that "I charge you that there has been no evidence of a valuation or amount of damage caused by this [aesthetic] injury." Whether evidence has been presented or not is a question for the jury. This requested instruction was erroneous. There was sufficient evidence of plaintiff's injury to sustain an award for damages.

D. Increase Sedimentation Charge

Defendant requested the additional instruction that "sediment being deposited now [on plaintiff's property] is no more than, or not measurable more than in the past." Both sides presented their evidence. It was for the jury, as fact finder, to determine from the evidence the volume of sediment that flowed onto plaintiff's property. The amount of sediment affecting plaintiff's property goes to the issue of reasonableness of the interference or invasion and the significance of the injury.

The trial court's instructions to the jury sufficiently defined the law and were supported by the evidence with respect to every substantive element of the case. Defendant's assignments of error are overruled.

VI. Testimony and Demonstrative Evidence

[7] Defendant contends that the introduction of turbidity samples from the lake and creek water into evidence was error. Defendant claims that the instrument used by plaintiff's expert witness John Boaze ("John") was not properly calibrated.

The admissibility of scientific evidence is governed by Rules 702 and 703 of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 702-703 (1999). "Whether scientific opinion evidence is sufficiently reliable and relevant is a matter entrusted to the sound discretion of the trial court." *State v. Spenser*, 119 N.C. App. 662, 664, 459 S.E.2d 812, 814 (1995) (citation omitted). After a *voir dire* hearing, the trial court determined that John's testimony about turbidity sampling was reliable. Sufficient evidence in the record supports the trial court's finding.

John testified that he has twenty-eight years experience taking water samples after obtaining his master's degree. He had prepared annual reports of water quality for the Army Corps of Engineers investigating impacts on stream water. At the time of trial, John was monitoring turbidity levels during the construction of state route 52 in Tennessee.

Additionally, defense counsel cross-examined John. Defendant offered no evidence of turbidity readings. Nor did defendant offer any evidence that the measurements were inaccurate. Accordingly, we find no abuse of discretion.

Defendant also argues that five jars of water with different turbidity levels should have been excluded because no one authenticated the evidence as being the water in plaintiff's lake. After *voir dire* of plaintiff's expert witness Pam Boaze ("Pam"), the trial court allowed the five jars into evidence for illustrative purposes only to demonstrate what various levels of turbidity look like. Pam authenticated the evidence not as water from the lake, but as demonstrative evidence to assist the jury in determining different levels of turbidity. The exhibits were not introduced as substantive evidence. This assignment of error is overruled.

VII. Attorney and Expert Witness Fees

Defendant argues on appeal that the trial court's granting of attorney and expert witness fees: (1) erroneously included expenses incurred in prosecuting its common law claims and defending its counterclaim, (2) were not supported by the evidence and findings of fact, and (3) the court improperly awarded expert witness fees without proof that the witnesses were subpoenaed.

A. Apportionment of Fees

[8] The general rule is that attorney fees may not be recovered by the successful litigant as damages or a part of the court costs, unless

expressly authorized by statute or a contractual obligation. *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980).

N.C. Gen. Stat. § 113A-66(c) (1999) provides:

> The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation (including reasonable attorney and expert-witness fees) to any party, whenever it determines that such an award is appropriate.

This section expressly allows attorney and expert witness fees for civil actions brought under the Sedimentation Pollution Control Act of 1973 ("Sedimentation Act") as an exception to the general rule. N.C. Gen. Stat. § 113A-50 et. seq.

Defendant correctly argues that fees are not recoverable for plaintiff's common law nuisance and trespass claim nor in defending against a counterclaim for abuse of process. *Holly*, 120 N.C. App. at 354, 462 S.E.2d at 243. However, where all of plaintiff's claims arise from the same nucleus of operative facts and each claim was "inextricably interwoven" with the other claims, apportionment of fees is unnecessary. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 596, 525 S.E.2d 481, 487 (2000) (multiple state law and federal civil rights claims litigated together could fairly be charged under 42 U.S.C.A. Sec. 1988). This Court applies the reasonable relation test: "reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys' fees statutes" in awarding fees for attorney activity connected with that under the statute. *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 228, 319 S.E.2d 650, 656, *rev. denied*, 312 N.C. 621, 323 S.E.2d 922 (1984) (allowing attorney fees for bankruptcy, foreclosure, and receivership actions under N.C. Gen. Stat. § 6-21.2, since such activity was connected to the collection of the note).

Here, all three claims were based on the same intertwined nucleus of facts, defendant's land-disturbing activity and its impact on plaintiff's property. The trial court observed the evidence presented in the course of six days of trial as well as the parties' arguments, motions, and responses. On 8 May 2000, plaintiff's attorney amended its motion to remove fees for services involving the same parties in an unrelated matter. We find competent evidence in the record to hold that all three claims arose from a common nucleus of facts making apportionment of the fees unnecessary and unrealistic.

B. Showing of Reasonableness

[9] Defendant argues that to support a discretionary award of attorney fees, there must be evidence and findings of fact to support the reasonableness of the award. *Coastal Prod.*, 70 N.C. at 226, 319 S.E.2d at 655. " 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *West v. Tilley*, 120 N.C. App. 145, 149, 461 S.E.2d 1, 3 (1995) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). The allowance of attorney fees under the Sedimentation Act is expressly in the discretion of the trial court. N.C. Gen. Stat. § 113A-66(c); *see McDaniel v. North Carolina Mut. Life Ins. Co.*, 70 N.C. App. 480, 483, 319 S.E.2d 676, 678, *disc. review denied*, 312 N.C. 84, 321 S.E.2d 897 (1984). We review the trial court's award under an abuse of discretion standard. *Wachovia Bank of N.C., N.A. v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 175, 450 S.E.2d 527, 533 (1994). To show an abuse of discretion, defendant must prove 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." *Robinson v. Shue*, 145 N.C. App. 60, 65, — S.E.2d —, — (July 17, 2001) (No. 00-1059) (citing *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)).

Defendant argues that it is an abuse of discretion to grant attorney fees without making appropriate 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. *Brookwood Unit Ownership Ass'n. 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 Lab., 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)).

In this case, the record reveals that detailed invoices for legal fees were submitted to the trial court along with an affidavit of William Clark, plaintiff's counsel, which sets forth the hourly rates for the legal services rendered, the fact that the hourly rates charged were commensurate with the type of work involved, and are within the range of such fees and charges customarily charged in the community. Plaintiff's attorney amended its motion to reduce its invoice for legal fees for unrelated matters. Defendant has not argued that the hourly fee or time expended was unreasonable, but that portions of the attorney and expert witness fees were not related to this case.

Defendant made the same argument before the trial court. The trial court in its order stated "having considered the arguments of the attorneys as well as their written motions and responses hereby determines that an award of attorney and expert-witness fees is appropriate." Defendant has presented no evidence that the trial court ignored its motion, responses, or arguments. Absent such a showing by defendant, we cannot find an abuse of discretion. The order allowing attorney fees is affirmed.

C. Expert Witness Fees

[10] Also submitted were detailed invoices for expert witness fees along with an affidavit of J. David Young regarding those fees. The Sedimentation Act authorizes the award of costs, including expert witness fees. N.C. Gen. Stat. § 113A-66(c) (1999). The decision to award expert witness fees also rests within the court's discretion. Defendant argues that the trial court erred in awarding expert witness fees since their testimony was not pursuant to a subpoena. N.C. Gen. Stat. § 7A-314 (1999); *Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992).

N.C. Gen. Stat. § 7A-314(a) and (d) provide:

> (a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which, except as to witness before the Judicial Standards Commission, must be certified to the clerk of superior court.
>
> . . . .
>
> (d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize.

As interpreted by our Supreme Court in *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 659 (1972), "[s]ections (a) and (d) must be considered together, section (d) modifies section (a) by permitting the court, in its discretion, to increase the compensation and allowances." "The modification . . . does not abrogate the requirement

that all witnesses must be subpoenaed before they are entitled to compensation." *Id.* at 27-28, 191 S.E.2d at 659.

The subpoena requirement under G.S. § 7A-314 has been applied in conjunction with the award of costs pursuant to G.S. § 6-20; *see Campbell v. Pitt Co. Mem. Hosp.*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd* 321 N.C. 260, 362 S.E.2d 273 (1973), *overruled on other grounds, Johnson v. Ruark Ob. & Gyn. Assoc.*, 327 N.C. 283, 395 S.E.2d 85 (1990); *Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992). There is no evidence in the record that plaintiff's expert witnesses appeared under subpoena. Without the witnesses being subpoenaed, the trial court had no authority to award expert witness fees. We hold that the order allowing fees for expert witnesses not subpoenaed must be reversed.

Affirmed in part as to defendant's liability, and remanded for a new trial on damages only, and affirmed in part as to award of attorney fees and costs, and reversed in part as to the award of expert witness fees.

Affirmed in part, reversed in part and remanded.

Judges WYNN and HUNTER concur.

PNE AOA MEDIA, L.L.C., PLAINTIFF-APPELLANT v. JACKSON COUNTY, JACKSON COUNTY BOARD OF COMMISSIONERS, AND THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS-APPELLEES

No. COA00-1239

(Filed 16 October 2001)

1. Zoning— billboard moratorium—local ordinance—not preempted by state law

A local outdoor sign moratorium was properly passed and was not preempted by state law where PNE built a new billboard without the required DOT permit because an old billboard had not yet been removed; the Outdoor Advertising Control Act, N.C.G.S. § 136-134, provides 30 days for curing defects; and, in the interim, the Jackson County Board of Commissioners passed a sign moratorium. DOT must honor local rules and moratoriums and this local moratorium was properly in place at the time PNE

filed its sign permit application. PNE failed to secure a DOT permit which it knew it needed; its own inaction caused its pecuniary loss.

2. Zoning— billboard moratorium—passed without notice—police power

A local outdoor advertising sign moratorium was properly passed by a county board of commissioners despite the absence of notice where the moratorium and subsequent ordinance were passed pursuant to the general police powers of N.C.G.S. § 153A-121. No notice or public hearing was required.

3. Zoning— common law vested rights doctrine—billboard moratorium—good faith—building permit

Plaintiff did not have a common law vested property right to erect a billboard where the county passed a sign moratorium between the time plaintiff began construction and the time it applied for a required DOT permit. The common law vested rights doctrine has four elements; plaintiff satisfied the first and fourth elements in that it made expenditures prior to the amendment of the zoning ordinance and in that the ordinance was a detriment to its pecuniary interest, but did not satisfy the second and third elements in that plaintiff knew the proper course for securing DOT permits and did not act in good faith, and did not rely on the issuance of a valid building permit. Even though no county permit was required, it is clear that the necessary DOT permit was not issued before plaintiff began to erect the sign.

4. Zoning— statutory vested right—billboard moratorium—police power

Plaintiff did not have a statutory vested right to erect a billboard under N.C.G.S. § 153A-344.1 where there were no local regulations at the time it began building. The local sign moratorium and subsequent ordinance were passed under the general police powers granted to counties by N.C.G.S. § 153A-121.

5. Constitutional Law— due process—billboard moratorium without notice—no vested property right—judicial review provided

Plaintiff's due process rights were not violated where it began construction of a billboard without the required DOT permit and a local sign moratorium was passed without notice just before plaintiff applied for the permit. There was no need for notice and

a hearing because PNE did not have a vested property right; moreover, plaintiff could and did challenge DOT's determination that its sign was illegal by filing a petition for judicial review under N.C.G.S. § 136-134.1.

Appeal by plaintiff from order entered 15 June 2000 by Judge Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 13 September 2001.

Charles F. McDarris and Bradford A. Williams, for plaintiff appellant.

Hunter, Large & Sherrill, P.L.L.C., by Raymond D. Large, Jr., for defendant appellees.

McCULLOUGH, Judge.

Plaintiff PNE AOA Media, L.L.C. (PNE) is a limited liability corporation which provides off-premises advertising to businesses, mainly in the form of outdoor billboards. In July 1999, PNE leased a parcel of land along State Highway 441 outside the town limits of Dillsboro, North Carolina, but within the jurisdiction of Jackson County. On 13 and 14 August 1999, PNE erected a steel monopole sign structure on its property; PNE also bought the existing billboard, which was approximately 300 feet from the new structure on the same parcel of land. The existing billboard had previously been authorized by the North Carolina Department of Transportation (DOT); however, PNE had to dismantle and remove the old billboard before DOT could issue a permit for the new structure, since the two billboards were within 300 feet of each other, in violation of DOT regulations.

Prior to erecting the sign on the property, PNE employees talked with Buddy Burrell, a DOT employee, and notified him that a new sign would soon be erected on the land. According to plaintiff, Mr. Burrell told PNE the sign was in compliance with the State's requirements, and also stated that DOT would issue a permit for the new sign as soon as the old sign was removed from the premises.

In July 1999, PNE employee Julie Snipes contacted the Jackson County Planning Department and asked whether Jackson County required any special permits for the new sign. She was told that Jackson County did not require any permits. Thereafter, PNE employees Frank Moody and Robert Shipman went to the Jackson County Land Records Department and located the map that included

the newly purchased tract of land. The two discussed the location with the Jackson County Director of Land Records, Bobby McMahan, who again confirmed that Jackson County did not require any permits to be filed for PNE's new sign.

PNE proceeded to erect the steel monopole sign structure on 13 and 14 August 1999, though it did not place an advertisement upon it. At that time, PNE had not secured a permit from DOT. On 18 August 1999, the Jackson County Board of Commissioners (Board of Commissioners) met, and among other things, considered an outdoor advertising sign moratorium; this sixty-day moratorium was passed on 19 August 1999. The Board of Commissioners did not advertise or publish notice to the public that it was considering the moratorium, and the official agenda of the meeting did not indicate that a moratorium would be discussed.

PNE delivered its sign permit application to DOT on 20 August 1999. At that time, DOT informed PNE that Jackson County had voted on, and approved, a sign moratorium the night before. DOT also told PNE that it could not grant the permit because it was prohibited from issuing sign permits that conflicted with a county zoning code. PNE's steel skeleton structure remained on the premises, but no billboard was ever erected.

PNE filed its initial complaint on 12 October 1999. PNE also filed an amended complaint on 18 October 1999, alleging that Jackson County's moratorium was illegal and violated PNE's constitutional, statutory and common law vested rights. On the same date, PNE also filed a petition for writ of certiorari and a request for declaratory relief, asking the trial court to declare the Jackson County moratorium "null and void and of no legal effect[.]"

On 22 November 1999, DOT answered, responded to PNE's petition, and moved to dismiss the complaint against it on the grounds of sovereign immunity, lack of subject matter jurisdiction, improper venue, and failure to state a claim upon which relief could be granted. On 9 December 1999, the Board of Commissioners and Jackson County filed a document entitled "Motions, Defenses, Answer to Amended Complaint and Response to Petition for Writ of Certiorari," as well as a counterclaim requesting temporary and permanent injunctions against PNE's sign.

On 28 December 1999, the trial court denied plaintiff's petition for writ of certiorari. Both plaintiff and defendants Jackson County and

the Board of Commissioners filed motions for summary judgment in April 2000. On 15 June 2000, the trial court denied plaintiff's motion for summary judgment and granted DOT's motion to dismiss plaintiff's complaint against it. The trial court also granted summary judgment in favor of the Board of Commissioners and Jackson County with regard to their counterclaim requesting temporary and permanent injunctions against plaintiff's sign. Pursuant to the trial court's order, plaintiff was required to dismantle and remove the steel skeleton within 30 days of the order.

Plaintiff appealed to this Court on 14 July 2000. Plaintiff also filed a motion requesting a stay of the trial court's decision pending appeal so that its steel structure could remain in place. The trial court granted PNE's motion for a stay on 31 July 2000.

On appeal, plaintiff brings forth seven assignments of error, all of which revolve around PNE's contention that the trial court erred in granting summary judgment to defendants. For the reasons set forth, we disagree with PNE's arguments and affirm the trial court's grant of summary judgment to defendants.

When a party files a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999), this Court must determine whether the trial court properly ruled that no genuine issue of material fact existed such that the moving party was entitled to judgment as a matter of law. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996), *disc. reviews denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997). "In addition, the record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom." *Id.* When making its determination, the trial court is to consider evidence "includ[ing] admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). With this standard of review in mind, we turn to the allegations of PNE's complaint.

Preemption

[1] PNE first argues that the Jackson County sign moratorium preempted North Carolina's Outdoor Advertising Control Act, N.C. Gen. Stat. § 136-126, *et. seq.* (1999), because it cut short the statutory thirty-day right to cure defects in outdoor advertising provided

by N.C. Gen. Stat. § 136-134 (1999). N.C. Gen. Stat. § 136-134 states that

> any outdoor advertising maintained without a permit regardless of the date of erection shall be illegal and shall constitute a nuisance. The Department of Transportation or its agents shall give 30 days['] notice to the owner of the illegal outdoor advertising . . . to remove the outdoor advertising or to make it conform to the provisions of this Article or rules adopted by the Department of Transportation hereunder. The Department of Transportation or its agents shall have the right to remove the illegal outdoor advertising at the expense of the owner if the owner fails to remove the outdoor advertisement or to make it conform to the provisions of this Article or rules issued by the Department of Transportation within 30 days after receipt of such notice . . . .

PNE applied for its permit from DOT on 20 August 1999, one day after the Jackson County sign moratorium was passed. Because PNE's sign was erected without a permit, it is a nuisance as that term is defined by N.C. Gen. Stat. § 136-134; thus, the issue of preemption is properly before this Court.

It is well settled that state regulation of a particular field preempts county and municipal rules which govern the same issue and conflict with the state provision. *Greene v. City of Winston-Salem*, 287 N.C. 66, 73-74, 213 S.E.2d 231, 235-36 (1975). If there is discord between the state provisions and the municipal or county provisions, the municipal and county provisions "must give way." *Id.* at 73, 213 S.E.2d at 236 (quoting *Town of Washington v. Hammond*, 76 N.C. 33 (1877)). Moreover, if the state law clearly shows a legislative intent to provide "a complete and integrated regulatory scheme to the exclusion of local regulation[]" in a particular area of law, then the local rules must be consistent with the General Assembly's legislative intent. *See* N.C. Gen. Stat. § 160A-174(b)(5) (1999); and *Greene*, 287 N.C. at 76, 213 S.E.2d at 237. Plaintiff contends that the General Assembly intended the state rules for outdoor advertising to harmonize with the local rules, as well as DOT's regulations. Thus, plaintiff argues, the statutory thirty-day right to cure found in N.C. Gen. Stat. § 136-134 conflicted with Jackson County's moratorium, in which case the moratorium should have given way. We disagree.

PNE asserts that its statutory right to cure defects in its sign structure began with receipt of DOT's letter on 17 August 1999

and lasted for thirty days, during which PNE could remove the old billboard so its new sign would comply with DOT regulations. The Board of Commissioners passed the Jackson County moratorium on 19 August 1999. At that time, PNE had not yet filed for a permit from DOT, so its sign properly fell under the scope of the moratorium.

While DOT is not responsible for interpreting the legality of zoning regulations or the legality of moratoriums, it must honor properly passed local rules and moratoriums. The Board of Commissioners expressly stated that Jackson County's moratorium was passed pursuant to N.C. Gen. Stat. § 153A-121(a) (1999), which confers general police powers upon the county as follows:

> (a) A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.

We discern no procedural problems with the passage of the moratorium, and it was therefore properly in place at the time PNE filed its sign permit application with DOT on 20 August 1999.

While conceding that the Jackson County moratorium cut short PNE's right to cure, defendants maintain that PNE was at fault because it erected the steel structure without first securing a permit from DOT. We agree. Defendants point to the deposition of Frank Moody, the General Manager of PNE. Mr. Moody explained that he had worked in the outdoor advertising business for over sixteen years. Over that span, his job duties included sales, leasing, and general management. Mr. Moody started his own outdoor advertising business in 1989, and part of his job was to select sites for outdoor billboards and secure the proper permits. After explaining how he selected the tract of land along State Highway 441, Mr. Moody was asked whether he secured a permit before the steel structure went up. He responded as follows:

> [Q.] Prior to this time have you—do you usually get a permit before you erect a sign?
>
> A. Yep.
>
> Q. Do you do that most of the time or some of the time?
>
> A. All the time.

Q. You do it all the time?

A. Yeah.

Q. So this would be the only instance in which you have ever erected a sign without first obtaining the necessary permits. Is that true?

A. I believe so, yeah.

Mr. Moody stated he and his coworkers spoke to several people at DOT and in Jackson County and determined that the only permit necessary was the one issued by DOT. Mr. Moody stated that he knew PNE's new sign was too close to an existing sign, and that the existing sign would have to be purchased and dismantled before a DOT permit could be issued. He further explained that there was confusion about the sequence of events because Mr. Buddy Burrell, his contact at DOT, was out sick and was unavailable for consultation a few days before construction commenced, and before the permit application was filed. As a result, PNE's new sign was erected too early, before Mr. Moody had secured a permit from DOT.

PNE knew it needed a permit from DOT, and failed to secure one. At the same time, Jackson County and its Board of Commissioners properly passed their sixty-day moratorium on 19 August 1999. PNE filed for its permit one day later, on 20 August 1999. Had PNE filed sooner with DOT, it would have learned that its sign was too close to the existing billboard, and it could have taken steps to remedy the situation. However, PNE failed to do so, and was bound by the terms of the newly enacted moratorium. Based on these facts, we decline to assist PNE on appeal when its own inaction caused it to suffer pecuniary losses. We conclude that the Jackson County moratorium on outdoor advertising was properly passed, and that it does not preempt state law. Plaintiff's first assignment of error is overruled.

Notice

[2] PNE next argues that Jackson County's moratorium was enacted in violation of the notice provisions of N.C. Gen. Stat. § 153A-323 (1999) and that it was therefore *ultra vires*. We disagree.

Article 18 of the North Carolina General Statutes sets forth the rules for county planning and regulation. *See* N.C. Gen. Stat. § 153A-320, *et seq.* (1999). Before adopting ordinances pursuant to Article 18, counties must follow certain procedural and notice requirements. *Vulcan Materials Co. v. Iredell County*, 103 N.C.

App. 779, 782, 407 S.E.2d 283, 285-86 (1991). Specifically, N.C. Gen. Stat. § 153A-323 states that

> [b]efore adopting or amending any ordinance authorized by this Article . . . the board of commissioners shall hold a public hearing on the ordinance or amendment. The board shall cause notice of the hearing to be published once a week for two successive calendar weeks. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. In computing such period, the day of publication is not to be included but the day of the hearing shall be included.

The evidence in this case indicates that no notice was given either that a sixty-day moratorium was being discussed by the Board of Commissioners on 18 August 1999 or that the moratorium was adopted on 19 August 1999.

Defendants maintain that Jackson County and the Board of Commissioners enacted the sign moratorium under the general police powers granted to counties under N.C. Gen. Stat. § 153A-121(a). We agree. We note first that Article II of Jackson County's "Off-Premise Sign Control Ordinance, Jackson County, North Carolina" states:

> This ordinance is established by the Jackson County Board of Commissioners *pursuant to the authority conferred in Chapter 153(A)-121(a) of the North Carolina General Statutes.* The Board of Commissioners hereby ordains and enacts into law the following articles and sections.

(Emphasis added.) Thus, by its very terms, Jackson County made its moratorium part of its official Off-Premise Sign Control Ordinance via N.C. Gen. Stat. § 153A-121(a), rather than by Article 18 of Chapter 153A.

The issue of ordinance passage and statutory authority was thoroughly discussed in *Summey Outdoor Advertising v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989), *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990). The *Summey* Court stated

> [w]e do not believe that because defendant has authority to regulate signs under G.S. 153A-340, it may not regulate signs in a similar manner under the general police powers in G.S. 153A-121 (allowing regulation of "conditions detrimental to the health,

> safety or welfare of its citizens and the peace and dignity of the county . . ."). G.S. 153A-121 and 153A-340 do not operate exclusively of each other. *See* G.S. 153A-124 (Specific powers enumerated in Article 6, Chapter 153A to "regulate, prohibit or abate acts, omissions, or conditions is not exclusive [or] a limit on the general authority to adopt ordinances . . . [under] G.S. 153A-121.").

Id. at 538, 386 S.E.2d at 443.

We therefore conclude that Jackson County's sixty-day moratorium and subsequent ordinance were passed pursuant to the general police powers of N.C. Gen. Stat. § 153A-121, and as such, no notice or public hearing was required. Plaintiff's second assignment of error is overruled.

Common Law Vested Right

[3] PNE next argues that it acted in good faith and had common law vested property rights to erect a sign on its property because it reasonably relied on statements from defendants that no local permits were needed to proceed. Defendants, on the other hand, argue that PNE did not act in good faith and cannot, therefore, assert common law vested property rights. We agree with defendants.

The common law vested rights doctrine " 'has evolved as a constitutional limitation on the state's exercise of its police power[s].' " *Browning-Ferris Industries v. Guilford County Bd. of Adj.*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997) (quoting *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986)). The *Browning-Ferris* Court also explained that

> [a] party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building[;]" (2) the obligations and/or expenditures are incurred in good faith[;] (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party[;] . . . and (4) the amended ordinance is a detriment to the party.

Browning-Ferris, 126 N.C. App. at 171-72, 484 S.E.2d at 414 (citations omitted).

In this case, there is evidence that plaintiff meets element one, because it leased the property along State Highway 441, bought the existing sign, hired contractors to build and erect the steel skeleton and the new sign, and hired people to remove the existing sign. Plaintiff has also shown that the Jackson County ordinance is a detriment to its pecuniary interests, because it loses $1,500.00 per month in advertising revenues which it could have earned had it secured the permit allowing it to post advertisements.

However, plaintiff did not act in good faith. Though plaintiff talked to employees of DOT and Jackson County, Mr. Moody proceeded to take on the project without first securing the permit from DOT, and this was the first time he had ever done so. Mr. Moody was highly experienced and knew the proper course of action for securing permits from DOT.

We also reject plaintiff's argument that its obligations and expenditures were made in reasonable reliance on and after the issuance of a valid building permit. While it is true that no county permit was required, a permit from DOT was, and it is clear that PNE had not secured that permit before it began to erect the sign along State Highway 441.

Plaintiff has failed to show that it met all four elements necessary to establish that it had a common law vested property right. Plaintiff's third assignment of error is therefore overruled.

Statutory Vested Right

[4] By its fourth assignment of error, PNE argues that it had a statutory vested right to erect a sign on the property when no local regulations governed the erection of the sign at the time plaintiff began building. Plaintiff also argues that defendants had full knowledge of PNE's actions at all times relevant to this lawsuit. While plaintiff may technically be correct that no local rule was in effect, we can discern no reason why Jackson County and the Board of Commissioners could not act at the time and in the manner they did.

Plaintiff cites N.C. Gen. Stat. § 153A-344.1(b) (1999) and argues that it had a vested right to complete the development of real property "under the terms and conditions of the site specific development plan or the phased development plan." Plaintiff also argues that the plan must be made after notice and a public hearing. N.C. Gen. Stat. § 153A-344.1(c). PNE characterizes these factors as creating a genuine issue of material fact as to whether it had a statutory vested

right to erect the sign, such that summary judgment was improper. We disagree.

As previously discussed, Jackson County did not have a comprehensive zoning plan or ordinance in effect when PNE began building on its leased land. Plaintiff's arguments assume that the Jackson County moratorium and subsequent ordinance were passed pursuant to N.C. Gen. Stat. § 153A-344.1, such that notice and a public hearing were required. However, we have concluded that the Jackson County moratorium and ordinance were passed pursuant to the general police powers granted to counties under N.C. Gen. Stat. § 153A-121. This statute does not have notice and public hearing requirements, nor does it contain a provision for a statutory vested right. We therefore deem plaintiff's arguments to be without merit, and overrule this assignment of error.

Due Process Considerations

[5] By its fifth assignment of error, PNE argues that the Board of Commissioners and Jackson County violated its due process rights by failing to provide public notice of the proposed moratorium, and thus the moratorium constituted an unjust taking of its vested right without just compensation. We disagree.

> " 'A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title*, legal or equitable, *to the present or future enjoyment of property, a demand, or legal exemption from a demand by another.*' "

State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn., 336 N.C. 657, 678, 446 S.E.2d 332, 344-45 (1994) (quoting *Armstrong v. Armstrong*, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988) (quoting *Godfrey v. State*, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975))). While it is true that a governmental entity must afford procedural due process to a party who has a vested right to property before that party's right is altered, we do not find a vested right for PNE in this case. We further note that

> [w]hile the demonstration of a protected "property" interest is a condition precedent to procedural due process protection, the existence of the "property" interest does not resolve the matter before this Court. We must inquire further and determine exactly what procedure or "process" is due. The fundamental

> premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be "at a meaningful time and in a meaningful manner."

Peace v. Employment Sec. Comm'n, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citations omitted).

We are persuaded by defendants' position that there was no need for notice and a hearing because PNE did not have a vested property right in this case. Defendants correctly point out that the Board of Commissioners' meetings are open to the public, and there is time reserved at each meeting for public comment. We do not believe that PNE was entitled to notice beyond that given to the general public. We again note that the Board of Commissioners was not required to provide public notice when enacting an ordinance pursuant to N.C. Gen. Stat. § 153A-121. Compare *Summey*, 96 N.C. App. 533, 386 S.E.2d 439 (Henderson County ordinance passed pursuant to N.C. Gen. Stat. § 153A-121(a), even without the procedural safeguards required when proceeding under Article 18).

We also agree with defendants that plaintiff enjoyed ample due process under N.C. Gen. Stat. § 136-134.1 (1999), which provides an avenue for plaintiff to challenge DOT's determination that its sign was illegal. Under N.C. Gen. Stat. § 136-134.1, PNE can file a petition for judicial review of the Secretary of Transportation's determination that PNE's sign was illegal. After examining the record, we note that plaintiff in fact filed such a petition with the Wake County Superior Court on 5 November 1999. Such protection is adequate in this situation, and we therefore overrule plaintiff's fifth assignment of error.

Other Arguments

By its sixth assignment of error, PNE argues that the trial court acted arbitrarily and capriciously by granting summary judgment to the Board of Commissioners and Jackson County and ordering plaintiff to dismantle and remove the sign along State Highway 441. This argument is merely an amalgamation of plaintiff's previous arguments, and adds no new information. For the reasons previously stated herein, we reject plaintiff's argument and overrule this assignment of error.

Lastly, PNE argues that the trial court acted arbitrarily and capriciously by granting DOT's motion to dismiss. However, plaintiff's assignment of error was rendered moot by this Court's order on 27 June 2001, which dismissed DOT as a defendant in this case.

The trial court's grant of summary judgment to Jackson County and the Board of Commissioners is affirmed. The trial court's order directing plaintiff to dismantle and remove its sign erected along State Highway 441 is also affirmed.

Affirmed.

Judges MARTIN and BIGGS concur.

KIRSTEN DURLING, TIM HULL, AND DEE NICHOLS v. KEVIN J. KING, INDIVIDUALLY, KEVIN J. KING D/B/A KEVIN J. KING AND RBT ENTERPRISES

No. COA00-707

(Filed 16 October 2001)

1. Unfair Trade Practices— sufficiency of evidence—in or affecting commerce

The trial court did not err by denying plaintiffs' motions for treble damages under N.C.G.S. § 75-16 where there was evidence of a breach of contract involving sales commissions, but there was no evidence that these transactions had any impact beyond the parties' employment relationships or that defendant's behavior was "in or affecting commerce."

2. Unfair Trade Practices— attorney fees—denied

The trial court correctly denied plaintiffs' motion for attorney fees under N.C.G.S. § 75-16.1 where plaintiffs did not prevail on their claim under N.C.G.S. § 75-1.1.

3. Unfair Trade Practices— damages—basis

The trial court should not have awarded damages to plaintiffs for alleged unfair or deceptive trade practices based upon a jury finding where the judge correctly found that the defendant's acts did not meet the requirements for recovery under N.C.G.S. § 75-1.1. The judge's ruling eliminated plaintiffs' theory of recovery and left no basis for the award of damages beyond those resulting from a breach of contract.

4. Evidence— cross-examination—limited—no error

The court neither prevented defendant from conducting cross-examination nor abused its discretion in limiting cross-

examination in an action concerning compensation for Beanie Baby sales reps; moreover, the court was not required to enter a judgment that reflected particular parts of a witness's testimony that may have been contradicted by other testimony or evidence.

5. Jury— notation on verdict sheet—validity of verdict

A judgment in an action arising from unpaid sales commissions was supported by the verdict sheet where the jury was instructed to consider two possible sources of injury and the damages awarded for those injuries were separate amounts, even though the foreman also totaled the damages. The additional notation did not affect the validity of the verdict.

6. Judgments— entry—notice to opposing party by fax

A judgment was properly entered where it was reduced to writing, signed by the judge, and filed with the clerk, but faxed. N.C.G.S. § 1A-1, Rule 5 does not authorize the use of facsimile machines for service of documents, but the procedures for serving all parties with a copy of a judgment after its entry under N.C.G.S. § 1A-1, Rule 58 are separate and distinct and the method of service of copies of the judgment is not a statutory criteria for entry of judgment. Moreover, defendant clearly had notice of the entry of judgment, and any procedural errors in plaintiffs' service of the first judgment upon defendant were rendered irrelevant by a subsequent amended judgment awarding the same damages.

Appeal by defendant from judgment entered 12 November 1999 and from amended judgment entered 20 January 2000, and by plaintiffs from amended judgment entered 20 January 2000. Judgments entered by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 16 May 2001.

Van Camp, Hayes, & Meacham, P.A., by Michael J. Newman for defendant.

Sanford Holshouser Law Firm, PLLC, by Kieran J. Shanahan and Daniel G. Cahill for plaintiffs.

BIGGS, Judge.

Kevin J. King, individually and d/b/a Kevin J. King and RBT Enterprises, (defendant) appeals from the trial court's judgment and amended judgment finding defendant liable for breach of contract

and for other injurious behavior towards Kirsten Durling, Tim Hull, and Dee Nichols (Durling, Hull, and Nichols, or, collectively, plaintiffs), and awarding damages to plaintiffs. The plaintiffs cross-appeal from the amended judgment's conclusion that the defendant had not engaged in deceptive and unfair trade practices, and from its denial of plaintiffs' motion for attorneys' fees and treble compensatory damages. We affirm in part and reverse in part.

Ty, Inc. is a manufacturer of toys and gift products, most notably small stuffed animals known as "Beanie Babies." Defendant began employment with Ty in 1992 as a salaried employee, and became a regional sales representative in 1995. As a sales representative, defendant traveled to card and gift shops in North Carolina to obtain orders for Ty, Inc.'s products. Pursuant to his employment contract, the defendant was allowed to hire "sub-representatives" to assist him in managing his sales contracts. This proved necessary in 1997, when Beanie Babies became immensely popular, and he could no longer manage all of the Beanie Baby contracts alone. Accordingly, defendant hired Nichols, Hull, and Durling. He assigned each of them Beanie Baby sales accounts to service, although he remained responsible to Ty, Inc. for the accounts. The parties agreed that plaintiffs would be paid on a commission basis, to be determined by the value of sales that were paid for and shipped by Ty to its customers. This lawsuit arises out of a dispute over these commissions.

Plaintiffs had no direct employment or contractual relationship with Ty, but only with defendant. Therefore, the documents that confirmed orders placed with and shipped by Ty were sent directly to defendant. These included shipping invoices and monthly sales summaries, from which defendant determined the commissions owed to plaintiffs. During 1997 and 1998, plaintiffs became concerned that defendant was not providing them with all the relevant sales information, or paying them all the commissions they were owed. The employment relationship among the parties ended in 1998.

On 13 October 1998, plaintiffs filed suit against defendant and against Ty, Inc., alleging breach of contract, unfair and deceptive trade practices, negligent retention and supervision (by Ty, Inc., in its supervision of defendant), conversion, and unjust enrichment (*quantum meruit*). Plaintiffs sought an accounting of all commissions owed them, as well as costs, attorneys' fees, and treble compensatory damages. Defendant moved for summary judgment, which the trial court granted with respect to the claims for unjust enrichment and

conversion. Before trial, plaintiffs dismissed their claims against Ty, Inc., leaving only the present defendant.

A jury trial was held in November, 1999. The jury found that defendant had breached his contracts with plaintiffs, and awarded damages for breach of contract in the amounts of $106,000 (Nichols), $24,000 (Durling), and $57,000 (Hull). The jury also answered the following questions affirmatively:

> 3. Did defendants do any one or more of [the] acts listed in the special interrogatories?
>
> Special Interrogatories
>
> (1) Did the defendant Kevin J. King, individually or through his trade names, Kevin J. King or RBT Enterprises, [make] efforts to conceal from the Plaintiffs or otherwise prevent them from discovering the true amount of money they were owed pursuant to the commission agreement[?]
>
> (2) Did the defendant Kevin J. King, individually or through his trade names, Kevin J. King or RBT Enterprises, wilfully and unfairly [use] his position of power to retain funds due and owing to Plaintiff[s] after being requested to pay these funds to the plaintiff[?]

The jury found that each plaintiff was entitled to $22,000 "as a proximate cause of defendant's conduct," described in the special interrogatories, adding these damages to those owed for breach of contract, for total damages of $128,000 (Nichols), $46,000 (Durling), and $79,000 (Hull). The trial court entered a judgment reflecting this verdict, from which the defendant appealed on 18 November 1999. Following plaintiffs' motion for treble compensatory damages and attorney's fees, the trial court entered an amended judgment on 20 January 2000. The amended judgment awarded each plaintiff the same amount as in its original judgment, and denied plaintiffs' motions. Defendant gave notice of appeal from this judgment on 7 February 2000; plaintiffs gave notice of appeal from the denial of their motions on 1 February 2000.

Plaintiffs' Appeal

[1] Plaintiffs assign error to the trial court's denial of their motions for treble damages under N.C.G.S. § 75-16 (1999), and for attorneys' fees under N.C.G.S. § 75-16.1 (1999). We will consider their argument together with defendant's contention that the trial court erred in "per-

mitting plaintiffs to recover both breach of contract damages and damages for alleged violations of Chapter 75," because the two arguments are related. We affirm the trial court's holding that the defendant's conduct did not constitute unfair or deceptive trade acts or practices, and its consequent refusal to award treble damages to plaintiffs. However, because we affirm the trial court's ruling that plaintiffs did not prove unfair or deceptive trade practices under Chapter 75, we vacate the award to each plaintiff of $22,000 damages for the alleged deceptive or unfair acts.

Plaintiffs moved for treble damages in connection with their claim for damages under N.C.G.S. § 75-1.1 (1999) for unfair and deceptive trade practices. N.C.G.S. § 75-1.1, "Methods of competition, acts and practices regulated; legislative policy," provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." If a plaintiff proves damages arising under this statute, he or she is automatically entitled to treble damages pursuant to G.S. § 75-16, which states:

> If any person shall be injured or the business of any person . . . injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Plaintiffs contend that the jury's affirmative answers to Issues three and four of the verdict sheet which set forth the alleged unfair and deceptive acts, and Issue five which sets forth damages for the alleged acts, establish a violation of G.S. § 75-1.1, and thus entitle them to treble the damages awarded under Issue five. However, a successful claim under G.S. § 75-1.1 requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to the claimant. *Rawls & Associates v. Hurst*, 144 N.C. App. 286, 550 S.E.2d 219 (2001); *Market America, Inc. v. Christman Orth*, 135 N.C. App. 143, 520 S.E.2d 570 (1999), *disc. review denied*, 351 N.C. 358, 542 S.E.2d 213 (2000). The jury decides whether the defendant has committed the acts complained of. If it finds the alleged acts have been proved, the trial court then determines as a matter of law whether those acts constitute

unfair or deceptive practices in or affecting commerce. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988); *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000); *Allen v. Roberts Const. Co. Inc.*, 138 N.C. App. 557, 532 S.E.2d 534, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). In the instant case, the jury found that the defendant had committed the acts described in the special interrogatories. The trial court then held in its amended judgment that "the defendants' conduct, as found by the jury in their answers to the special interrogatories, does not constitute unfair and deceptive trade acts or practices." We affirm the trial court's ruling and its denial of treble damages.

The primary purpose of G.S. § 75-1.1 is to provide a "private cause of action for consumers." *Gray v. N.C. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Although commerce is defined broadly under G.S. § 75-1.1(b) as "all business activities, however denominated," "the fundamental purpose of G.S. § 75-1.1 is to protect the consuming public." *Prince v. Wright*, 141 N.C. App. 262, 268-69, 541 S.E.2d 191, 197 (2000). Typically, claims under G.S. § 75-1.1 involve buyer and seller. *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. review denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). Thus, the statute usually is not applicable to employment disputes. *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001) (act intended to benefit consumers); *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 403 S.E.2d 483 (1991) (although the statute has been extended to business relationships when appropriate, it is "clearly intended to benefit consumers"); *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982) (employer-employee relationships not within intended scope of the law). Nonetheless, "the mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade or practice claim." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001). *See, e.g., Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999) (employee guilty of unfair and deceptive trade acts where he starts his own company, which then sells computer hardware and services to his employer at inflated prices); *Kewaunee Scientific Corp. v. Pegram*, 130 N.C. App. 576, 503 S.E.2d 417 (1998) (when purchasing manager buys products for the company from partnerships in which he was partner, his activities affect commerce). The proper inquiry "is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts affected

commerce." *Prince v. Wright*, 141 N.C. App. 262, 268, 541 S.E.2d 191, 197 (2000). What is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L. Ed. 2d 325 (1963).

The evidence presented in the instant case was that the parties were engaged in a dispute over the amount of commissions that defendant owed to plaintiffs. Defendant's actions in withholding commissions that were owed to plaintiffs were a breach of the contracts that he had made with plaintiffs. However, no evidence was presented that the subject transactions had any impact beyond the parties' employment relationships. There is no indication that defendant's behavior was "in or affecting commerce." Accordingly, we find that the trial court was correct in its ruling that defendant's actions did not amount to a violation of G.S. § 75-1.1.

[2] We also affirm the trial judge's denial of plaintiffs' motion for attorneys' fees. Attorneys' fees may be awarded in a case alleging unfair or deceptive trade practices only to "the prevailing party." G.S. § 75-16.1; *Evans v. Full Circle Productions*, 114 N.C. App. 777, 443 S.E.2d 108 (1994). In the instant case, the plaintiffs did not prevail on their claim of a violation of G.S. § 75-1.1. Thus, plaintiffs were not entitled to an award of attorneys' fees. Consequently, we affirm the trial court's denial both of treble damages and of attorneys' fees.

[3] Defendant argues that plaintiffs should not have been allowed damages for the acts submitted to the jury in support of plaintiffs' claim of unfair or deceptive trade practices. We agree with this contention. The trial judge correctly found that the defendant's acts did not meet the requirements for recovery under G.S. § 75-1.1. The trial judge's ruling eliminated plaintiffs' theory of recovery, and left no basis for the award of damages beyond those found to result from defendant's breach of contract. Consequently, we vacate the part of the judgment and amended judgment awarding each plaintiff $22,000 damages for alleged unfair or deceptive trade acts or practices.

Defendant's Appeal

[4] Defendant argues that the trial court erred in its limitation of his cross-examination of Nichols. Defendant's contention is that the trial judge prevented him from exploring inconsistencies between dollar amounts stated in Nichols' trial testimony and the figures listed in the various charts, ledgers, and other documents submitted by plaintiffs.

Defendant also argues that the trial judge was obligated to enter judgment in an amount that reflected specific testimony by Nichols, even though the testimony was contradicted by other evidence or testimony. We disagree with both of these contentions.

The general rule regarding cross-examination is that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611 (b) (1999). Nichols' calculations of her unpaid commissions were relevant to the issues of whether she was owed any unpaid commissions and, if so, in what amount. Thus, this was a proper subject for cross-examination. However, Rule 611 also provides that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611(a). "[T]he scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 666 (2000), *disc. review denied*, 353 N.C. 394, 547 S.E.2d 37 (2001) (citation omitted).

In the instant case, the record indicates that King's cross-examination of Nichols extends for approximately one hundred pages of transcript. King obtained repeated concessions from Nichols that she probably had made some mathematical errors in her calculation of the commissions owed. Indeed, *most* of this cross-examination concerns the mathematical method by which plaintiffs attempted to determine whether King owed them any unpaid commissions. Any inconsistency between the amount of unpaid commissions presented in plaintiffs' exhibits and Nichols's trial testimony was available for the jury's consideration. Moreover, King himself testified concerning the same matters, followed by Nichols's rebuttal testimony, and a second cross-examination of Nichols. We find that the trial court neither prevented King from conducting cross-examination, nor abused its discretion in limiting cross-examination. We also find that the trial court was not required to enter a judgment that reflected particular parts of Nichols's testimony that may have been contradicted by other testimony or evidence. *See State v. Pallas*,

144 N.C. App. 277, 548 S.E.2d 773 (2001) (contradictions in evidence are for the jury to resolve); *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 171, 510 S.E.2d 690, 697, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999) ("trier of fact, in this case the jury, must resolve issues of credibility and determine the relative strength of competing evidence"). For these reasons, this assignment of error is overruled.

Defendant next argues that the trial court erred in its denial of defendant's motion for a directed verdict on the claim of unfair and deceptive trade practices. However, we have held above that the portion of the judgment awarding damages for purported unfair or deceptive trade acts or practices must be vacated. This ruling renders harmless any error in the court's denial of defendant's motion for directed verdict on the issue of unfair and deceptive trade practices.

[5] Finally, defendant argues that the judgment entered by the court in this case did not accurately reflect the jury's verdict, and was not properly entered. We disagree with both contentions.

The jury was given five issues to answer regarding possible injury and damages to plaintiffs. These issues may be summarized as follows:

> Issue One: Did the defendant breach his contracts with any or all of the plaintiffs?
>
> Issue Two: If there was a breach of contract, what damages resulted from the breach?
>
> Issue Three: Did the defendant either (a) make efforts to conceal from the plaintiffs, or otherwise prevent them from discovering, the true amount of commissions owed them, or (b) willfully and unfairly use his position of power to retain funds due to the plaintiffs after being requested to pay these funds?
>
> Issue Four: If defendant did either or both of the acts in Issue three, did this cause damage to the plaintiffs?
>
> Issue Five: What amount of damages were caused by the behavior described in the special interrogatories?

The jury was instructed to consider two possible sources of injury, and each verdict sheet had two spaces for entry of dollar amounts: Issues two and five. The jury answered Issues one, three,

and four affirmatively for each plaintiff, and entered the dollar amount owed to each plaintiff in Issues two and five. Below the dollar amount entered for Issue five, the foreman totaled the entries from Issues two and five. This notation did not affect the validity of the verdict, nor render the verdict or judgment erroneous. We find that the verdict sheets were correctly completed. The defendant argues that each plaintiff was entitled to only $22,000, the amount entered in response to Issue Five. We find no support in the record for this position. The trial court instructed the jury as follows on the damages that could be awarded in response to Issues 2 and 5:

> [SECOND ISSUE:]
>
> THEN THE **SECOND** ISSUE IS, WHAT AMOUNT OF DAMAGES IS THE PLAINTIFF ENTITLED TO RECOVER FOR BREACH OF CONTRACT? IF YOU'VE ANSWERED THE **FIRST** ISSUE IN FAVOR OF THE PLAINTIFF, THEN EVEN WITHOUT PROOF OF ACTUAL DAMAGES, THE PLAINTIFFS WILL BE ENTITLED TO AT LEAST NOMINAL DAMAGES. . . .
>
> [FIFTH ISSUE:]
>
> THE **FIFTH** AND FINAL ISSUE, WHAT AMOUNT OF DAMAGES HAS THE PLAINTIFF SUSTAINED AS A PROXIMATE CAUSE OF THE DEFENDANTS' CONDUCT? IF YOU ANSWERED ISSUES **THREE** AND **FOUR** "YES" IN FAVOR OF THE PLAINTIFF, THE PLAINTIFF IS ENTITLED TO RECOVER AT LEAST NOMINAL DAMAGES WITHOUT PROOF OF ACTUAL DAMAGES. . . . SO, FINALLY, IF BY THE GREATER WEIGHT OF THE EVIDENCE THE PLAINTIFF [NAME] HAS PROVEN THE AMOUNT OF DAMAGES SHE SUSTAINED BY THE DEFENDANTS' CONDUCT SPECIFICALLY REFERRED TO IN ISSUES **THREE** AND **FOUR**, YOU WOULD WRITE THAT AMOUNT IN THE SPACE PROVIDED.

It is clear from a review of the record that the damages awarded pursuant to Issues two and five were separate amounts. Therefore, we conclude that the judgment was an accurate statement of the jury's verdict. However, as we have held above, plaintiffs are entitled to recover damages for breach of contract, but not for unfair or deceptive trade acts or practices. Thus, each plaintiff should be awarded only the damages specified by the jury in response to Issue two.

[6] Defendant also contends that the judgment was not properly entered. The jury returned a verdict in favor of plaintiffs on 12

November 1999. Plaintiffs then made a motion for treble damages and for attorneys' fees. The trial court directed plaintiffs to prepare a judgment expressing the jury's verdict, and indicated that it would reserve ruling on plaintiffs' post-trial motions until a later date. Plaintiffs prepared a judgment, which was signed by the trial court and filed with the clerk of court on 12 November 1999, the same afternoon that the jury's verdict was returned. Defendant had left the courtroom at some point before the trial court signed the judgment. Therefore, plaintiffs faxed a copy of the judgment to defense counsel's office; defendant received the copy on 17 November 1999, and gave notice of appeal to this Court the following day.

Defendant contends that because plaintiffs sent a copy of the judgment by fax, the judgment was not properly entered in compliance with N.C.R. Civ. P. 58 (2000). Rule 58 provides as follows:

> [A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. (emphasis added)

Judgment is entered when the three requirements stated in the first sentence of this rule are met. *State v. Coronel*, 145 N.C. App. 237, 550 S.E.2d 561 (2001); *Stevens v. Guzman*, 140 N.C. App. 780, 538 S.E.2d 590 (2000), *disc. review allowed*, 353 N.C. 397, 547 S.E.2d 437 (2001). The record shows that the judgment was reduced to writing, signed by the judge, and filed with the clerk on 12 November 1999. We find that judgment was entered on that date. The defendant does not dispute that these criteria for entry of judgment were met; rather, he contends that plaintiffs's use of a fax to provide defendant with a copy of the judgment renders it void and unenforceable. Defendant is correct that N.C.R. Civ. P. 5 does not authorize use of facsimile machines for service of documents. However, under Rule 58, the procedures for serving all parties with a copy of the judgment after its entry are separate and distinct from the criteria that govern entry of judgment, and the method of service of copies of the judgment is not a statutory criteria for entry of judgment. The cases cited by defendant for this proposition interpret an earlier version of Rule 58, which included different requirements.

Moreover, the purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered. *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991); *In re Estate of Peebles*, 118 N.C. App. 296, 454 S.E.2d 854 (1995). Defendant clearly had notice of the entry of judgment, as shown by his filing notice of appeal from the judgment. In addition, the trial judge on 13 January 2000 filed an amended judgment, whose entry defendant does not contest. The amended judgment awarded plaintiffs the same damages as the original judgment, and differed from it only in its denial of certain of plaintiffs' motions. Any procedural errors in plaintiffs' service of the first judgment upon defendant were rendered irrelevant by the entry of the later amended judgment. For these reasons, we hold that the judgment was properly entered pursuant to N.C.R. Civ. P. 58.

In conclusion, we affirm the trial court's order finding that the evidence did not establish that defendant had committed unfair or deceptive trade acts or practices, and its consequent denial of plaintiffs' motion for treble damages and attorneys' fees. Consistent with this ruling, we vacate the part of the judgment and the amended judgment awarding plaintiffs $22,000 each for unfair or deceptive trade acts or practices.

Affirmed in part; reversed and vacated in part.

Judges WYNN and CAMPBELL concur.

STATE OF NORTH CAROLINA v. TONY DOUGLAS MILLER

No. COA00-1003

(Filed 16 October 2001)

1. Constitutional Law— right to be present at all stages— exclusion from courtroom during jury selection

The trial court did not violate defendant's constitutional right to be present at all stages of his trial in a second-degree kidnapping, common law robbery, and felonious escape from jail case by excluding defendant from the courtroom during jury selection, because: (1) defendant voluntarily waived his right to

be present during jury selection by his own disruptive behavior, including refusing to sit down and refusing to participate when he was given the opportunity to be present during opening statements; (2) although the trial court failed to comply with N.C.G.S. § 15A-1032(b)(2) requiring it to instruct the jurors that defendant's removal is not to be considered in weighing evidence or determining the issue of guilt, defendant has not shown any reasonable probability that a different result would have been reached had the instruction been given; (3) defendant was afforded the opportunity to talk with his attorney and keep informed of what took place during his absence; (4) defendant was present during the admission of all the evidence and confronted all of the witnesses; and (5) neither defendant nor his attorney ever objected to the trial court's removing defendant prior to jury selection and before the presentation of opening statements, and defendant failed to argue plain error. N.C. Const. art. I, § 23; N.C.G.S. § 15A-1032(a).

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

The trial court did not err in a second-degree kidnapping, common law robbery, and felonious escape from jail case by failing to inform the jury that defendant's absence from the courtroom was not to be considered in weighing the evidence or deciding his guilt, because: (1) defendant never objected to the omission of any such instructions; and (2) defendant failed to preserve the issue for plain error review as required by N.C. R. App. P. 10(c)(4).

3. Escape— felonious escape from jail—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of felonious escape from jail, because: (1) the State failed to present any evidence that defendant was serving a sentence upon conviction of a felony on the date of defendant's escape; and (2) the record does not contain any clear statement of a stipulation by defendant that he was serving a sentence for a felony at the time of the escape, but merely that he was serving an active sentence which supports a finding of the lesser included offense of misdemeanor escape under N.C.G.S. § 148-45(a).

4. Kidnapping— second-degree—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping under N.C.G.S. § 14-39 based on defendant's unlawfully confining and restraining a jailer for the purpose of facilitation of the commission of felony escape from jail, because the State failed to present substantial evidence that defendant was serving a sentence for a felony, which means defendant could not be guilty of committing felonious escape.

Appeal by defendant from judgment entered 1 March 2000 by Judge Russell G. Walker, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 15 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Russell J. Hollers III, for defendant-appellant.

TYSON, Judge.

Tony Douglas Miller ("defendant") appeals the entry of judgment upon a jury verdict finding him guilty of two counts of common law robbery, one count of second-degree kidnapping, and one count of felonious escape from jail. We hold there was no error as to the entry of judgment on two counts of common law robbery. We vacate as to the entry of judgment on felonious escape and second-degree kidnapping, and remand for sentencing on misdemeanor escape and false imprisonment.

I. Facts

Evidence presented at trial tended to establish that on 15 September 1998, defendant was an inmate of the Montgomery County Jail. Jailers Carolyn Britt ("Britt") and Donna Williamson ("Williamson") were making their rounds for purposes of "locking down" the jail at approximately 11:00 p.m. Williamson went to cell number three to collect some used bottles. She unlocked the cell and reached in to collect the bottles. Williamson testified that as she did so, an inmate of cell number three grabbed her by the arm and restrained her.

Britt testified that she heard Williamson scream, and saw defendant walk out of cell number three and come towards her. Britt also

testified that she attempted to close the main door, but that defendant "stepped between [her] and the double door." She further testified defendant "was right on me, and so he took my left wrist and put it up behind my back. He . . . told me if I would do as he said he would not hurt me." Defendant then instructed Britt to open some of the cell gates, which she did. Defendant asked Britt for the keys to the "booking room". She responded that she did not have those keys and did not know where the keys were. Defendant then took Britt to the booking room and again asked for the keys. Britt again responded that she did not have the keys.

Britt testified that defendant then "took [her] all the way back inside the west walk area" where Williamson was sitting on the floor. Defendant asked Williamson for the keys to the booking room. Williamson responded that the other inmates had taken the keys. Defendant took Britt back in the direction of the "visiting room" and instructed her not to move. Defendant left Britt momentarily and returned with some keys. Britt testified that defendant took her back to the booking room and told her to unlock the door with the keys. Britt told defendant that those were not the keys to the booking room. Defendant transported Britt back to the visiting room where he took her police radio. When defendant left again, Britt locked herself in the Chief Jailer's office and called for help. When help arrived at approximately 11:45 p.m., defendant and three other inmates were gone.

Defendant was tried at the 28 February 2000 criminal session of the Montgomery County Superior Court on indictments of kidnapping, common law robbery, felonious escape, and larceny. Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all evidence. The trial court granted defendant's motion on the charge of larceny, at the close of all evidence. The jury returned guilty verdicts on one count of second-degree kidnapping, two counts of common law robbery, and one count of felonious escape from jail. The trial court sentenced defendant to an active term of imprisonment of a minimum of 77 months and a maximum of 103 months. Defendant appeals.

II. Issues

The issues on appeal are: (1) whether the trial court violated defendant's constitutional right to be present at all stages of his trial; (2) whether the trial court erred in denying defendant's motions to dismiss the charges of felonious escape and second-degree kidnap-

ping; and; (3) whether the trial court's jury instruction on felonious escape amounted to plain error.

A. Defendant's absence from jury selection

1. Failure to object to absence and waiver

[1] Defendant argues that he is entitled to a new trial based on the trial court's violation of his constitutional right to be present for all stages of the trial. Specifically, defendant contends that the trial court erred in excluding him from the courtroom during jury selection. Defendant was present in the courtroom when the case was called to trial and while the trial judge explained the process of jury selection. With the jury venire present, defendant stood up and engaged the trial judge in the following exchange:

> MR. MILLER: Honorable Judge?
>
> THE COURT: Have a seat please, Mr. Miller.
>
> MR. MILLER: I was told you told me not to come in here with my colors on, sir.
>
> THE COURT: I let you come in here with the hat. Sit down.
>
> MR. MILLER: But sir—
>
> THE COURT: Sit down.
>
> MR. MILLER: I have a problem with that.
>
> THE COURT: Sheriff, take him out of here please . . . . He's waived his right to be present.

Following jury selection, and outside the presence of the jurors, the trial court made the following statement for the record:

> [P]lease let the record reflect that before we began court this afternoon that [defense counsel] requested of the Court on behalf of [defendant's] mother and grandmother that they be allowed to speak with him in private in an effort to see if they could have some effect on his willingness to sit in the courtroom and be quiet, and that we did afford them that opportunity . . . . I am going to now bring him back in the absence of the jury and see if he is willing to sit and participate in this trial in a civilized and respectful fashion.

With the jury absent, defendant returned to the courtroom, and the trial court stated that defendant would have "the chance to say what-

ever it is [he] wants to say with the jury out of the room." Defendant then requested that his attorney be dismissed. After an exchange regarding defendant's legal representation, the trial court asked defendant the following:

> THE COURT: . . . Do you wish to sit here and participate in your trial in defense?
>
> MR. MILLER: Participate?
>
> THE COURT: Sit there and be quiet?
>
> MR. MILLER: I will not disrespect my family.
>
> THE COURT: So you're choosing not to be here for your trial, is that correct?
>
> MR. MILLER: I will not disrespect my mother and grandmother for injustice.
>
> THE COURT: Let the record reflect that Mr. Miller chooses not to be present for his trial, and we will proceed in his absence.

Defendant was escorted from the courtroom and the jury was impaneled. The trial court made the following statement to the jury:

> Now, ladies and gentlemen, first of all let me explain to you that the circumstances of this case are obviously a little different than you might have anticipated anywhere outside of a television portrayal of a trial. While you were out Mr. Miller came back in the courtroom, and we had a discussion as to whether he wished to be in the courtroom for the rest of his trial, and if so, whether he would commit to me that he would sit and participate in his defense in a respectful and quiet manner. He has chosen not to be present for the rest of his trial, and we're going to go ahead and let the State present their evidence to you and then let the defense present evidence, if they choose to do so.

The trial proceeded with opening statements. Prior to the examination of witnesses, defendant expressed that he wished to return to the courtroom and would sit quietly, which was reported to the trial court in open court. The trial court then allowed defendant to re-join the trial. Defendant remained in the courtroom throughout the balance of the trial.

The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution " 'guarantees an accused the right to be present

in person at every stage of his trial.' " *State v. Daniels*, 337 N.C. 243, 256, 446 S.E.2d 298, 307 (1994), *cert. denied*, *Daniels v. North Carolina*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995) (quoting *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987)). "However, in felonies less than capital, it is well established that a defendant may personally waive his right to be present." *State v. Stockton*, 13 N.C. App. 287, 291, 185 S.E.2d 459, 462-63 (1971) (citing *State v. Ferebee*, 266 N.C. 606, 146 S.E.2d 666 (1966)); *see also Parker v. United States*, 184 F.2d 488, 490 (4th Cir. 1950) (citing *Diaz v. United States*, 223 U.S. 442, 56 L. Ed. 500 (1912)). Such a right is "a purely personal right" that can be waived "expressly or by [the] failure to assert it." *State v. Braswell*, 312 N.C. 553, 559, 324 S.E.2d 241, 246 (1985).

"A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner." N.C. Gen. Stat. Sec. 15A-1032(a) (1999). Defendant voluntarily waived his right to be present during jury selection by his own disruptive behavior. Defendant continued to disrupt the trial by refusing to sit down. Defendant was given the opportunity to be present during opening statements and again refused to participate. *See State v. Callahan*, 93 N.C. App. 579, 378 S.E.2d 812 (1989) (no error when defendant was removed after becoming disruptive upon denial of his motion and again when the jury venire returned for jury selection); *State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518 (2000) (no error when defendant was removed after making two outbursts during the presentation of evidence regarding the charge of habitual felon); *State v. Thomas*, 134 N.C. App. 560, 518 S.E.2d 222 (1999) (no error when defendant was removed from the courtroom after disrupting the trial court while attempting to rule and enter an observation on the record).

The State acknowledges that the trial court failed to comply with the requirements of N.C. Gen. Stat. Sec. 15A-1032(b)(2) which provides: "if the judge orders a defendant removed from the courtroom he must . . . (2) [i]nstruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt." This Court has held that such an omission is error. *Smith*, 139 N.C. App. at 217, 533 S.E.2d at 522. This Court went on to say that not every error warrants a new trial. *Id.* (citing *State v. Ginyard*, 334 N.C. 155, 431 S.E.2d 11 (1993)). "An error is considered harmful when there is a reasonable probability that without the error a different result would have occurred. *Id.* (citing N.C. Gen. Stat. Sec. 15A-1443(a)).

Defendant has not shown any reasonable probability that a different result would have been reached had the instruction been given. Defendant was afforded the opportunity to talk with his attorney and keep informed of what took place during his absence. Defendant was present during the admission of all the evidence and confronted all of the witnesses.

Defendant concedes that neither defendant nor his attorney ever objected to the trial court's removing defendant prior to jury selection or following jury selection and before the presentation of opening statements. When defendant was excused prior to jury selection, his attorney continued on with the selection without making any objection to defendant's absence or the trial court's finding that defendant waived his right to be present. The failure to object at trial to the alleged denial of such a right constitutes waiver of the right to argue the denial on appeal. *See State v. Watson*, 338 N.C. 168, 191, 449 S.E.2d 694, 708 (1994), *cert. denied*, *Watson v. North Carolina*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995) ("In the instant case defendant, having failed to object at trial [based on his constitutional right to be present at all stages of the trial], waived his right and cannot assign as error the trial court's denial of the right."); *State v. Almond*, 112 N.C. App. 137, 149, 435 S.E.2d 91, 98 (1993) (defendant abandoned argument that his right to be present at all stages of trial was violated where record reveals that defendant raised objection for the first time on appeal).

When a party fails to timely object at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error. *State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 705 (1986); *State v. Reaves*, 142 N.C. App. 629, 630, 544 S.E.2d 253, 255 (2001). A defendant must "specifically and distinctly" contend on appeal that the omission amounted to plain error. N.C. R. App. P. 10(c)(4).

Defendant here has failed to argue that the trial court's finding that defendant waived his right to be present during jury selection amounted to plain error, or is otherwise preserved for our review. In short, defendant "did not object at trial or allege plain error," *State v. Scott*, 343 N.C. 313, 332, 471 S.E.2d 605, 616 (1996), and thus "has failed to properly preserve this issue for appeal." *Id.*; *see also, e.g.*, *State v. Call*, 353 N.C. 400, 545 S.E.2d 190 (2001) (assignment of error overruled where defendant "failed to assert plain error on appeal."); *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998) (defendant

waives plain error review where defendant does not assert plain error); *State v. McGraw*, 137 N.C. App. 726, 728, 529 S.E.2d 493, 496, ("In failing to assert plain error, defendant has waived review by this Court."), *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000).

The right to be present at all critical stages of a trial is subject to a harmless error analysis. *Braswell*, 312 N.C. at 560, 324 S.E.2d at 247 (citation omitted); *State v. Buckner*, 342 N.C. 198, 227-28, 464 S.E.2d 414, 431 (1995), *cert. denied*, *Buckner v. North Carolina*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996)). " '[T]he burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence.' " *State v. Neal*, 346 N.C. 608, 616, 487 S.E.2d 734, 739 (1997), *cert. denied*, *Neal v. North Carolina*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998) (quoting *State v. Buchanan*, 330 N.C. 202, 224, 410 S.E.2d 832, 845 (1991)). Defendant here has failed to show "the usefulness of his presence" during jury selection; especially in light of his subsequent statements evincing an intent not to sit quietly in the courtroom and allow the trial to proceed, and being present during the testimony of witnesses, presentation of all the evidence, return of the verdict, and entry of judgment.

2. Failure to object to jury instructions

[2] Defendant further argues that the trial court erred in failing to inform the jury that defendant's absence from the courtroom "was not to be considered in weighing the evidence or deciding his guilt" and that the trial court did not include any such instruction in the jury charge. However, defendant never objected to the omission of any such instruction.

"According to our rules of appellate procedure, a defendant waives his right to assign error to the omission of a jury instruction where he does not object to such omission before the jury retires to deliberate." *State v. Farmer*, 138 N.C. App. 127, 132, 530 S.E.2d 584, 588, *disc. review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000) (citing N.C. R. App. P. 10(b)(2)) (despite request for particular instruction, argument not preserved where defendant did not object at trial to omission of instruction). Again, defendant failed to preserve the issue for plain error review by "specifically and distinctly" contending that the omission amounted to plain error as required by N.C. R. App. P. 10(c)(4). Defendant has abandoned this argument. *See State v. Turner*, 11 N.C. App. 670, 673-74, 182 S.E.2d 244, 246 (1971) (where defense counsel failed to request that trial court instruct jury on defendant's waiver of right to be present and that his absence should

not be considered with regard to guilt or innocence, trial court's failure to so instruct not error). These assignments of error are overruled.

B. Motions to dismiss

1. Felonious escape

[3] Defendant first argues that the trial court should have granted his motion to dismiss the charge of felonious escape. Defendant contends that the State failed to present any evidence that defendant was serving a sentence upon conviction of a felony on 15 September 1995, the date of defendant's escape. We agree.

"The elements of felonious escape thus are (1) lawful custody, (2) while serving a sentence imposed upon a plea of guilty, a plea of nolo contendere, or a conviction for a felony, and (3) escape from such custody." *State v. Malone*, 73 N.C. App. 323, 324, 326 S.E.2d 302, 302-03 (1985) (citation omitted). "To prove the second of the foregoing elements, the State must offer evidence of the felony conviction or plea for which defendant was in lawful custody when he escaped." *Id.* at 324, 326 S.E.2d at 303. Evidence such as a properly certified copy of the commitment is competent to show the lawfulness of the custody and the type of offense for which the defendant was committed. *State v. Ledford*, 9 N.C. App. 245, 247, 175 S.E.2d 605, 606 (1970).

"Before a defendant can be convicted of this offense, the state must prove beyond a reasonable doubt that at the time of his escape defendant was serving a sentence of incarceration imposed for the conviction of a felony." *State v. Hammond*, 307 N.C. 662, 665, 300 S.E.2d 361, 363 (1983) (citation omitted); *State v. Parrish*, 73 N.C. App. 662, 667, 327 S.E.2d 613, 617 (1985) (citing *Hammond*, 307 N.C. 662, 300 S.E.2d 361) ("When a defendant is charged with felonious escape from the state prison system under G.S. § 148-45, the State has the burden of proving that defendant was . . . serving a sentence imposed upon conviction of a felony.").

In the present case, the State failed to present any evidence to the jury that defendant was serving a sentence for the commission of a felony on the date of his escape. The State argues that this fact was stipulated to by defendant. However, the record does not contain any clear statement of a stipulation by defendant that he was serving a sentence for a felony at the time of the escape. Defense counsel clearly stated that "defendant will stipulate that on the date in ques-

tion he was serving an active sentence . . . [i]n the Department of Corrections." Defendant never stipulated that he was serving an active sentence upon conviction of a felony, and the State neither introduced testimony nor exhibits, such as a certified copy of defendant's commitment, to prove that defendant was serving a sentence upon conviction of a felony.

Viewed in the light most favorable to the State, the evidence fails to establish the necessary element of felonious escape that defendant was serving a sentence for the commission of a felony. The evidence does prove that defendant was serving an active sentence, which supports a finding that defendant is guilty of the lesser included offense of misdemeanor escape under N.C. Gen. Stat. 148-45(a).

2. Second-degree kidnapping

[4] Defendant further assigns error to the trial court's denial of his motions to dismiss the charge of second-degree kidnapping, arguing that the evidence was insufficient to support each element of the crime. In order to establish the commission of second-degree kidnapping, "the State bears the burden of proving that the defendant 'unlawfully confined, restrained, or removed the [victim] for one of the eight purposes set out in the statute.' " *State v. Guice*, 141 N.C. App. 177, 181, 541 S.E.2d 474, 477-78 (2000), *stay allowed*, 353 N.C. 388, 546 S.E.2d 610 (2001) (quoting *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986)). " 'The indictment in a kidnaping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment.' " *Id.* at 181, 451 S.E.2d at 478 (quoting *Moore*, 315 N.C. at 743, 340 S.E.2d at 404).

In the present case, defendant's indictment for second-degree kidnapping alleged that defendant unlawfully confined and restrained Britt "for the purpose of facilitation of the commission of a felony . . . felony escape from jail." *See* N.C. Gen. Stat. § 14-39 (unlawful confinement or restraint amounts to second-degree kidnapping where done for the purpose of "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony.").

The State was required to present substantial evidence that defendant kidnapped Britt for the purpose of committing the crime of felonious escape. We have already held that the State failed to present

substantial evidence that defendant was serving a sentence for a felony, and thus could not be guilty of committing felonious escape. However, the jury's verdict of guilty of second-degree kidnapping contains all the elements of the lesser included offense of false imprisonment: (1) intentionally and unlawfully, (2) restrains or detains a person, (3) without the person's consent. *State v. Surrett*, 109 N.C. App. 344, 350, 427 S.E.2d 124, 127 (1993).

C. Jury instruction on felonious escape

We need not address defendant's remaining argument that the trial court erred in instructing the jury on felonious escape in light of our holding that the State failed to present evidence to the jury that defendant was serving a sentence for the commission of a felony on the date of his escape.

We, however, note that the trial court's instruction, which required a guilty verdict upon the findings that defendant (a) was lawfully confined in the Montgomery County Jail, and (b) escaped, erroneously failed to distinguish between felonious escape and misdemeanor escape and to clearly require the finding that defendant was serving a sentence for the commission of a felony. *See Ledford* at 247-48, 175 S.E.2d at 607.

We hold that the evidence was insufficient to support the verdicts of felonious escape (98CRS004137) and second-degree kidnapping (98CRS004138) and vacate defendant's convictions as to these charges. We hold there was no error in the remainder of the verdict and judgment as to the two counts of common law robbery (98CRS004135 and 98CRS004136). We remand to the trial court for imposition of judgment on the lesser included offenses of misdemeanor escape and false imprisonment and for resentencing.

No error in part, vacated and remanded in part.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. MICHAEL DALTON COLBERT, DEFENDANT

No. COA00-715

(Filed 16 October 2001)

1. Evidence— motion to suppress—grounds—other than stated in motion

The trial court did not err by granting defendant's motion to suppress evidence obtained during an impaired driving checkpoint on grounds other than those stated in the motion. N.C.G.S. § 15A-977(c) provides that the judge may summarily deny a motion that does not allege a legal basis; the decision is vested in the discretion of the trial court and, once the court decides not to dismiss the motion but to have a hearing, it may base its conclusion on grounds other than those set forth in the motion.

2. Motor Vehicles— impaired driving checkpoint—validity of plan—screening procedure

The trial court erred by dismissing evidence gained from an impaired driving checkpoint on the grounds that it did not meet the requirement of N.C.G.S. § 20-16.3A in that it did not designate in advance the pattern for requesting that drivers be stopped to submit to screening tests. The plan required that every vehicle be stopped, that every driver be administered a series of alcohol screening procedures such as engaging the driver in conversation, and that a driver would be taken to a second location for the alco-sensor test only if there was a reasonable and articulable suspicion of impairment. The fact that an officer must make a judgment as to whether there is reasonable and articulable suspicion does not vitiate the validity of the plan nor offend the requirement that officers not be permitted unbridled discretion.

3. Motor Vehicles— impaired driving checkpoint—officers observing defendant and making arrest

There is nothing in the impaired driving checkpoint statute or case law to support the argument that the officer who observed defendant in his vehicle must be the officer who performs the alcohol screening test and makes the arrest, or that the officers observing defendant, administering the screening test, and arresting defendant must be members of the agency which made the plan for the checkpoint.

Appeal by the State from judgment entered 11 January 2000 by Judge Narley L. Cashwell in Granville County Superior Court. Heard in the Court of Appeals 16 May 2001.

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

Currin & Dutra, LLP, by Thomas L. Currin, for defendant.

BIGGS, Judge.

The State appeals the trial court's grant of defendant's motion to suppress evidence obtained during an impaired driving checkpoint stop. The trial court ruled that the checkpoint did not comply with N.C.G.S. § 20-16.3A(2) (1999) in that the agency conducting the check failed to designate, in advance, a pattern for requesting drivers to submit to alcohol screening tests. We disagree and reverse the trial court.

On 6 July 1998, the Senior Public Safety Officer of the Butner Public Safety Department sent a letter to several law enforcement agencies requesting their participation in an impaired driving checkpoint operation scheduled for 18 July 1998. The letter requested the participation of eight organizations including: Butner Public Safety personnel, the Granville County Sheriff's Office, the North Carolina Highway Patrol, the Oxford Police Department, and the Creedmoor Police Department, to name a few. Attached to the letter was a memorandum from Rufus Sales (Sales), Chief of Butner Public Safety Department, setting forth the guidelines for carrying out this operation (hereinafter, Butner Plan). According to the memorandum, on 18 July 1998, two impaired driving checkpoints would be set up, one on Highway 56 and the other in another location. Each site would have a Breath Alcohol Testing Mobile Unit.

On 18 July 1998, defendant, while traveling on Highway 56, approached one of the impaired driving checkpoints set up pursuant to the 6 July 1998 letter and was stopped by Sergeant Rose of the North Carolina Highway Patrol. Sergeant Rose performed the following screening of the defendant: (1) requested defendant to produce his driver's license, (2) observed the defendant's eyes for signs of impairment, (3) engaged the defendant in conversation to determine if the defendant had the odor of alcohol on his breath or if his speech pattern indicated impairment, and (4) observed the defend-

ant's clothing. Following these initial observations, Sergeant Rose instructed Trooper McMillan, who had also observed the defendant operate the vehicle, to take the defendant for further alcohol screening. Trooper McMillan conducted an alco-sensor test on the defendant and based on the results of the test, he placed the defendant under arrest for impaired driving and cited him for other driving violations. Sergeant Rose did not participate in the administration of the alco-sensor test or arrest.

On 9 November 1999, the defendant filed a motion to suppress the evidence obtained during the stop. A hearing on the motion to suppress took place in Superior Court in Granville County on 3 March 2000. The trial court granted defendant's motion to suppress, concluding that the agency failed to designate in advance the pattern for requesting drivers that are stopped to submit to alcohol screening tests which was required by G.S. § 20-16.3A(2).

I.

[1] The State first assigns as error the trial court's grant of defendant's motion to suppress on a ground other than the grounds specifically raised by defendant in his motion. The State argues that the issue of "whether the checkpoint complied with N.C.G.S. § 20-16.3A(2) was not raised in defendant's motion to suppress and is therefore barred on appellate review." We disagree.

The standards governing motions to suppress are set forth in Chapter 15A of the North Carolina General Statutes. There are two provisions which are relevant to this discussion. First, N.C.G.S. § 15A-977(a) (1999) provides that "[t]he motion to suppress must state the grounds upon which it is made." Section 15A-977(c) provides "[t]he judge *may* summarily deny the motion to suppress evidence if . . . the motion does not allege a legal basis for the motion[.]" "[T]he decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court." *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E.2d 857, 859 (1985). Once the trial court decides not to dismiss the motion but rather to have a hearing, the court may base its conclusion on grounds other than those set forth in the motion. *Id.*

In the case *sub judice*, defendant's motion set forth the following grounds as a basis to suppress evidence obtained following his stop: that (1) the stop was not conducted by "an agency" within the

meaning of G.S. § 20-16.3A and (2) the stop did not comply with provisions as set forth in the 6 July 1998 memorandum. The State argues that since the court granted the motion to suppress on the ground that "the agency failed to designate in advance the pattern for requesting drivers that are stopped to submit to alcohol screening tests" that the court's decision should be reversed. We find no support for this argument.

In *State v. Harvey*, the Court was asked to consider whether the trial judge properly considered grounds for the suppression motion which were not contained in the motion itself. *Harvey*, 78 N.C. App. at 237, 336 S.E.2d at 859. This Court upheld the trial court where the motion to suppress filed by the defendant raised the issue of voluntariness of a confession; however, the trial court granted the motion to suppress on the grounds that defendant had not been given his Miranda rights. *Id.* at 235, 336 S.E.2d at 857.

While G.S. § 15A-977(c) and this Court in *Harvey* make clear that the court in this case may have had the authority to dismiss the motion, there is nothing that requires it to do so. Once the court, in its discretion, moves forward with a hearing it must set forth findings of fact and conclusions of law based on the evidence presented. Accordingly, this assignment is overruled.

II.

[2] The State next contends that the trial court erred in granting defendant's motion to suppress on the basis that the Butner Plan failed to meet the requirement of G.S. § 20-16.3A (2) in that it did not designate in advance the pattern for requesting drivers that are stopped to submit to alcohol screening tests. We agree.

G.S. § 20-16.3A which governs the establishment, organization and management of impaired driving checkpoints provides in pertinent part:

> A law-enforcement agency may make impaired driving checks of drivers of vehicles on highways and public vehicular areas if the agency:
>
> . . . .
>
> **(2) Designates in advance the pattern both for stopping vehicles and for requesting . . . screening tests** . . . but no individual officer may be given discretion as to which vehicle is

stopped or, of the vehicles stopped, which driver is requested to submit to an alcohol screening test.

G.S. § 20-16.3A.

Defendant contends, and the trial court, found that while the Butner Plan did designate in advance a pattern for stopping vehicles, *i.e.*, every car was to be stopped; it did not designate in advance a pattern for requesting alcohol screening tests. In its Order Allowing the Motion to Suppress, the trial court made the following findings with respect to the Butner Plan:

2. C. Subparagraph D of the memorandum provided "every vehicle is to be stopped. If traffic conditions create a hazard the Captain in charge may temporarily alter this pattern. The officers conducting the check may not vary from the pattern otherwise."

   D. Subparagraph E of the memorandum provided "the Officer stopping the vehicle, in every case will perform only the following screening: 1. Request the driver to produce a driver's license. 2. To observe the driver's eyes for signs of impairment. 3. Engage the driver in conversation to determine if the driver has an odor of alcohol on his or her breath or if his or her speech pattern indicates possible impairment. 4. Observe the driver's clothing."

   E. Thereafter, the memorandum provided "if, after the driver submits to this screening test, the officer forms a reasonable and articulate (sic) suspicion based on the above test, that the driver is impaired or has otherwise committed a violation of law, the officer will take the driver to a secondary location for further tests or observation which may aid the officer in determining probable cause."

   F. The memorandum provided "the alco-sensor will only be used after the officer has formed and (sic) articulable and reasonable suspicion that the driver has committed an implied consent offense."

The trial court concluded that the Butner Plan did not comply with G.S. § 20-16.3A(2) in that it did not designate in advance the pattern for "requesting drivers that are stopped to submit to alcohol screening tests". Further, the court concluded:

> [t]hat to the extent that the procedures and directives set out in the memorandum designated a "pattern" for requesting drivers that are stopped to submit to alcohol screening tests then such pattern gave individual officers discretion as to which driver was requested to submit to an alcohol screening test within the meaning of 20-16.3A in violation of the specific provision of that subsection prohibiting such discretion.

In reviewing the trial court's ruling on a motion to suppress, we determine only whether the trial court's findings of fact are supported by competent evidence in the record, and whether these findings of fact support the court's conclusions of law. *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d. 280, 282 (2000). We find that the trial court's conclusions in the case *sub judice* are not supported by the court's findings and the law governing impaired driving checkpoint stops.

The United States Supreme Court in *Michigan State Police v. Sitz* upheld a sobriety checkpoint program similar to the plan in the present case. 496 U.S. 444, 447, 110 L. Ed. 2d 412, 418 (1990). Under the program in *Sitz*, checkpoints would be set up at selected locations. *Id.* All vehicles passing through a checkpoint would be stopped and drivers briefly examined for signs of intoxication. *Id.* In cases where a checkpoint officer detected signs of intoxication, the driver was directed to a location where the motorist's driver's license and car registration were investigated and, if warranted, further sobriety tests were conducted. *Id.* Finally, if the subsequent tests indicated that the driver was impaired, an arrest would be made. *Id.* Law abiding drivers were allowed to resume traveling after the initial screening. *Id.*

The Court in *Sitz* applied a three-prong balancing test to determine whether this sobriety checkpoint plan, would survive constitutional muster. The Court "balanc[ed] the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." *Sitz*, 496 U.S. at 449, 110 L. Ed. 2d at 419.

The Court concluded that the Michigan checkpoint program was constitutional. It found that the State had a significant interest in preventing accidents caused by drunk drivers and that the checkpoint plan would be effective in achieving that goal. Moreover, the court found that the intrusion upon motorists stopped briefly at sobriety

checkpoints is slight. *Sitz*, 496 U.S. at 451, 110 L. Ed. 2d at 421. The Supreme Court was careful to limit its holding to the initial stop of each motorist passing through the checkpoint and the associated preliminary questioning and observation by checkpoint officers. The Court acknowledged that "[d]etection of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard[.]" *Sitz*, 496 U.S. at 451, 110 L. Ed. 2d at 420.

Moreover this Court in *State v. Barnes*, 123 N.C. App. 144, 472 S.E.2d 784 (1996), upheld a similar checkpoint stop. In that case, defendant drove his vehicle to the checking station where he was stopped, along with all other motorists passing through the checkpoint, and asked to produce his driver's license and registration. The officer noticed that defendant's eyes were glassy and bloodshot and he detected the odor of alcohol. When asked how much he had to drink, defendant responded, "none." Thereafter, another officer took over the investigation and defendant was later charged with driving while impaired. This Court in reversing the trial court and upholding the stop stated "[t]here is no evidence or finding that the checking station . . . resulted in any unusual delay for defendant or other motorists, created any unsafe condition(s) or was otherwise unreasonable." *Barnes*, 123 N.C. App. at 146-47, 472 S.E.2d at 785.

In the case *sub judice*, the Butner Plan requires that: 1) every vehicle driving through the checkpoint be stopped; 2) every driver be administered a series of alcohol screening procedures as set forth in the trial court's finding #2D; and 3) only if there is reasonable and articulable suspicion of impairment is the driver then taken to a second location for administration of a alco-sensor test. We agree with the State that the fact that an officer must make a judgment as to whether there is a reasonable and articulable suspicion does not vitiate the validity of the plan nor offend the requirement that individual officers not be permitted to exercise unbridled discretion under G.S. § 20-16.3A(2).

Another pertinent provision of G.S. § 20-16.3A that supports the legality of the Butner Plan is as follows:

> This section does not prevent an officer from using the authority of G.S. § 20-16.3 to request a screening test if, in the course of dealing with a driver under the authority of this section, he develops grounds for requesting such a test under G.S. § 20-16.3.

Further, G.S. § 20-16.3 provides, in pertinent part, that:

> A law-enforcement officer may require the driver of a vehicle to submit to an alcohol screening test . . . if the officer has:
>
> . . . .
>
> (2) An articulable and reasonable suspicion that the driver has committed an implied-consent offense under G.S. 20-16.2, and the driver has been lawfully stopped for a driver's license check or otherwise lawfully stopped or lawfully encountered by the officer in the course of the performance of the officer's duties.

The Butner Plan has incorporated the essence of these statutory provisions into its plan. The trial court appears to have accepted defendant's argument that because the Butner Plan did not require "every driver" or "every tenth driver" or "every driver with the odor of alcohol about his person" to submit to the alco-sensor test, the plan did not comply with G.S. § 20-16.3A(2). This is reflected in the following statement by the court:

> Again, my concern is that the pattern for stopping vehicles and there must be also a pattern for asking drivers to submit to alcohol screening tests. I don't necessarily know that it has to be by vehicle. I mean, I would assume that the pattern for stopping vehicles could be, we are going to stop every vehicle and we are going to ask every third vehicle or every fifth vehicle, the driver of that vehicle, without regard to whether or not we have any articulable and reasonable suspicion, we are simply going to ask them to take a test, take an alco-sensor test or whatever alcohol screening test we designate.
>
> So, we are going—we stop every vehicle, but every third or every fifth or whatever their number decision was, we are going to ask that driver, doesn't matter period, because if we do it that way, we have met the constitutional requirements. Okay.
>
> But they could have also said, perhaps, again, we are going to stop every vehicle, but every driver who has the odor of alcohol on his breath will be asked to take an alco-sensor test. That would also be a pattern.

It would appear that the trial court believed that the alcohol screening test referred to in G.S. § 20-16.3A(2) refers only to the administration of the alco-sensor test. We find that the alcohol screening procedure outlined in the trial court's finding #2D (which

is administered to every driver passing through the checkpoint), and the administration of the alco-sensor test to those where the officer has a reasonable and articulable suspicion is a pattern designated in advance for requesting drivers that are stopped to submit to alcohol screening tests as required by G.S. § 20-16.3A(2).

To allow a pattern as contemplated by the trial court would violate the third prong of the balancing test as set forth in *Sitz* in that it would be far more intrusive to require every driver or every third driver, irrespective of evidence of intoxication, to be administered an alco-sensor test. Taking this position to its logical conclusion, the following scenario would be possible: A checkpoint is set up and the advance pattern designated in the checkpoint plan could require that every third driver be administered an alco-sensor. An officer at the checkpoint could have a reasonable and articulable suspicion that the driver of car #2 is impaired. The officer, under the plan, would be required to ignore obvious signs of impairment and allow the impaired driver through the checkpoint. We think not. We find this interpretation of G.S. § 20-16.3A and the supporting case law erroneous. The Butner Plan is clearly reasonable and does not allow unbridled discretion of the officer as contemplated by *Sitz*. *See also Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979), (the Court recognized that states should be permitted to develop methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion). Accordingly, we conclude that the Butner Plan is constitutionally permissible and comports with G.S. § 20-16.3A.

Having established that the Butner Plan is constitutionally permissible, we find no need to address the State's other assignments of error.

[3] Defendant sets forth two cross assignments of error pursuant to Rule 10(d) of the N.C. Rules of Appellate Procedure. He contends that the trial court erred in concluding that evidence from the stop was not required to be suppressed on the following grounds:

> 1) . . . That the officer who observed the defendant in his vehicle was not the same officer who performed the alcohol screening test and who determined the probable cause to arrest.
>
> 2) . . . That each of the officers who actually observed the defendant, administered the alcohol screening test and arrested the defendant were members of a law enforcement agency other

than the agency which made the plan for the impaired driving check on vehicles.

We note that the defendant cites no authority for these arguments. Moreover, we find nothing in the impaired driving checkpoint statute or case law to support these arguments. We agree with the trial court that even if these contentions are true, they do not require suppression of the evidence obtained as a result of the stop.

Accordingly, we overrule defendant's cross assignments.

Reversed.

Judges WYNN and CAMPBELL concur.

SHELBY JEAN PARRIS, PLAINTIFF v. NATHANIEL L. LIGHT, DEFENDANT

No. COA00-1230

(Filed 16 October 2001)

1. Civil Procedure— denial of Rule 60 motion—lack of explicit findings—no indication of improper standard

The trial court's failure to make explicit findings of fact when denying a Rule 60 motion for relief did not indicate that the court failed to employ the proper standard of review where there was nothing to suggest that the court examined the facts de novo or otherwise used an improper standard of review.

2. Civil Procedure— Rule 60 motion—neglect by attorney—imputed to client

The trial court did not abuse its discretion in denying a plaintiff's motion for Rule 60 relief from a dismissal which resulted from failure to comply with discovery orders where plaintiff argued that negligence by her counsel should not be imputed to her. Ignorance, inexcusable neglect, or carelessness by an attorney will not provide grounds for relief under N.C.G.S. § 1A-1, Rule 60(b)(1).

3. Civil Procedure— Rule 60 relief denied—failure to respond to discovery orders—inexcusable neglect

The trial court did not abuse its discretion by denying plaintiff's Rule 60(b)(1) motion for relief from a dismissal for failure to

comply with discovery orders where defendant served his discovery request in August of 1999; plaintiff failed to timely respond; defense counsel sent a letter to plaintiff regarding her late responses but received no reply; defendant filed a motion to compel several weeks after plaintiff's responses were due; the parties agreed to entry of an order allowing plaintiff an additional thirty days to comply but plaintiff did not do so; defense counsel left several messages with plaintiff's counsel regarding the failure to comply; defendant filed a second motion to compel; plaintiff's counsel was absent from the hearing; about six months passed between the time the orders were due and the dismissal but plaintiff never requested an extension; and defendant never received complete discovery responses.

Appeal by plaintiff from an order entered 1 June 2000 by Judge L. Todd Burke in Stokes County Superior Court. Heard in the Court of Appeals 12 September 2001.

Charles O. Peed and Associates, by Charles O. Peed, for plaintiff-appellant.

Davis & Hamrick, L.L.P., by J. Chad Bomar, for defendant-appellee.

HUNTER, Judge.

Shelby Jean Parris ("plaintiff") appeals the denial of her motion for relief from an order dismissing her negligence action against Nathaniel L. Light ("defendant"). We affirm the trial court's order denying plaintiff relief from the order of dismissal.

On 3 October 1996, plaintiff was injured when her vehicle collided with a vehicle driven by defendant. Plaintiff filed a complaint alleging defendant's negligence on 26 July 1999. On 25 August 1999, defendant, through counsel, served upon plaintiff a first set of Interrogatories and Request for Production of Documents. Plaintiff did not respond within the required thirty-day time frame and did not request that the court grant her an enlargement of time to respond to the discovery request. Defendant notified plaintiff by letter of her failure to timely respond to the discovery request.

When plaintiff had still not responded to the request by 16 November 1999, defendant filed a Motion to Compel, requesting that the trial court order plaintiff to respond to defendant's 25 August 1999

discovery request. Following the motion, plaintiff filed incomplete responses to the discovery request on 3 January 2000. On 5 January 2000, both parties, through counsel, consented to the entry of an order allowing plaintiff an additional thirty days from the date of the order to provide complete and accurate discovery responses. The order was signed by plaintiff's counsel.

Plaintiff failed to comply with the court-ordered thirty-day deadline for responding to defendant's discovery request. On 10 February 2000, after unsuccessful attempts to contact plaintiff's counsel, defense counsel filed another Motion to Compel. In addition to requesting that the court compel plaintiff to respond to defendant's 25 August 1999 request, defendant moved the court to impose appropriate sanctions pursuant to Rule 37 of the Rules of Civil Procedure.

Defendant's second Motion to Compel was heard on 1 March 2000. The trial court noted in its order that plaintiff's counsel had failed to appear for the 21 February 2000 calendar call of the case, and when the matter was subsequently called for hearing. The trial court, noting that defendant had requested appropriate relief under Rule 37, entered an order dismissing plaintiff's action.

Plaintiff's counsel filed a Motion for Relief from Judgment or Order on 14 April 2000 on the basis of "inadvertence or excusable neglect," stating that he was "unaware" of the failure to comply with discovery rules. Plaintiff's motion was heard on 1 June 2000 in the Superior Court of Stokes County. The trial court reviewed the file, heard arguments of counsel for both parties, and entered an order denying plaintiff's motion to set aside the order dismissing her action. Plaintiff appeals.

Plaintiff argues that the trial court abused its discretion in denying her motion for relief pursuant to Rule 60(b)(1) of the Rules of Civil Procedure. Plaintiff argues: (1) the trial court's order must be reversed for failure to apply the appropriate standard of review; and (2) the trial court's order must be reversed because the evidence is sufficient to show that plaintiff's counsel's failure to comply with discovery rules and the court order was due to "excusable neglect" and that any negligence of plaintiff's counsel should not be imputed to plaintiff.

Rule 60(b)(1) of the Rules of Civil Procedure "allows a party, on motion to the trial court, to seek relief from a final judgment on the grounds of mistake, inadvertence, surprise or excusable neglect."

Gibson v. Mena, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001). "Appellate review of a trial court's ruling pursuant to Rule 60(b) is limited to determining whether the trial court abused its discretion." *Moss v. Improved B.P.O.E.*, 139 N.C. App. 172, 176, 532 S.E.2d 825, 829 (2000) (citing *Vaughn v. Vaughn*, 99 N.C. App. 574, 575, 393 S.E.2d 567, 568, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990)).

[1] Plaintiff first argues that the trial court's order must be reversed because the trial court failed to employ the proper standard of review. We note that this argument in plaintiff's brief fails to correspond directly to any of the assignments of error set forth in the record on appeal. The scope of appellate review "is confined to a consideration of those assignments of error set out in the record on appeal." N.C.R. App. P. 10(a). In any event, plaintiff's argument is unpersuasive.

The trial court's order recited the procedural background of the case, including all of plaintiff's failures to comply with discovery rules and the court order compelling discovery. The court then concluded that "it is within the Court's discretion to decide this matter and does therefore deny the Plaintiff's Motion for Relief from Judgment of [sic] Order." Plaintiff argues that the trial court's failure to make findings as to whether relief was warranted on the basis of "inadvertence or excusable neglect," as argued by plaintiff in her Rule 60(b)(1) motion, reveals that the trial court did not employ the proper standard of review for a Rule 60(b) motion.

We do not agree that the absence of any such findings indicates that the trial court failed to employ the proper standard of review for a motion based upon Rule 60(b)(1). "[T]his Court consistently has held: 'Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party.' " *Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 (citations omitted), *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). "Rendition of findings of fact is not required of the trial court in ruling upon a Rule 60(b) motion absent the request of a party, 'although it is the better practice to do so.' " *Gibson*, 144 N.C. App. at 128, 548 S.E.2d at 747 (citation omitted) (noting that "[i]n the case *sub judice*, the trial court entered no findings of fact upon which to base its legal conclusion of excusable neglect"). Thus, the trial court was not required to make any findings regarding counsel's conduct and whether it constituted excusable neglect.

In support of her position, plaintiff cites *Anuforo v. Dennie*, 119 N.C. App. 359, 458 S.E.2d 523 (1995), in which this Court determined that the trial court applied an inappropriate standard of review to a Rule 60(b) motion. In that case, not only did the trial court fail to mention any of the factors for granting relief under Rule 60(b), but the trial court's order affirmatively revealed that it applied the wrong standard of review to the Rule 60(b) motion. *Id.* at 362, 458 S.E.2d at 525. The trial court's order clearly stated that the trial court simply reconsidered whether the movant had violated the Rules of Appellate Procedure, and having determined that the movant had done so, denied the Rule 60(b) motion on that ground. *Id.* Essentially, the trial court considered the issue of dismissal of the suit *de novo* as opposed to determining whether the neglect was excusable. *Id.*

Here, however, nothing in the trial court's order suggests that the court examined the facts *de novo* or otherwise used an improper standard of review in ruling upon the motion. Indeed, the trial court was correct in its statement that the matter before it was purely within its discretion to determine. *See, e.g., Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170 (citation omitted) (" '[t]he granting of [a Rule 60] motion is within the sound discretion of the trial court' "), *disc. review denied*, 354 N.C. 365, 555 S.E.2d 922 (2001); *Grant v. Cox*, 106 N.C. App. 122, 124-25, 415 S.E.2d 378, 380 (1992) ("[a] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion" (citations omitted)).

Although it is clearly the better practice for trial courts to make explicit findings of fact with respect to the elements of Rule 60(b)(1), we hold that the trial court's failure to do so here does not require reversal. Unlike the trial court order under review in *Anuforo*, the order on appeal here does not affirmatively reveal any error of law.

[2] Plaintiff next argues that the trial court abused its discretion in denying her motion because there was sufficient evidence upon which it could conclude that any neglect was excusable, and thus worthy of relief under Rule 60(b)(1). Plaintiff argues that she herself was diligent in the prosecution of her case, that she could not have foreseen the negligence of her attorney, and that the trial court was required to find that any negligence on the part of plaintiff's counsel cannot be imputed to her. We disagree.

In support of her argument, plaintiff argues that the trial court's denial of her motion is evidence that plaintiff's counsel's negligence

was "imputed to [plaintiff]-a ruling that is in direct conflict with this Court's holding in *Briley v. Farabow*[, 127 N.C. App. 281, 488 S.E.2d 621 (1997)]." However, this Court's opinion in *Briley* has been overruled by our Supreme Court which expressly held that an attorney's inexcusable neglect may be imputed to the party:

> Clearly, 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). In enacting Rule 60(b)(1), the General Assembly did not intend to sanction an attorney's negligence by making it beneficial for the client and to thus provide an avenue for potential abuse. Allowing 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. Plaintiffs have argued that this Court should provide relief from an order if only the attorney, rather than the client, was negligent. Looking only to the attorney to assume responsibility for the client's case, however, leads to undesirable results. As one federal judge noted:
>
> "Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either."

Briley v. Farabow, 348 N.C. 537, 546-47, 501 S.E.2d 649, 655 (1998) (citations omitted).

The Supreme Court concluded: "Thus, we hold that an attorney's negligent conduct is not 'excusable neglect' under Rule 60(b)(1) and that in determining such, the court must look at the behavior of the attorney." *Id.* at 547, 501 S.E.2d at 655. This Court has recently reaffirmed the principle that a trial court must consider an attorney's conduct in determining whether there is inexcusable neglect under Rule 60(b). *See Henderson v. Wachovia Bank of N.C.*, 145 N.C. App. 621, 551 S.E.2d 464, *disc. review denied*, 354 N.C. 572, 558 S.E.2d 869 (2001); *Fox v. Health Force, Inc.*, 143 N.C. App. 501, 506, 547 S.E.2d 83, 86-87 (2001). As we recently noted, "[i]gnorance, inexcusable negligence, or carelessness on the part of an attorney will not provide grounds for relief under Rule 60(b)(1)." *Clark v. Penland*, 146 N.C. App. 288, 292, 552 S.E.2d 243, 245 (2001) (citation

omitted). Plaintiff's argument that her attorney's negligence cannot be imputed to her is without merit.

[3] Moreover, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for relief. In order to set aside a judgment on the grounds of excusable neglect under Rule 60(b)(1), the moving party must show both that the judgment rendered against him was due to excusable neglect and that he has a meritorious defense. *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 726, 515 S.E.2d 17, 21 (1999) (citation omitted). Moreover, when a trial court fails to make findings of fact with respect to the elements of Rule 60(b), the order will be reversed "unless there is evidence in the record sustaining findings which the trial court could have made to support such order." *Gibson*, 144 N.C. App. at 128-29, 548 S.E.2d at 747.

An attorney's neglect in failing to abide by the rules of discovery has been held to be inexcusable in the context of Rule 60(b)(1). In *Briley*, the Supreme Court addressed whether Rule 60(b)(1) "may be used to provide relief from sanctions imposed upon plaintiffs under Rule 26(f1) of the North Carolina Rules of Civil Procedure for their attorney's failure to designate experts by a court-ordered deadline." *Briley*, 348 N.C. at 538-39, 501 S.E.2d at 650. The plaintiffs' attorney had failed to designate any expert witnesses within the court-ordered thirty-day time frame for doing so. *Id.* at 539, 501 S.E.2d at 651. When the plaintiffs finally designated their experts approximately four months after the thirty-day deadline, the defendants filed a motion to strike the experts, and moved for summary judgment on the grounds that, without any expert testimony from the plaintiffs, there remained no genuine issues of material fact. *Id.* at 540, 501 S.E.2d at 651.

The plaintiffs argued that they were entitled to relief under Rule 60(b)(1) from the trial court's order striking their expert witness designation and granting defendants summary judgment. *Id.* at 540, 501 S.E.2d at 652. The plaintiffs maintained that their attorney's failure to comply with discovery deadlines was due to a "mistaken assumption" that the parties had informally agreed to delay discovery. *Id.* at 541, 501 S.E.2d at 652. The trial court determined that the attorney's neglect was "unexcused" and that the neglect was imputed to plaintiffs. *Id.*

In upholding the trial court's denial of the Rule 60(b)(1) motion, the Supreme Court held that the evidence was sufficient to support the trial court's findings that the plaintiffs were required to file their

expert witness designation on or before 30 November 1995; that they failed to do so; that no extension of time was sought; and that they did not offer any plausible excuse for the late designation. *Id.* at 547, 501 S.E.2d at 655.

A variety of similar rules violations have been held to constitute inexcusable neglect. *See, e.g., East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 82 N.C. App. 746, 748, 348 S.E.2d 165, 167 (1986) (plaintiff's failure to reply or otherwise file any pleading within thirty days of being served with counterclaim not excusable neglect within meaning of Rule 60(b)(1)), *disc. review denied*, 318 N.C. 693, 351 S.E.2d 745 (1987); *Overnite Transportation v. Styer*, 57 N.C. App. 146, 150, 291 S.E.2d 179, 181 (1982) (defendant's failure to appear for motion for summary judgment despite having received calendar properly informing him of time, date, and place for hearing not excusable neglect within meaning of Rule 60(b)(1)).

In this case, the evidence would have supported findings of fact that plaintiff's counsel's neglect was inexcusable. Defendant served his discovery request in August 1999. Plaintiff failed to timely respond. Defense counsel stated that he sent a letter to plaintiff regarding her late discovery responses, but received no reply or acknowledgment. Defendant filed a Motion to Compel discovery responses on 16 November 1999, several weeks after plaintiff's responses were due under Rules 33 and 34 of the Rules of Civil Procedure.

Both parties then agreed to the entry of an order allowing plaintiff an additional thirty days to respond completely to the request. Plaintiff's counsel signed the order. Nevertheless, plaintiff failed to comply with the court order. Defense counsel stated that he left several messages with plaintiff's counsel regarding the failure to comply with the court order, but that the messages had no effect. On 10 February 2000, defendant filed a second Motion to Compel plaintiff's responses. When the matter came to hearing, plaintiff's counsel was absent. By the time the trial court entered an order of dismissal in March 2000, approximately one half year had passed since the date that plaintiff's responses were due under Rules 33 and 34. Plaintiff never requested an extension of time to respond during these several months. Defendant stated that he never received complete discovery responses from plaintiff.

Although plaintiff presented the trial court with affidavits blaming the extended failure to comply with discovery rules on counsel's

office staff and on counsel's vision problems, the decision to accept such evidence as excusable neglect was within the sound discretion of the trial court. We discern no abuse of discretion in light of all of the evidence, particularly the fact that plaintiff's counsel—not office staff—signed the 5 January 2000 consent order entered upon defendant's first Motion to Compel. Moreover, plaintiff has failed to present any evidence which would support a finding that the failure to comply with discovery rules and the court order was the result of mistake, inadvertence, or surprise.

We hold that the evidence of plaintiff's consistent failure to comply with both the Rules of Civil Procedure and a court order is sufficient to support a conclusion that plaintiff's counsel's neglect was not excusable; that such neglect is imputed to plaintiff; and that the trial court did not abuse its discretion in determining that counsel's neglect did not warrant relief under Rule 60(b)(1) or 60(b)(6) (relief permitted for "[a]ny other reason" within the court's discretion).

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. DARIN L. HAYNESWORTH

No. COA00-1228

(Filed 16 October 2001)

1. Homicide— attempted first-degree murder—struggle with officer

The trial court did not err by refusing to dismiss a charge of attempted first-degree murder for insufficient evidence where an officer responded to a call regarding an individual causing a disturbance at a church; a struggle ensued when the officer attempted to handcuff defendant; the officer's attempt to handcuff defendant was not a provocation and the officer struck defendant only after defendant struck him; several witnesses, including the officer, testified that defendant made repeated attempts to grab the officer's gun as they struggled and one stated that the officer was in a struggle for his life; defendant freed the gun from the officer's holster and pointed it at the officer upside

down, then turned the gun around and pointed it directly in the officer's face; the struggle continued and the gun fired, grazing the top of the officer's hand; and the officer's finger was not inside the trigger guard when the gun fired.

2. **Assault— on an officer with a firearm—sufficiency of evidence**

The trial court did not err by denying a defendant's motion to dismiss a charge of assault with a firearm on a law enforcement officer where there was uncontroverted evidence that the officer was in the performance of his duties when an altercation with defendant took place and that defendant was aware of the officer's status as an officer, and further evidence which, when viewed in the light most favorable to the State, shows that defendant pointed the gun directly at the officer, that the show of force was sufficient to put a person of reasonable firmness in fear of immediate physical injury, and that defendant was holding the gun when it fired as one would properly hold a pistol.

3. **Constitutional Law— double jeopardy—attempted first-degree murder—assault on an officer**

The trial court did not err by sentencing defendant separately for the crimes of attempted first-degree murder and assault with a firearm on a law enforcement officer; each offense requires proof of specific and distinct elements not required for conviction of the other.

Appeal by defendant from judgment entered 2 June 2000 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 18 September 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Amy L. Yonowitz, for the State.

John T. Hall for defendant-appellant.

MARTIN, Judge.

Defendant was charged, in proper bills of indictment, with attempted first degree murder, assault with a firearm on a law enforcement officer, assault on a law enforcement officer, and resisting, delaying and obstructing an officer. A jury found him guilty as charged. He appeals from judgments entered upon the verdicts. We find no error.

The State's evidence at trial tended to show that on 25 April 1999, Officer John R. Osborne of the Raleigh Police Department responded to a call regarding an individual causing a disturbance at a church in the Poole Road section of Raleigh as the congregation was leaving a service at about 9:30 p.m. Officer Osborne testified that he called defendant over to his patrol car so that he could talk with him. Defendant smelled of alcohol, was loud and boisterous, and was speaking unclearly. Officer Osborne informed defendant, on more than one occasion, that someone from the church had requested that he be escorted from the property and that if he did not leave, he could be arrested for trespassing. Defendant responded by stating that the church members were his brothers and sisters and that he was not going to leave. Officer Osborne then asked defendant to turn around and place his hands behind his back because he was being placed under arrest for trespassing.

The evidence tended to show that defendant began to put his left hand behind his back but then spun around and punched Officer Osborne in the mouth with his right hand. Subsequently, Officer Osborne knocked defendant to the ground by using a light sweep. Officer Osborne and other witnesses testified that after defendant was knocked to the ground, he reached for the officer's gun that was located on the officer's right hip.

While on the ground, Officer Osborne attempted to contact communications on his radio but defendant knocked the radio out of his hand. Officer Osborne continued to struggle with defendant and repeatedly attempted to push his hands away from the weapon to keep his gun secure. Officer Osborne had difficulty in restraining defendant; several times when Officer Osborne placed his hand on the weapon in an attempt to protect it, defendant struck him in the face. Officer Osborne occasionally punched defendant back. During the struggle, the two men rolled down a hill. When they reached the bottom of the hill, defendant's right hand was on Officer Osborne's holster. Then, Officer Osborne sprayed defendant in the face and inadvertently sprayed himself with pepper spray; the pepper spray appeared to have no effect on defendant but Officer Osborne was severely affected.

At that point in the altercation, Officer Osborne asked for assistance from the churchgoers witnessing the struggle. Defendant was on top of Officer Osborne and removed the gun out of the holster. Defendant was holding the butt of the gun in his hands upside down and Officer Osborne had the barrel in his hands attempting to keep it

out of his face. Officer Osborne eventually managed to flip over onto his stomach and keep at least one hand on the weapon. Defendant had turned the gun around so that he was holding the weapon properly or right side up and was pointing it at Officer Osborne. Officer Osborne then grabbed the slide in an effort to keep the weapon from firing. Officer Osborne pushed the weapon to the ground while his left hand was out in front of the weapon about 18 to 20 inches. When Officer Osborne tried to get up from being on all fours, the weapon fired and grazed the top of Officer Osborne's left hand, striking his knuckle on his index finger and the top of his pinky finger. Officer Osborne testified that when the gun was fired, defendant had his hands on the gun and was holding it properly. Further, the State's evidence showed that Officer Osborne's finger or hand was not inside the trigger guard when the pistol fired. The officer realized that his hand was still operable and grabbed the weapon with both hands and pulled it close to his body. Officer Osborne managed to get the weapon completely out of defendant's hands; he then stood up and spun around, causing defendant to fall off his back. The weapon fell out of Officer Osborne's hands down into the grass.

Officer Osborne secured the weapon and attempted to place handcuffs on defendant but because the officer was exhausted from the struggle, he was unable to place defendant on his stomach and secure defendant's hands behind his back. Officer Osborne moved away from defendant, drew the weapon out of his holster, and pointed the pistol towards the ground, while telling defendant to turn over on his stomach and place his hands behind his back. At that point, defendant got up and ran and eventually crawled underneath a car. When Officer Osborne told defendant to come out from underneath the vehicle, defendant got out from under the car and ran. Officer Osborne tackled defendant and with assistance from two other Raleigh police officers who had arrived, finally restrained and handcuffed defendant. Officer Osborne received treatment from Emergency Medical Services at the scene.

Defendant testified that he struck Officer Osborne because he thought the officer was trying to "rough [him] up" and he didn't understand why he was being arrested because he had not done anything wrong. He denied that he was trying to grab the gun in order to shoot Officer Osborne, and claimed that he was acting in self-defense by trying to keep Officer Osborne from drawing his weapon from the holster. Defendant denied ever trying to kill Officer Osborne.

I.

[1] Defendant first assigns error to the trial court's failure to dismiss, for insufficiency of the evidence, the charge of attempted first degree murder at the close of all of the evidence. Defendant contends that the evidence gives rise to no more than a surmise, suspicion, or conjecture that defendant is guilty of attempted first degree murder.

The North Carolina Supreme Court has set forth the standard for reviewing the denial of a motion to dismiss in *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985):

> A defendant's motion for dismissal for insufficiency of the evidence in a criminal case raises the question of whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. In determining this issue the court must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, a case for the jury is made and a motion to dismiss should be denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion [citations omitted].

Evidence is not substantial if it arouses only a strong suspicion about the facts to be proved. *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983). When considering a motion to dismiss, the trial court "is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal. *Id.*

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). Specifically, this Court has previously stated that

> a person commits the crime of attempted first-degree murder if: (1) he or she intends to kill another person unlawfully and (2) acting with malice, premeditation, and deliberation does an overt act

calculated to carry out that intent, which goes beyond mere preparation, but falls short of committing murder.

State v. Gartlan, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77, *disc. review denied*, 350 N.C. 597, 537 S.E.2d 485 (1999); N.C. Gen. Stat. § 14-17 (1999).

The overt act required for an attempted crime must be more than preparation in that it "reach[es] far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971). A killing has been defined as premeditated if the defendant formed a specific intent to kill the victim some period of time, regardless of how short, before perpetrating the actual act. *State v. Gainey*, 343 N.C. 79, 468 S.E.2d 227 (1996). In addition, deliberation has been defined as acting in a cool state of blood and not under the influence of a violent passion. *Id.*

In the context of attempted first degree murder, circumstances that may tend to prove premeditation and deliberation include: (1) lack of provocation by the intended victim or victims; (2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the intended victim or victims by the defendant; and (4) ill will or previous difficulty between the defendant and the intended victim or victims. *State v. Myers*, 299 N.C. 671, 677-78, 263 S.E.2d 768, 773 (1980). We hold that in this case, there was sufficient evidence of each element of attempted first degree murder and that defendant was the perpetrator.

Defendant contends that the evidence showed there was physical provocation by Officer Osborne when he grabbed defendant's arm and therefore, there was insufficient evidence to show premeditation and deliberation. We disagree. After being called about a disturbance at a church, Officer Osborne made several attempts to get defendant to leave the premises, but defendant refused. Officer Osborne then advised defendant that he was being placed under arrest for trespassing and instructed him to place his hands behind his back. Officer Osborne proceeded to begin the handcuffing process by taking hold of defendant's left elbow. It is this act that defendant argues was provocation, but we hold the officer's attempt to handcuff defendant clearly did not constitute provocation. Though Officer Osborne did punch defendant during the altercation, it was only after defendant had struck him. The evidence shows that the officer was acting in self-defense and did not provoke defendant in any way.

Moreover, the evidence shows that defendant acted with premeditation and deliberation. The evidence, when viewed in the light most favorable to the State, showed that this was not a situation in which a gun accidentally discharged. One of the witnesses stated, "[t]he police officer was engaged at that particular time in what I considered a struggle for his life. I saw a man struggling for his life . . . . I saw an individual in a very, very asserted effort trying to take the officer's gun from him." Furthermore, several witnesses, including Officer Osborne, testified that defendant made repeated attempts to grab the gun out of the holster. After being successful in freeing the gun from the holster, defendant pointed the gun at the officer while it was upside down. Defendant then managed to turn the gun around so that he was holding it in the proper position and pointed the weapon directly in the officer's face. The struggle continued between Officer Osborne and defendant until the gun was fired, grazing the top of the officer's left hand. Officer Osborne testified that when the gun was fired, defendant "was holding the gun as you would properly hold a pistol." Further, Officer Osborne's finger or hand was not inside the trigger guard when the gun fired. Therefore, the evidence, when viewed in the light most favorable to the State, showed that defendant intended to grab the gun, pointed the gun in the direction of the officer, and discharged the gun, striking the officer in the hand. This evidence is sufficient to support a finding of premeditation and deliberation on the part of defendant. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of attempted first degree murder at the close of all the evidence.

II.

[2] We also reject defendant's assignment of error directed to the trial court's denial of his motion to dismiss, for insufficiency of the evidence, the charge of assault with a firearm on a law enforcement officer. G.S. § 14-34.5 makes it illegal for any person to commit, "an assault with a firearm upon a law enforcement officer . . . while the officer is in the performance of his or her duties . . . ." For this offense, the State must prove that defendant knew the victim was a law enforcement officer. *State v. Rowland*, 54 N.C. App. 458, 283 S.E.2d 543 (1981). The word assault has been defined as an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or violence must be sufficient to put a person of reasonable firmness in fear of immediate physical injury. *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967).

In the present case, there was uncontroverted evidence that Officer Osborne was in the performance of his duties when the altercation with defendant took place and that defendant was aware of Osborne's status as a law enforcement officer. Defendant argues, though, that the evidence was lacking on the element of assault. We disagree.

The evidence, when viewed in the light most favorable to the State, shows that defendant pointed the gun directly at Officer Osborne. Officer Osborne testified, "I looked down and the weapon was pointing right up at me. He was holding the weapon properly." In addition, one of the eyewitness's account of the scene was that it was a matter of life and death for the officer. The evidence showed that Officer Osborne feared immediate physical injury by his repeated attempts to keep defendant from firing the gun by struggling to keep defendant from removing the gun from the holster and holding the slide of the gun. Thus, the show of force was sufficient to put a person of reasonable firmness in fear of immediate physical injury. Finally, Officer Osborne testified that when the gun was fired, defendant "was holding the gun as you would properly hold a pistol." Therefore, we hold there was substantial evidence, viewed in the light most favorable to the State, to show that defendant committed an assault with a firearm on Officer Osborne, that he was aware that Officer Osborne was a law enforcement officer, and that Officer Osborne was in the performance of his duties at the time.

III.

[3] Defendant next assigns error to the trial court's sentencing him separately for the crime of assault with a firearm on a law enforcement officer. Defendant argues that offense had merged with the conviction for attempted first degree murder of the same officer, and that, by entering separate sentences for each offense, the trial court violated his constitutional right not to be punished twice for the same offense. We disagree.

The prohibition against "multiple punishments" contained in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prevents the imposition of multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986). When the same act or transaction constitutes a violation of two criminal statutes, the test to determine whether there are two separate offenses is whether each statute requires proof of a fact which the

other does not. *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932).

> If what purports to be two offenses actually is one under the *Blockburger* test, double jeopardy prohibits successive prosecutions, . . . (citations omitted) but, as was made clear in *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), double jeopardy does not prohibit multiple punishment for offenses when one is included within the other under the *Blockburger* test if both are tried at the same time and if the legislature intended for both offenses to be separately punished . . . . **When each statutory offense has an element different from the other, the *Blockburger* test raises no presumption that the two statutes involve the same offense** (emphasis supplied).

Gardner at 454-55, 340 S.E.2d at 709. The fact that each crime requires proof of an element which the other does not demonstrates the intent of the General Assembly to allow multiple punishments to be imposed for the separate crimes. *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988).

The elements required for conviction of first degree murder are (1) the unlawful killing of another human being; (2) with malice; and (3) with premeditation and deliberation. N.C. Gen. Stat. § 14-17; *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991). As noted above, the elements required for conviction of the crime of assault with a firearm on a law enforcement officer are (1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his or her duties. N.C. Gen. Stat. § 14-34.5. Each offense requires proof of specific and distinct elements not required to be proved for conviction of the other. Therefore, we hold cumulative punishment does not violate double jeopardy principles and defendant was properly sentenced separately for each offense. This assignment of error is overruled.

No error.

Judges WALKER and TYSON concur.

STATE OF NORTH CAROLINA v. RICKY ANDREW SKIPPER

No. COA00-1175

(Filed 16 October 2001)

1. Constitutional Law— right of confrontation—right to be present at all stages—habitual felon proceeding in defendant's absence

The trial court did not violate defendant's right of confrontation in an assault with a deadly weapon inflicting serious injury case by proceeding with the habitual felon matter and accepting a verdict in defendant's absence, because: (1) a defendant's unexplained absence from trial proceedings amounts to a waiver of a defendant's right to confrontation and to be present during all stages of a trial; and (2) defendant failed to return from the five-minute recess after the habitual felon proceeding was well underway, and there is no evidence in the record indicating that defendant ever attempted to justify or otherwise explain his absence. N.C. Const. art. I, § 23.

2. Constitutional Law— effective assistance of counsel—failure to object

A defendant in an assault with a deadly weapon inflicting serious injury case was not denied effective assistance of counsel based on his attorney's alleged failure to object to the trial court's use of an habitual felon count listed in the habitual felon indictment to enhance defendant's sentencing level, because: (1) the trial court did not use any of the convictions used to establish defendant's habitual felon status to also enhance defendant's sentence; and (2) the trial court is not prohibited from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained the same week to determine prior record level. N.C.G.S. § 14-7.6.

3. Constitutional Law— right to counsel—failure to allow defendant to apply for court-appointed counsel

The trial court did not abuse its discretion by failing to allow defendant to apply for court-appointed counsel following his trial on assault with a deadly weapon inflicting serious injury but prior to his habitual felon proceeding after defense counsel asked that he be allowed to discontinue his representation, because: (1) defendant failed to argue that his counsel's representation fell below an objective standard of reasonableness or that his coun-

sel's errors in representation were such that the result of defendant's trial would have been different in their absence; and (2) the transcript reveals that defense counsel provided competent assistance to defendant throughout the trial.

4. Assault— jury instruction—self-defense

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by failing to instruct the jury on self-defense, because: (1) there is no evidence in the record which would support an inference that defendant did not enter into the altercation with the victim voluntarily; and (2) defendant failed to present evidence showing that despite entering the altercation voluntarily, he abandoned the fight, withdrew from the fight, and gave notice to the victim that he had done so.

Appeal by defendant from judgment entered 27 March 2000 by Judge James L. Baker, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 12 September 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Fred Lamar, for the State.

David W. Rogers for defendant-appellant.

HUNTER, Judge.

Ricky Andrew Skipper ("defendant") appeals his conviction and sentencing for assault with a deadly weapon inflicting serious injury, and for being an habitual felon. We conclude that there was no error in defendant's trial or sentencing.

The State's evidence tended to show that in the early morning hours of 14 May 1999, the victim, Lloyd Dean Morrow ("Morrow"), was sitting on the front porch of a friend's house along with other friends. Morrow and his friends observed defendant, who lived across the street, arrive home. Defendant got out of a car and carried a cooler up to his front porch. Defendant then sat on his front porch and drank beer. From his front porch, defendant began making "chicken noises" and "cursing and antagonizing" Morrow and his friends. Defendant urged Morrow and his friends to "come out in the road."

Morrow testified that defendant persisted in his verbal harassment, and that finally, Morrow "got fed up" and told defendant he was "tired of it." Defendant then suggested that Morrow take a "walk up

the street with [him]." Morrow testified that defendant began walking up the street and Morrow did the same. As the two approached a streetlight, Morrow saw defendant "reach in the back for something." Morrow stated that he could not tell what defendant had in his hand at first, but when defendant swung at him, Morrow threw up his left hand in defense.

As defendant struck Morrow's hand, Morrow stepped back and began to reach into the left pocket of his pants for his pocket knife. Morrow then realized that he could not feel his fingers. He testified that he looked at his hands and saw that his middle finger of his left hand was "just hanging off." Defendant swung at Morrow again, but missed. Morrow then saw defendant's weapon, which he described as a "machete." Defendant then began walking back towards his house. Morrow's version of the events was corroborated by other eyewitnesses.

Defendant was indicted on charges of assault with a deadly weapon inflicting serious injury and of being an habitual felon, based upon prior drug-related charges. On 5 November 1999, the jury returned a verdict of guilty on the charge of assault with a deadly weapon inflicting serious injury. Following that verdict, the trial court proceeded with the introduction of evidence on the issue of defendant's status as an habitual felon. Following arguments of counsel for both parties, defense counsel requested a five-minute recess. When defense counsel returned to court, defendant was not present. The trial court allowed the trial to proceed to conclusion in defendant's absence.

The jury returned a verdict that day of guilty on the charge of being an habitual felon. On 27 March 2000, defendant was sentenced to a prison term of a minimum of 116 and a maximum of 149 months. Defendant appeals.

Defendant brings forth four arguments on appeal: (1) the trial court erred in proceeding with the habitual felon matter and accepting a verdict in defendant's absence; (2) defendant was denied effective assistance of counsel when his attorney failed to object to the trial court's use of an habitual felon count listed in the habitual felon indictment to enhance defendant's sentencing level; (3) the trial court erred in failing to allow defendant to apply for court-appointed counsel following the trial on assault but prior to the habitual felon proceeding; and (4) the trial court erred in failing to instruct the jury on self-defense.

I. Defendant's Absence

[1] Defendant argues that the trial court erred in proceeding with the remainder of the habitual felon matter in defendant's absence. Defendant first argues that the trial court erred in proceeding with the matter because the Habitual Felon Act is in violation of art. I, § 6 of the North Carolina Constitution. However, this Court has expressly held that the Habitual Felon Act does not violate art. I, § 6 of our Constitution. *State v. Wilson*, 139 N.C. App. 544, 550, 533 S.E.2d 865, 870, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000).

Defendant further argues that the trial court's proceeding in his absence violated his right to confrontation as provided by art. I, § 23 of our Constitution. We reject this argument. Our Supreme Court has held that a defendant's unexplained absence from trial proceedings amounts to a waiver of a defendant's right to confrontation and to be present during all stages of a trial:

> In noncapital felony trials, th[e] right to confrontation is purely personal in nature and may be waived by a defendant. *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985); *State v. Hayes*, 291 N.C. 293, 296-97, 230 S.E.2d 146, 148 (1976); *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). A defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver. *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976); *State v. Mulwee*, 27 N.C. App. 366, 219 S.E.2d 304 (1975). Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred. *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985); *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

State v. Richardson, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (footnote omitted); *see also, e.g.*, *State v. Austin*, 75 N.C. App. 338, 341, 330 S.E.2d 661, 663 (1985) (trial court did not err in proceeding with trial following defendant's unexplained absence from courtroom); *State v. Montgomery*, 33 N.C. App. 693, 696, 236 S.E.2d 390, 392 (defendant's failure to return from recess following jury selection amounted to waiver of right to be present; trial court did not err in proceeding with trial in defendant's absence), *appeal dismissed and disc. review denied*, 293 N.C. 256, 237 S.E.2d 258 (1977).

In the present case, it is clear the habitual felon proceeding was well underway when defendant failed to return from the five-minute

recess. Evidence in the matter had been introduced, and both parties had presented their arguments to the trial court. It was therefore defendant's burden to explain his sudden absence from the courtroom. *See Richardson*, 330 N.C. at 178, 410 S.E.2d at 63. There is no evidence in the record indicating that defendant ever attempted to justify or otherwise explain his absence. The trial court was therefore correct to infer that defendant waived his right to be present for the remainder of the proceeding. *See id.*; *see also*, *State v. Miller*, 142 N.C. App. 435, 446, 543 S.E.2d 201, 208 (2001) (trial court did not err in proceeding with sentencing hearing following defendant's unexplained absence from courtroom; defendant's flight from courtroom did not constitute good cause sufficient to postpone hearing). This assignment of error is overruled.

II. Sentence Enhancement

[2] Defendant next argues that his right to effective assistance of counsel was denied because his attorney failed to object to the trial court's use of one of the felonies named in the habitual felon indictment as a part of defendant's prior record used to enhance his sentence to level three. Under N.C. Gen. Stat. § 14-7.6 (1999), a trial court may not use the same conviction that has been used to establish habitual felon status in order to enhance a defendant's sentencing level. However, a close review of the record reveals that the trial court did not use any of the convictions used to establish defendant's habitual felon status to also enhance defendant's sentence.

The convictions listed on defendant's habitual felon indictment include: (1) selling cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1) (1995); (2) possession of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(3); and (3) possession with intent to manufacture, sell, and/or deliver marijuana in violation of N.C. Gen. Stat. § 90-95(a)(1). The trial court used all three of these convictions in instructing the jury on the issue of defendant's habitual felon status.

On the prior conviction level worksheet contained in the record, the trial court clearly crossed out defendant's convictions for felony possession of cocaine and possession with intent to sell and deliver marijuana from the list of defendant's prior convictions that could be considered in enhancing defendant's sentence. The trial court also crossed out the conviction for selling of cocaine, but then wrote in the same line "possession with intent to sell and deliver cocaine." We take judicial notice that defendant was also convicted of possession with intent to sell and deliver cocaine on the same date as his con-

viction for selling cocaine. The trial court is not prohibited "from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level." *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996).

It is clear that the trial court crossed out all three of the convictions used to establish defendant's habitual felon status from the prior conviction worksheet for purposes of enhancing defendant's sentence. The trial court then used the remaining convictions to enhance defendant's sentence, including a class H felony conviction for possession with intent to sell and deliver cocaine, a class I felony conviction for placing a flaming cross on the property of another, and a class one misdemeanor conviction for larceny. The trial court did not violate N.C. Gen. Stat. § 14-7.6; therefore, defendant's claim for ineffective assistance of counsel based upon the trial court's failure to comply with N.C. Gen. Stat. § 14-7.6 fails.

III. Court-Appointed Counsel

[3] In his next argument, defendant contends that the trial court erred in not allowing defendant to apply for different court-appointed counsel following his conviction for assault, but before the disposition of the habitual felon matter. At the beginning of both proceedings, defense counsel, Mr. King, asked that he be allowed to discontinue his representation for the habitual felon charge and that defendant be allowed to seek court-appointed counsel for that portion of the proceeding. The trial court denied the motion.

"The determination of counsel's motion to withdraw is within the discretion of the trial court, whose decision is reversible only for abuse of discretion." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 26, 514 S.E.2d 517, 520 (1999) (citing *Benton v. Mintz*, 97 N.C. App. 583, 389 S.E.2d 410 (1990)). "N.C.G.S. § 15A-144 provides that '[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause.' 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 (quoting *State v. Cole*, 343 N.C. 399, 411, 471 S.E.2d 362, 367 (1996), *cert. denied*, 519 U.S. 1064, 136 L. Ed. 2d 624 (1997)), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). In order to establish ineffective assistance of counsel, a defendant must establish (1) that his attorney's performance fell below an objective standard of reasonable-

ness; and (2) that the defendant was prejudiced by his attorney's performance to the extent there exists a reasonable probability that the result of the trial would have been different absent the error. *State v. Jaynes*, 353 N.C. 534, 547-48, 549 S.E.2d 179, 191 (2001).

In the present case, defendant has failed to argue that Mr. King's representation fell below an objective standard of reasonableness, or that Mr. King's errors in representation, if any, were such that the result of defendant's trial would have been different in their absence. The transcript of the proceedings below reveals that Mr. King provided competent assistance to defendant throughout the trial. We discern no abuse of discretion in the trial court's denial of Mr. King's motion to withdraw.

Moreover, the fact that Mr. King requested to withdraw after the substantive portion of the trial, yet before the habitual felon proceeding is of no consequence. In *State v. Jackson*, 128 N.C. App. 626, 629, 495 S.E.2d 916, 919, *disc. review improvidently allowed*, 349 N.C. 287, 507 S.E.2d 37 (1998), this Court held that the trial court did not abuse its discretion in disallowing the defendant's request to reappoint counsel for the habitual felon portion of his trial. The defendant dismissed his attorney during trial, then sought his reappointment following the substantive portion of the trial, but prior to commencement of the habitual felon hearing. *Id.* We noted, "[b]ecause an adjudication on a habitual felon charge 'is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony,' *State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977), the defendant's trial was not yet fully terminated . . . ." *Id.* This assignment of error is overruled.

IV. Self-Defense Instruction

[4] In his final argument, defendant maintains that the trial court should have instructed the jury on self-defense when submitting the charge of assault with a deadly weapon inflicting serious injury. We disagree.

"A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citing *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)). "The right of self-defense is only available, however, to 'a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it

and gives notice to his adversary that he has done so.' " *Id.* (quoting *Marsh*, 293 N.C. at 354, 237 S.E.2d at 747).

Here, defendant did not testify or introduce any evidence. There is simply no evidence in the record which would support an inference that defendant did not enter into the altercation with Morrow voluntarily. The testimony presented at trial was consistent that defendant verbally harassed Morrow and the others and taunted them to "come out in the road." The testimony was uncontroverted that when Morrow expressed to defendant that he was tired of the harassment, defendant told Morrow to "walk up the street with [him]." There is no evidence to support a finding that defendant did not enter the altercation with Morrow aggressively and willingly. Thus, to be entitled to a self-defense instruction, defendant must have presented evidence showing that despite entering the altercation voluntarily, he abandoned the fight, withdrew from the fight, and gave notice to Morrow that he had done so. *See Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206. Defendant presented no such evidence. Although defendant argues Morrow had a knife, there is no evidence Morrow ever drew his knife or used it against defendant. The uncontradicted evidence was that defendant struck Morrow with a machete. We hold that there was no error in the trial court's failure to instruct the jury on self-defense.

No error.

Judges WYNN and TYSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. FAYE MORGAN ALLEN, ADMINISTRATRIX OF THE ESTATE OF EDGAR LEWIS ALLEN AND JOE HAMPTON YOW, DEFENDANTS

No. COA00-1407

(Filed 16 October 2001)

1. Appeal and Error— record on appeal—inclusion of defendant's deposition

The trial court did not err by allowing defendant's deposition to be included in the record on appeal from summary judgment for plaintiff insurance company in a declaratory judgment action

to determine whether plaintiff was required to defend and indemnify an insured in a personal injury action brought by an individual based on the insured shooting the individual, because: (1) there is no definitive indication in the record whether the deposition was considered by the trial court in ruling on the parties' opposing motions for summary judgment; and (2) the trial judge's settlement of the record on appeal is final and cannot be reviewed by the appellate court.

2. Insurance— personal injury action—expected or intended injury exclusionary language

The trial court did not err by granting summary judgment in favor of plaintiff insurance company in a declaratory judgment action to determine whether the insurance company was required to defend and indemnify the insured in a personal injury action brought by an individual based on the insured shooting the individual, because: (1) the insured's statement to police after the shooting indicated that he shot through the door at someone he saw outside and that the insured shot the individual because he thought he was breaking in; (2) the insured's intentional act of firing his handgun at the individual in close proximity was sufficiently certain to cause injury that the insured should have expected such injury to occur; and (3) the expected or intended injury exclusionary language in the insured's insurance policy precludes coverage for the individual's injuries.

Appeal by defendant Joe Hampton Yow from order entered 21 July 2000 by Judge Melzer A. Morgan, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 19 September 2001.

Robbins May & Rich L.L.P., by P. Wayne Robbins, for defendant-appellant Joe Hampton Yow.

Pinto, Coates, Kyre & Brown, P.L.L.C., by Paul D. Coates and John I. Malone, Jr., for plaintiff-appellee North Carolina Farm Bureau Mutual Insurance Company.

WYNN, Judge.

Joe Hampton Yow appeals from summary judgment favoring North Carolina Farm Bureau Mutual Insurance Company. We affirm.

Farm Bureau Insurance insured Edgar Lewis Allen providing bodily injury liability coverage "[i]f a claim is made or a suit is

brought against any insured for damages because of bodily injury . . . to which this coverage applies[.]" The policy also provided for payment of "necessary medical expenses incurred or medically ascertained within three years from the date of an accident causing bodily injury" to persons "on the insured location with the permission of [the] insured[.]" However, the policy excluded such personal liability and medical payments coverage from bodily injury "which is expected or intended by the insured." This appeal concerns the interpretation of this exclusionary language.

Allen owned an unoccupied house in Montgomery County, North Carolina. The house had previously been broken into, and on 4 September 1997, Allen asked Yow to stay with him overnight in the house to guard against a further break-in. Allen took along several firearms, including two handguns and two rifles. At some point during the night, Allen awoke and thought he heard someone outside, possibly an intruder. Allen pointed one of his handguns in the direction of the purported intruder; the gun fired, striking Yow. Yow contends in his brief that Allen fired the gun accidentally, while Farm Bureau Insurance argues that Allen fired the gun intentionally. Furthermore, Farm Bureau Insurance contends that Yow's injuries, even though perhaps not intended by Allen, could nonetheless be reasonably expected to result from the intentional act of firing the gun, and therefore were excluded from coverage under the policy.

Under a declaratory action against Allen[1] and Yow, Farm Bureau Insurance sought a determination of whether it was required to defend and indemnify Allen in a personal injury action brought by Yow based on the shooting. That declaratory judgment action resulted in the trial court granting summary judgment in favor of Farm Bureau Insurance against both Allen and Yow; only Yow appeals to us.[2]

1. At the time of this action, Allen was deceased so Farm Bureau Insurance brought this action against his estate through his administratrix, Faye Morgan Allen. The Estate is referred to as "Allen" throughout the opinion.

2. Neither party takes issue with the failure of Allen to appeal from summary judgment. Since Allen did not appeal, the summary judgment declaring that Farm Bureau Insurance has no obligation to provide coverage that would indemnify Allen for potential liability to Yow stands.

As the parties have not raised this issue, and consideration thereof is not necessary to our disposition of this appeal, we do not address whether Yow nonetheless qualifies as a third-party beneficiary such that he alone can directly seek enforcement of the terms of the Farm Bureau Insurance policy. *See DeMent v. Nationwide Mutual Ins. Co.*, 142 N.C. App. 598, 604, 544 S.E.2d 797, 801 (2001) (noting that North Carolina permits "a person to bring an action to enforce a contract to which he is not a party, if he

Yow brings forth the following two assignments of error:

1. The Court erred in granting Plaintiff's Motion for Summary Judgment.

2. The Court erred in allowing [Yow's] Deposition to be included in the Record on Appeal.

At the outset, we note that in his brief, Yow presents a single "Argument" without reference to his assignments of error, in violation of our Rules of Appellate Procedure. *See* N.C.R. App. P. 28(b)(5) (2000) (requiring appellant's brief to *separately* state each question presented, followed by a reference to the pertinent assignment(s) of error, "identified by their numbers and by the pages at which they appear in the printed record on appeal"). Although such a failure to comply with our appellate rules may subject an appeal to dismissal, *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999), we exercise our discretion under N.C.R. App. P. 2 (2000), and consider the merits of this appeal. *See Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 533 S.E.2d 501 (2000); *May v. City of Durham*, 136 N.C. App. 578, 525 S.E.2d 223 (2000).

[1] Regarding his second assignment of error, Yow cites *Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 465 S.E.2d 558 (1996), arguing that his deposition should not have been included in the record on appeal as he contends it was not considered by the trial court in ruling upon the parties' opposing motions for summary judgment. In *Graham*, this Court declined to consider additional materials offered by the plaintiff for addition to the record on appeal, where "the transcript show[ed] these materials were not properly tendered for consideration on [the] defendant's motion for summary judgment and were not considered by the trial court." 121 N.C. App. at 386, 465 S.E.2d at 560-61. As the transcript indicated those materials were not part of the official record on appeal, this Court held that they could

demonstrates that the contracting parties intended primarily and directly to benefit him or the class of persons to which he belongs"); *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 15, 472 S.E.2d 358, 366 (1996) ("[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party"); *Jefferson-Pilot Life Ins. Co. v. Spencer*, 110 N.C. App. 194, 429 S.E.2d 583 (1993) (finding that wife of insured under life insurance policy was neither a party to the contract nor a third-party beneficiary, and consequently had no standing to sue on the contract). This case begs the question whether an injured third party can *ever* achieve third-party beneficiary status thus entitling him to maintain an action against the insurer, where the insurer has been conclusively deemed to have no liability to the insured. Since that matter has not been addressed by the parties, we reserve our answer to that question for another day.

not be considered by it on appeal. *See id.* (citing N.C.R. App. P. 9 (2000)).

In the instant case, there is no definitive indication in the record whether Yow's deposition was considered by the trial court in ruling on the parties' motions for summary judgment. Farm Bureau Insurance's motion requested entry of summary judgment in its favor on grounds that the materials before the trial court, specifically including "depositions," revealed no genuine issue as to any material fact. However, Farm Bureau Insurance's motion was filed with the trial court on 16 June 2000, several days prior to Yow's deposition on 22 June 2000.

Allen moved for summary judgment on grounds that the materials before the trial court, specifically including "depositions," revealed no genuine issue as to any material fact. This motion was filed with the trial court on 6 July 2000. Nonetheless, this motion specifically asked the trial court to "consider all pleadings in the file, the Plaintiff's responses to the Defendant, Faye Morgan Allen, Administratrix of the Estate of Edgar Lewis Allen, Request for Production of Documents; the [] Affidavit of Faye Morgan Allen and all other documents of record." Noticeably absent is any mention of Yow's deposition testimony.

Lastly, the trial court's 21 July 2000 order granting summary judgment to Farm Bureau Insurance states that the court considered the "depositions," among other materials, and found no genuine issue of material fact. However, we do not deem the trial court's general recitation of the N.C. Gen. Stat. § 1A-1, Rule 56(c) language conclusive on the issue of whether the court considered Yow's deposition testimony in ruling on the motions for summary judgment.

Regardless of the inconclusive nature of the materials in the record on this issue, we take this opportunity to point out that "only the judge of [the] superior court or of [the] district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required." N.C. Gen. Stat. § 1-283 (1999). This Court has held that "the appellate court is bound by the contents of the record on appeal. The record imports verity and the Court of Appeals is bound thereby." *State v. Hickman*, 2 N.C. App. 627, 630, 163 S.E.2d 632, 633-34 (1968). Where asked to settle the record on appeal, "[t]he trial judge then has both the power and the duty to exercise supervision to see that the record accurately presents the questions on which this Court is expected to rule."

Conrad v. Conrad, 252 N.C. 412, 416, 113 S.E.2d 912, 914 (1960). "[T]his Court must receive and act upon the case settled for this Court as importing absolute verity and as it comes from the court below[.] . . . This Court . . . has no authority to suggest to, direct or require the judge, in settling the case, as to . . . what facts he shall state, or what matter he shall set forth." *Boyer v. Teague*, 106 N.C. 571, 573-74, 11 S.E. 330, 330-31 (1890). Thus, the trial judge's settlement of the record on appeal is final, and cannot be reviewed by this Court on appeal. *See State v. Gooch*, 94 N.C. 982 (1886); *State v. Johnson*, 230 N.C. 743, 55 S.E.2d 690 (1949). Appellant's second assignment of error is therefore overruled, and we consider the entire record on appeal, including Yow's deposition testimony, in ruling on the merits of his first assignment of error.

[2] We next consider Yow's argument that the trial court erred in granting summary judgment to Farm Bureau Insurance. With this argument, we disagree.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). The party seeking summary judgment must establish the absence of any triable issue; this burden may be met by (1) proving the nonexistence of an essential element of the opposing party's claim, (2) establishing through discovery that the opponent cannot produce evidence supporting an essential element, or (3) showing that the opposing party cannot overcome an affirmative defense that would bar the claim. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

The pertinent issue before us is whether, as a matter of law, the bodily injury inflicted upon Yow by Allen was "expected or intended" by Allen such that it is barred from coverage under Farm Bureau Insurance's policy. We conclude that the policy excludes coverage for Yow's injuries.

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). The language used in such policies is subject to judicial con-

struction only where it "is ambiguous and reasonably susceptible to more than one interpretation." *Id.*

In *Mizell*, this Court addressed a factual scenario strikingly analogous to the instant case. There, plaintiff North Carolina Farm Bureau Mutual Insurance Company provided homeowner's insurance coverage to defendant Mizell. One evening Mizell emerged from his house with his rifle, which he fired in the direction of someone running away from his house who he believed to be a prowler. At least one of the bullets fired struck defendant Austin in the head, injuring him; Austin later filed suit against Mizell seeking to recover damages from Mizell for his personal injuries. Subsequently, as in the instant case, Farm Bureau Insurance filed a declaratory judgment action to determine whether the insurance policy covered Mizell's actions.

The insurance policy insuring Mizell excluded coverage for "bodily injury" or "property damage":

> a. Which is intended by or which may reasonably be expected to result from the intentional act or omissions or criminal acts or omissions for one or more 'insured' persons. This exclusion applies even if:
>
> . . .
>
> (2) The 'bodily injury' or 'property damage' is of a different kind, quality or degree than intended or reasonably expected[.]

138 N.C. App. at 531, 530 S.E.2d at 94. Mizell's statement to the district attorney indicated that he fired the rifle at a person he believed to be a prowler. Mizell indicated that he fired in the prowler's general direction, meaning only to scare the prowler but not to hit him. *Id.*

This Court affirmed the trial court's grant of summary judgment in Farm Bureau Insurance's favor, stating that "when a person fires multiple shots from a rifle at night in the direction of a prowler who is approximately fifty feet away, that person could reasonably expect injury or damage to result from the intentional act." *Id.* at 533-34, 530 S.E.2d at 95. In so holding, this Court noted that the insurance policy's exclusionary language "suggests the application of an objective standard as opposed to" a subjective one. *Id.* at 533, 530 S.E.2d at 95.

However, even in instances in which an insurance policy's exclusionary language suggests a subjective standard of intent to injure or expectation of injury, this Court has held that an intent to injure may

be inferred as a matter of law from certain acts. *See Erie Ins. Group v. Buckner*, 127 N.C. App. 405, 489 S.E.2d 901 (1997) (interpreting Virginia law but noting the substantial similarities of North Carolina law and finding that "intended or expected" exclusion precluded coverage where insured punched victim in the forehead); *Eubanks v. State Farm Fire and Casualty Co.*, 126 N.C. App. 483, 485 S.E.2d 870, *disc. review denied*, 347 N.C. 265, 493 S.E.2d 452 (1997) (intent to inflict emotional injury may be inferred from solicitation to commit murder, precluding coverage due to "expected or intended" exclusion); *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 464 S.E.2d 723 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905, *and motion to reconsider dismissed*, 343 N.C. 309, 472 S.E.2d 334 (1996) (intent to injure may be inferred from intentional act of sexual harassment). *See also Nationwide Mutual Ins. Co. v. Abernethy*, 115 N.C. App. 534, 445 S.E.2d 618 (1994); *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983).

Defendant Yow cites *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992), and *Miller v. Nationwide Mutual Ins. Co.*, 126 N.C. App. 683, 486 S.E.2d 246 (1997), in support of his contention that the "expected or intended" exclusion in the instant case does not preclude coverage for his injuries resulting from Allen's actions. As in *Mizell*, we distinguish *Stox* and *Miller* in that the insurer in each of those cases failed to show that the insured's action was expected or intended to cause injury or damage.

Similar to *Mizell*, in the instant case, Allen's statement to police after the shooting indicated that he "shot through the door" at someone he saw outside. Allen also advised police that "he had shot Joe Yow because he thought he was breaking in on him." According to Yow's deposition, he could clearly see Allen approximately three feet away through the door when Allen shot him. We hold that Allen's intentional act of firing his handgun at Yow, in close proximity, was sufficiently certain to cause injury that Allen should have expected such injury to occur. *See Eubanks; Russ; Mauldin; Mizell.* Accordingly, the "expected or intended" exclusionary language in Allen's insurance policy with Farm Bureau Insurance precludes coverage for Yow's injuries. The trial court's grant of summary judgment in favor of Farm Bureau Insurance is therefore,

Affirmed.

Judges McCULLOUGH and BRYANT concur.

CAROLYN B. McCURRY, PLAINTIFF v. ANITA SHIVE PAINTER AND MARK T. PAINTER, DEFENDANTS

No. COA00-678

(Filed 16 October 2001)

1. **Evidence— medical bills—negligence action—sufficient causal relationship**

   There was a sufficient foundation for the admission of medical bills in an automobile negligence action where plaintiff testified that she began to experience severe pain and suffering in her neck, back, and shoulder immediately following the collision and a doctor's testimony established a causal relationship between the accident and the injuries.

2. **Evidence— medical bills—rebuttable presumption of reasonableness**

   The reasonableness of plaintiff's medical bills in an automobile accident case was conclusively established under N.C.G.S. § 8-58.1 where plaintiff testified concerning her injuries and her medical treatment and introduced copies of her medical bills, but defendants presented no evidence and did not rebut the statutory presumption that the bills were reasonable.

3. **Appeal and Error— preservation of issues—failure to cite assignment of error**

   An argument was not addressed on appeal where it did not cite an assignment of error and none of the assignments of error included any reference to the argument.

4. **Trials— reopening evidence after party rested—no abuse of discretion**

   The trial court did not abuse its discretion in an automobile accident case by allowing plaintiff to reopen her case after she had rested where defendants moved to exclude testimony about plaintiff's medical bills on the grounds that she had failed to submit the bills to the jury in support of her testimony and the court allowed plaintiff to reopen her case for the limited purpose of introducing those bills.

Appeal by defendants from judgment entered 17 December 1999 by Judge Forrest Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 16 May 2001.

The Robinson Law Firm, PLLC, by William C. Robinson, for defendant-appellants.

James R. Carpenter for plaintiff-appellee.

BIGGS, Judge.

On 17 December 1994 a car driven by Anita Shive Painter (defendant) and owned by her husband Mark T. Painter (collectively, defendants) struck a car operated by Carolyn McCurry (plaintiff). This appeal arises out of a civil negligence action brought as a result of that collision. The plaintiff filed suit against defendants on 15 March 1999, alleging that defendant's negligence had caused the accident, and that the accident was a proximate cause of plaintiff's injuries. Prior to trial, defendants stipulated to defendant's negligence as the cause of the accident. However, defendants denied that the accident had caused any injury or damage to plaintiff. Thus, there were two issues to be resolved: whether the accident caused plaintiff's injuries and, if so, what damages were owed to plaintiff.

The case came to trial on 13 December 1999. At trial, plaintiff testified concerning the accident, her injuries, and the medical treatment she sought following the collision. Plaintiff's testimony was that the accident had resulted in painful and debilitating injuries to her back, neck, and shoulders, as well as migraine headaches. Several lay witnesses also testified about the accident and about its effect on plaintiff. Dr. Wheeler, a physician who had treated plaintiff, testified about plaintiff's injuries, the tests and treatments that plaintiff had undergone, and about the causal relationship between plaintiff's complaints and the collision. Defendants did not put on evidence. The jury returned a verdict finding that defendant's negligence had proximately caused plaintiff's injuries, and awarding damages of $50,000. From this verdict and judgment, defendants appeal.

We note at the outset that defendants have not complied with the North Carolina Rules of Appellate Procedure. Specifically, N.C.R. App. P. 10(c)(1) requires that assignments of error "shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." Rule 10(c)(1). Defendants failed to state a legal basis for any of their assignments of error. Moreover, defendants did not comply with N.C.R. App. P. 28(b)(5), requiring an appellant to include with each argument that is briefed "a reference to the assignments of error pertinent to the question[.]" Rule 28(b)(5). Defendants' violation of these rules has made it difficult for this Court to address the

merits of their arguments. Nonetheless, in the interest of justice and pursuant to N.C.R. App. P. 2, where it is possible to connect an argument to a specific assignment of error, we will consider the substance of defendants' contentions. We note also that defendants have not presented arguments or case citations in support of assignments of error seven, eight, or nine, which address the trial judge's failure to grant defendant's motions for directed verdict and for a new trial; nor are these assignments of error cited in defendants' list of questions presented, or at the beginning of any of defendants' arguments. Therefore, pursuant to Rule 28(b)(5), these assignments of error are deemed abandoned, and will not be considered.

[1] Defendants contend first that there was an insufficient foundation for the admission of medical bills from the following health care providers: Presbyterian Hospital, Mecklenburg Radiology Associates, Dr. James Sanders, Rehability Center, and Mecklenburg Emergency Medicine. They contend that plaintiff (a) failed to introduce evidence that the medical procedures performed at these sites were reasonably necessary to treat her injuries, (b) failed to lay a foundation that the medical charges were reasonable in amount, and (c) failed to introduce expert testimony that these specific medical bills pertained to treatment of injuries proximately caused by defendants' negligence.

Medical bills are admissible in a negligence action, provided there is evidence of a causal relationship between the negligent act and the injury that is the subject of the medical bills. *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (1989). Where there is no evidence that a defendant's negligence caused the illness or injury for which plaintiff seeks compensation, our courts have excluded the medical charges for treatment of that injury. *See, e.g., Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965) ("not a scintilla of medical evidence" that plaintiff's injury resulted from accident six months earlier); *McNabb v. Town of Bryson City*, 82 N.C. App. 385, 346 S.E.2d 285 (1986) (plaintiff's evidence fails to establish causal relationship between motorcycle accident and later suicide attempt). However, if lay and expert evidence demonstrates a causal relationship between the negligent act and plaintiff's injuries, the medical charges for these injuries are admissible. *Smith v. Pass*, 95 N.C. App. at 253, 382 S.E.2d at 788. In *Smith v. Pass*, the plaintiff testified concerning the back pain she experienced following a collision. She also presented the testimony of a physician who had treated her for back injuries, starting around a month after the accident. The physician took a medical history, examined the plaintiff, and ordered a bone scan and x-rays.

This Court upheld the admission of the medical bills, stating that "[m]edical bills are admissible where lay and medical testimony of causation is provided." *Id.* (citation omitted). The Court found that the plaintiff's testimony concerning pain she experienced at the time of the accident, coupled with the physician's testimony, sufficiently linked the collision and the resultant injuries to permit introduction of the plaintiff's medical bills.

The issue of the admissibility of medical bills generally arises when a defendant challenges the causal relationship between the negligent act and a specific injury or medical condition. *See, e.g., Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965) (Court finds insufficient evidence that plaintiff's ruptured disc caused by accident); *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (defendant challenges causal connection between accident and fracture of plaintiff's thoracic vertebrae; this Court finds evidence sufficient to allow admission of medical bills); *Lee v. Regan*, 47 N.C. App. 544, 267 S.E.2d 909, *disc. review denied*, 301 N.C. 92, 273 S.E.2d 299 (1980) (Court considers connection between accident and aggravation of plaintiff's pre-existing syringomyelia to determine whether certain medical bills were admissible). However, in the instant case defendants have not raised the issue of a causal relationship between the accident and any specific injury to plaintiff. Rather, defendants rely on a general contention that insufficient evidence connected plaintiff's treatment by certain health care providers to "her injuries." Therefore, the proper inquiry, and the one this Court will consider, is whether plaintiff's evidence sufficiently established a causal relationship between the accident and her injuries generally, so as to support the admission of medical bills for treatment of these injuries.

Plaintiff testified at trial that immediately after the collision she experienced extreme pain in her neck, head, and shoulder. Her left arm was numb, and her back was in severe pain. The following morning the pain was even worse. Plaintiff went to Presbyterian Hospital, where she was examined by Mecklenburg Emergency Medicine physicians, and received X-rays, pain medication, and a neck-support collar. The hospital staff recommended follow-up with an orthopedic doctor; therefore, plaintiff sought treatment from Dr. Sanders, a local orthopedic physician. Sanders saw plaintiff a few times, and prescribed pain medication and physical therapy. Several weeks later, plaintiff was still experiencing pain and numbness, as well as migraine headaches. She then consulted with Dr. Wheeler, a specialist in pain medicine and neurology. Dr. Wheeler took over plaintiff's

treatment from that point onward, prescribing tests, medication, and therapy over the following two years.

Dr. Wheeler testified that he first met with the plaintiff in early March, 1995, approximately three months after the accident. At that time, he took plaintiff's medical history and performed a complete physical examination. He also reviewed the X-rays that plaintiff had obtained at Presbyterian Hospital on the morning following the accident. Dr. Wheeler's medical diagnosis was that the plaintiff suffered from severe post traumatic cervical segmental and soft tissue dysfunction, and migraine headaches, as well as a nerve impingement, all of which could have been caused by a collision like the one at issue. Dr. Wheeler ordered a cervical MRI and a bone scan for diagnostic purposes, prescribed pain medication, and directed her to continue the physical therapy prescribed by Dr. Sanders. He treated her for these injuries for the following two years. Dr. Wheeler also performed an impairment rating examination which showed ten percent impairment overall. On cross-examination, defendants informed Dr. Wheeler that the emergency room physicians, and Dr. Sanders, had diagnosed plaintiff with a strained cervical spine and a strained dorsal lumbar spine. Wheeler explained that these physicians were using a different, less specific, vocabulary for the same kind of injuries that he had diagnosed. He noted that the terms "strain" and "sprain" were "the usual vernacular of an emergency room physician;" that, unlike the emergency room physicians and Dr. Sanders, he specialized in treating problems with the spine; and that physicians in his field were working towards adopting a "standard nomenclature" which would exclude the terms strain and sprain from diagnoses of the neck and back. Wheeler also testified to the purposes for which he had prescribed tests such as a bone scan and MRI.

In sum, plaintiff testified that immediately following the collision she began to experience severe pain and suffering in her neck, back, and shoulder area. Dr. Wheeler's testimony established a causal relationship between the accident and the injuries. His examination of X-rays taken the morning after the accident, and his concurring with Dr. Sander's prescription for physical therapy provide a sufficient basis to submit those bills; other challenged medical bills were for treatment or tests prescribed by Dr. Wheeler for these injuries. We find that the plaintiff's evidence demonstrated a causal relationship between the accident and her injuries.

[2] Defendant also argues that plaintiff's medical bills were admitted without sufficient evidence that they were reasonable in amount. However N.C.G.S. § 8-58.1 (1999) provides that:

> Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges.

This Court has held previously that the statute creates a rebuttable mandatory presumption of the reasonableness of the amount of the charges. *Jacobsen v. McMillan*, 124 N.C. App. 128, 476 S.E.2d 368 (1996). That is, when a plaintiff introduces medical bills in support of his testimony, the jury must find that the amount is reasonable, unless the defendant rebuts this presumption with other evidence. *Id.* at 134, 476 S.E.2d at 371-72. If, however, the defendant does not rebut the medical expenses presumption, it is conclusively established. *Id.* at 135, 476 S.E.2d at 372. In the instant case, plaintiff testified concerning her injuries and the medical treatment she received, and also introduced copies of these medical bills. Defendants presented no evidence; nor did they rebut the reasonableness of the amount of the medical charges on cross-examination. Therefore, the reasonableness of the amount of these charges is conclusively established.

For the reasons discussed above, we conclude that the plaintiff presented a sufficient foundation for the admission of her medical bills for treatment of injuries she contended were proximately caused by the accident. Thus, we overrule the assignment of error challenging the admission into evidence of these medical bills.

[3] Defendants next argue that the introduction of plaintiff's medical bills "without medical substantiation created an inference in the jury's minds that such alleged injuries and charges were not subject to challenge. . . ." This argument does not cite an assignment of error. In addition, none of defendants' assignments of error include any reference to "an inference in the jury's mind" that allegedly was generated by the admission of evidence. Therefore, this argument is not properly before this Court, and will not be addressed.

[4] Finally, defendants contend that the trial court erred when it allowed plaintiff to reopen her case after she had rested. Defendants

moved for directed verdict at the close of plaintiff's evidence, on the grounds that plaintiff had not presented a prima facie case of proximate cause and damages. After the trial court denied defendants' motion for directed verdict, defendants moved to exclude testimony about the amount of plaintiff's medical bills, arguing that she had failed to submit them to the jury in support of her testimony, as allowed under G.S. § 8-58.1. At plaintiff's request, the trial court then allowed plaintiff to reopen her case for the limited purpose of introducing into evidence the medical bills about which she had testified. Defendants objected, stating that they had made a "strategic" decision to defer their motion until after plaintiff had rested, apparently hoping that it would then be too late for plaintiff to remedy her oversight.

"The trial court has discretionary power to permit the introduction of additional evidence after a party has rested." *State v. Jackson*, 306 N.C. 642, 653, 295 S.E.2d 383, 389 (1982) (citations omitted). "Whether the case should be reopened and additional evidence admitted [is] discretionary with the presiding judge." *Smith Builders Supply v. Dixon*, 246 N.C. 136, 140, 97 S.E.2d 767, 770 (1957) (citations omitted). Because it is discretionary, the trial judge's decision to allow the introduction of additional evidence after a party has rested will not be overturned absent an abuse of that discretion. *See Kerik v. Davidson County*, 145 N.C. App. 222, 551 S.E.2d 186 (2001) (motion addressed to trial judge's discretion will not be disturbed unless court abused its discretion); *Harborgate Prop. Owners Ass'n, Inc. v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 551 S.E.2d 186 (2001) (remedy that "rests in the sound discretion of the trial court . . . is conclusive on appeal absent a showing of a palpable abuse of discretion"). In the instant case, there is no evidence that the trial court abused its discretion. In *Nelson v. Chang*, 78 N.C. App. 471, 337 S.E.2d 650 (1985), *disc. review denied*, 317 N.C. 335, 346 S.E.2d 501 (1986), defendant was allowed to reopen his case after resting, over plaintiff's objection. This Court held as follows:

> [P]laintiff contends the court erred in allowing defendant, over objection and after denial of plaintiff's motion for directed verdict, to reopen his case and attempt to correct the omissions in damages pointed out by counsel for plaintiff. We disagree. "The purpose of the 'specific grounds' requirement of Rule 50(a) is to allow the adverse party to meet any defects with further proof and avoid the entry of a judgment notwithstanding the verdict at the close of the trial, on a ground that could have been met with

proof had it been suggested earlier." . . . The assignment of error is overruled.

Id. at 476, 337 S.E.2d at 654 (quoting *Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E.2d 433 (1978)). We hold that the trial court did not abuse its discretion in permitting plaintiff to introduce her medical bills, and, accordingly, overrule this assignment of error.

For the reasons discussed above, we affirm the judgment entered by the trial court.

Affirmed.

Judges WYNN and CAMPBELL concur.

STATE OF NORTH CAROLINA v. SANFORD VIDEO & NEWS, INC.

No. COA00-949

(Filed 16 October 2001)

1. Constitutional Law— vagueness—Excessive Fines Clause—dissemination of obscenity statute

The trial court did not abuse its discretion by fining defendant corporation $50,000.00 under N.C.G.S. § 15A-1340.17(b) for dissemination of obscenity for selling two adult-theme magazines to a police officer in violation of N.C.G.S. § 14-190.1 even though defendant contends N.C.G.S. § 15A-1340.17(b) is unconstitutional on the grounds that the statute is vague or that it violates the Excessive Fines Clause under U.S. Const. amend. VIII and N.C. Const. art. I, § 27, because: (1) the legislature properly delineated the standards that should be followed in setting a fine as punishment for the crime; and (2) defendant's fine is not grossly disproportionate to the crime committed when the crime was a felony, the legislature has determined this crime to be more than minimally harmful to the community, the money to be forfeited was directly related to illegal activities, and the fine is not excessive when compared to defendant's financial resources available to pay the fine.

2. Obscenity— sexually oriented business—belief engaged in activity protected by Constitution

The trial court did not abuse its discretion by fining defendant corporation $50,000.00 under N.C.G.S. § 15A-1340.17(b) for dissemination of obscenity for selling two adult-theme magazines to a police officer in violation of N.C.G.S. § 14-190.1 even though defendant contends it believed it was engaged in activity protected by the Constitution, because: (1) dissemination of obscenity is not protected by any constitutional guarantees; (2) defendant has previously been confronted by the laws prohibiting the dissemination of obscenity; and (3) defendant's failure to challenge its underlying conviction for disseminating obscenity means it cannot now challenge its punishment on the theory that its underlying conduct was not illegal.

3. Obscenity— sexually oriented business—mitigating factor of reasonable belief conduct was legal

The trial court did not err in a dissemination of obscenity case by failing to find the existence of the N.C.G.S. § 15A-1340.16(e)(1) statutory mitigating circumstance that defendant corporation reasonably believed its conduct was legal, because there is significant reason to doubt defendant's credibility that it presumed its conduct was lawful when defendant's employee was previously convicted of this same offense.

4. Judgments— form—signature of trial court

The trial court did not err in a dissemination of obscenity case by allegedly failing to sign the judgment form finding defendant guilty, because: (1) the form provides two areas for the judge's signature including one directly beneath the judgment and the other located at the bottom of the form below the section giving the notice of appeal; and (2) the trial court signed the second signature area at the bottom of the form.

Appeal by defendant from judgment entered 26 August 1996 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 23 May 2001.

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

Alexander Charns for defendant-appellant.

CAMPBELL, Judge.

Defendant corporation, Sanford Video and News, Inc., was convicted of one count of dissemination of obscenity for selling two adult-theme magazines to a Sanford police officer in violation of N.C. Gen. Stat. § 14-190.1 (1999). Under this statute, a violation is a Class I felony. N.C. Gen. Stat. § 14-190.1(g) (1999). Ordinarily, a defendant, if an individual person, would be subject to imprisonment for this offense. However, as defendant here is a corporation, under our structured sentencing statute it is only subject to a fine. N.C. Gen. Stat. § 15A-1340.17(b) (1999) ("[W]hen the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.") The trial court, in its discretion granted under N.C. Gen. Stat. § 15A-1340.17(b), fined defendant $50,000.00. Defendant now appeals to this Court, finding no fault with the underlying conviction, but with what it argues is an "excessive" fine.

[1] Defendant's first two contentions challenge N.C. Gen. Stat. § 15A-1340.17(b) on the grounds that it is vague, and therefore facially unconstitutional, and that the statute is unconstitutional as applied to defendant. We do not agree.

Defendant alleges that we must find N.C. Gen. Stat. § 15A-1340.17(b), when read in conjunction with N.C. Gen. Stat. § 14-190.1 (the dissemination of obscenity statute), unconstitutional on its face because it is "facially vague." The test for "vagueness" recognized by our Supreme Court holds that "a statute is unconstitutionally vague if it either: (1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'; or (2) fails to 'provide explicit standards for those who apply [the law].' " *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)).

As defendant did not challenge its conviction, but solely its punishment, defendant's argument only involves the second prong of this test, i.e., whether N.C. Gen. Stat. § 15A-1340.17(b) fails to " 'provide explicit standards for those who apply [the law].' " *Id.*

As noted above, when a corporate defendant is charged with a crime punishable under our structured sentencing act, it is only subject to a fine. The amount of the fine is left to the sound discretion of the trial court. Defendant contends that because the amount of the

fine is within the court's discretion, "[o]n its face, the statutory scheme allows a trial judge to set a fine at any amount for a corporate defendant with no prior criminal record."

We begin by noting that "[t]rial judges have broad discretion in determining the proper punishment for crime," and that "[t]heir judgment will not be disturbed unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, or circumstances which manifest inherent unfairness." *State v. Wilkins*, 297 N.C. 237, 246, 254 S.E.2d 598, 604 (1979); *State v. Williams*, 65 N.C. App. 472, 478, 310 S.E.2d 83, 87 (1983). However, this discretion is not unbridled. In exercising its discretion, the trial court must take into account the nature of the crime, the level of the offense, and the aggravating and mitigating factors, just as it would in setting the length of imprisonment for a defendant. In addition, when the punishment allows for a fine, our statutes have provided that "[i]n determining the method of payment of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant." N.C. Gen. Stat. § 15A-1362(a) (1999). Therefore, we conclude that the legislature has properly delineated the standards that should be followed in setting a fine as punishment for a crime, and that N.C. Gen. Stat. § 15A-1340.17(b) is not unconstitutional on its face.

We next consider whether N.C. Gen. Stat. § 15A-1340.17(b) is unconstitutional as applied to defendant. Defendant contends that due to the nature of the crime committed and due to defendant's financial situation, a fine of $50,000.00 is in violation of the Excessive Fines Clause, and that the statute is therefore unconstitutional as applied. U.S. Const. amend. VIII; N.C. Const. art. I, § 27. To our knowledge, this issue is one of first impression in North Carolina. Therefore, we look to cases which have been decided by the United States Supreme Court that deal with the Excessive Fines Clause.

The Excessive Fines Clause, as is indicated by its name, prohibits the government from imposing excessive fines as punishment for a crime. As the wording of the clause under our North Carolina Constitution is identical to that of the United States Constitution, our analysis is the same under both provisions. U.S. Const. amend. VIII; N.C. Const. art. I, § 27.

Although the United States Supreme Court had previously discussed the Excessive Fines Clause, it actually applied the clause for the first time in *United States v. Bajakajian*, 524 U.S. 321, 327,

141 L. Ed. 2d 314, 325 (1998), where it held that the forfeiture of $357,144.00 for a violation of a reporting statute, constituted an excessive fine and was thus unconstitutional under the Eighth Amendment.

The defendant in *Bajakajian* pled guilty to a violation of 31 U.S.C. § 5316(a)(1)(A), which made it a crime to transport more than $10,000.00 out of the country without notifying customs officials. Pursuant to 18 U.S.C. § 982(a)(1), a willful violation of this statute required forfeiture of the property involved, which the government argued required a forfeiture of the entire $357,144.00. The United States Supreme Court disagreed, however, stating that due to the punitive nature of the forfeiture, it was in essence a "fine" and thus subject to the Excessive Fines Clause. *Bajakajian*, 524 U.S. at 328, 141 L. Ed. 2d at 325. Turning then to the clause itself, the Court said: "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334, 141 L. Ed. 2d at 329.

The Court then set forth the test to be followed in determining whether a punitive forfeiture is excessive, holding that "a punitive forfeiture violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense." *Id.* (Emphasis added.) Under this test, the Court held the forfeiture was unconstitutional, since the offense in question was only a reporting violation and the funds to be forfeited were not the proceeds of any illegal activity, i.e., the funds were not connected to any other crime, and defendant was using the money to pay a lawful debt. The Court further held that the defendant's violation had caused only minimal harm, stating, "[h]ad his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country." *Id.* at 339, 141 L. Ed. 2d 332. Therefore, a forfeiture of the entire $357,144.00 was grossly disproportionate to the gravity of the offense.

We find the grossly disproportionate test to be applicable to the case *sub judice*. Applying this test to the facts before us, we conclude that defendant's $50,000.00 fine for the crime of disseminating obscenity is not grossly disproportionate, and therefore does not violate the Excessive Fines Clause.

Defendant asserts that the $50,000.00 fine imposed by the trial court is excessive because it is disproportionate to the crime com-

mitted. Defendant argues that the offense here, disseminating obscenity, is "the lowest level felony—I—under North Carolina law," and that a $50,000.00 fine is therefore disproportionate to the level of offense. We disagree on several grounds.

First, although disseminating obscenity is a low level felony, it is still a felony offense. This, in and of itself, connotes the seriousness of the crime, unlike that of the reporting violation in *Bajakajian*, which was considered a minor offense. Second, the dissemination of obscenity has been determined by our legislature to be more than minimally harmful to the community in that such dissemination has been made a criminal offense. *Miller v. California*, 413 U.S. 15, 32-33 n.13, 37 L. Ed. 2d 419, 435-36 n.13 (1973) ("Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population . . . ."). Third, unlike *Bajakajian*, the money to be forfeited was "unrelated to any other illegal activities." *Id.* at 338, 141 L. Ed. 2d at 332. Here defendant obtained its money directly from the sale of obscene materials—a clear violation of N.C. Gen. Stat. § 14-190.1—and for which the fine of $50,000.00 was imposed as punishment. Other jurisdictions have also found this to be an important consideration. *See Vasudeva v. United States*, 214 F.3d 1155, 1161 (9th Cir. 2000) (recognizing that in determining whether a fine is excessive, the court should take into account the income earned from the illegal activity); *United States v. 300 Blue Heron Farm Lane Chestertown, Md.*, 115 F. Supp. 2d 525, 528 (D. Md. 2000) (holding that the legislative judgment regarding the severity of the offense is one of the most important factors to consider in determining whether a fine is grossly disproportional). Thus, after assessing these factors, we determine that under the gross disproportionality standard, the fine imposed here was constitutional.

We also find no merit in defendant's contention that the fine is excessive when compared to defendant's financial resources available to pay the fine. Although defendant asserts that its tax returns for the two most recent years prior to the indictment showed that it sustained losses of roughly $52,000.00, we find that upon closer examination of the transcript, defendant's tax returns showed significant assets and gross receipts (both years combined) of approximately $858,000.00, and that its losses were mainly due to deductions for depreciation. In addition, we note that "[d]eterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329, 141 L. Ed. 2d at 326; *see also State v. Oliver*, 343 N.C. 202, 206, 470 S.E.2d 16, 19 (1996). With its financial resources, a lesser fine may

have been seen as an "acceptable price" of conducting business and therefore not a deterrent. We therefore conclude that defendant's $50,000.00 fine was an acceptable punishment and not excessive.

[2] By its next assignment of error, defendant contends that the $50,000.00 fine was excessive because defendant believed it was engaged in activities protected by the Constitution. We do not accept this explanation.

First, this Court has plainly held that "the dissemination of obscenity . . . is not protected by any constitutional guarantees." *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 557, 351 S.E.2d 305, 314 (1986) (emphasis omitted). Second, we note that this is not the first time defendant Sanford Video and News, Inc. has been confronted by the laws prohibiting the dissemination of obscenity. In fact, this Court had the occasion to examine a conviction against another of defendant's employees in 1996, where, as in the case *sub judice*, the employee was charged with disseminating obscenity in violation of N.C. Gen. Stat. § 14-190.1. *See State v. Johnston*, 123 N.C. App. 292, 473 S.E.2d 25 (1996). We therefore have difficulty believing defendant thought its conduct was protected under either the federal or state constitution. Regardless of defendant's beliefs, however, defendant has not challenged its underlying conviction for disseminating obscenity, and cannot now challenge its punishment on the theory that its underlying conduct was not illegal.

[3] Along this same line of thought, defendant next asserts the trial court erred by not finding the existence of statutory mitigating factor number ten, which states that the defendant reasonably believed its conduct was legal. N.C. Gen. Stat. § 15A-1340.16(e)(10) (1999). However, "[t]he failure of the [trial] court to find a factor in mitigation urged by the defendant will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility." *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 412 (1985). Here, especially given the history of defendant's employee having been convicted of this same offense, there is a significant "reason to doubt [defendant's] credibility" that it presumed its conduct was lawful. *Id.* Thus, we hold the trial court did not err in failing to find statutory mitigating factor ten.

[4] Defendant's final contention is that the trial court erred by failing to sign the judgment form finding defendant guilty. We find this contention to be without merit. The Administrative Office of the Courts ("AOC") form AOC-CR-305 provides two areas for the judge's signa-

ture, one directly underneath the judgment, and the other located at the bottom of the form below the section giving notice of appeal. Therefore, we conclude that as the trial judge signed the second signature area at the bottom of the form, this was sufficient to constitute signing the judgment and that defendant was not prejudiced thereby.

Affirmed.

Judges BIGGS and JOHN concur.

BARKER INDUSTRIES, INC., PLAINTIFF v. ROBIN O. GOULD, AND GOULD INDUSTRIES, INC., DEFENDANTS

No. COA00-683

(Filed 16 October 2001)

1. Trials— continuance to obtain counsel—denied—no abuse of discretion

The trial court did not abuse its discretion by refusing to grant defendants an additional continuance to obtain counsel where the court had granted defense counsel's motion to withdraw four months before trial was scheduled to begin and had given defendants a thirty-day stay and a one day continuance on the day of trial.

2. Trade Secrets— breadth of injunction—attempt to evade more specific order

An order granting injunctive relief against defendant Gould was not overly broad where the order permanently enjoined the manufacture or sale of all inorganic or oregano-metallic chemical compounds in an action arising from defendant's use of a prior employer's information. It is apparent that the trial court felt it necessary to broaden the injunctive relief from an earlier, more specific order, given a history of bad faith and underhanded dealing which indicated that defendants would continue to try to evade the court's order. Moreover, defendants had no skills in this area apart from the trade secrets misappropriated from plaintiff.

3. Trade Secrets— misappropriation–damages

The trial court did not err in the amount of compensatory damages it awarded in a trade secret misappropriation action where defendants complained that the court's figures did not take into account defendants' costs but presented no evidence as to those costs.

4. Trade Secrets— attorney fees—findings as to calculation

The trial court erred in an award of attorney fees in a trade secret misappropriation action by not making findings as to how the award was calculated. N.C.G.S. § 66-154(d).

Appeal by defendants from judgment entered 30 November 1999 and 26 January 2000 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 May 2001.

Bishop, Capitano & Abner, P.A., by J. Daniel Bishop and A. Todd Capitano, for plaintiff-appellee.

Weaver, Bennett & Bland, P.A., by Howard M. Labiner and Joseph T. Copeland, for defendant-appellants.

CAMPBELL, Judge.

Defendants appeal from two orders of the trial court: (1) order dated 30 November 1999, enjoining defendant Robin O. Gould ("Gould") and his company, defendant Gould Industries, Inc. ("Gould Industries"), from all operations, ordering that the business be permanently closed, and awarding both compensatory and punitive damages, and (2) order dated 26 January 2000, denying defendants' motions for new trial, amendment of judgment, relief from judgment, and stay of enforcement of judgment.

Plaintiff Barker Industries, Inc., owned by Marc and Robert Settin, is a manufacturer of high grade, inorganic and organo-metallic chemical compounds. Plaintiff supplies its customers with high quality, high purity compounds which it has successfully researched and manufactured over the past twenty-five years. Plaintiff has also established close relationships with its suppliers to ensure quality raw materials, and has built a solid customer base, even sometimes working with its customers to tailor its products to the customers' specific needs.

In 1993, plaintiff hired defendant Gould to perform clerical work for the company. Gould's duties included recording customer orders

and placing orders for the needed supplies and raw materials. Gould was not engaged in actually manufacturing chemicals, and had no background or training in this area. Sometime before his termination in October of 1997, Gould began making copies of plaintiff's customer, supplier, and pricing lists; compiling this information in what became known as the "Address Book." Gould also made copies of plaintiff's "prep sheets," which contained the precise product formulations for the chemicals plaintiff manufactured. These "prep sheets" were the result of refinements made over the years that allowed for the high purity of the products, and could only be found on Robert Settin's password-protected computer.

After his termination, Gould began manufacturing inorganic and organo-metallic compounds in direct competition with plaintiff, using the information Gould had taken from plaintiff. Gould Industries obtained raw materials from plaintiff's suppliers, and attempted to sell its products to plaintiff's customers. Plaintiff sought to enjoin defendants' activities, and brought suit for injunctive relief and damages.

[1] Defendants' first contention is that the trial court erred by not allowing defendants a second continuance in order to obtain counsel for the 11 November 1999 proceeding. We disagree.

The decision to grant or deny a continuance is subject to the trial court's discretion, and will not be overturned absent an abuse of that discretion. *State v. Call*, 353 N.C. 400, 415, 545 S.E.2d 190, 200 (2001). Despite defendants' contention, it is apparent from the record before us that defendants were fully aware their counsel had filed a motion to withdraw, that this motion had been granted by the trial court a full four months before the trial was scheduled to begin, and that the trial court had given defendants ample opportunity to obtain counsel—including a thirty day stay of the proceedings to enable defendants to retain counsel, and a one day continuance on the day of trial when defendants announced that their attorney was not able to attend court on that day. Therefore, we conclude the trial court did not abuse its discretion by refusing to grant defendants an additional continuance in order to obtain counsel.

[2] Defendants' next set of contentions involve the 30 November 1999 order. First, defendants argue that the injunctive relief ordered by the court against defendant Gould, permanently enjoining him from the manufacture or sale of inorganic or organo-metallic chemical compounds is over broad. In support of this argument, defendants

state several factors that should be considered in tailoring injunctive relief. We review each of these factors under an abuse of discretion standard. *Roberts v. Madison County Realtors Ass'n, Inc.*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) ("When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion.").

To begin, defendants assert that our courts are wary of prohibiting "an employee from working in his field of training even if the employee's general skills and knowledge were acquired in the course of his employment," citing *Engineering Associates, Inc. v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966), for this proposition. Gould, however, was hired by plaintiff to do clerical work. He was studying to be a certified public accountant. His "field of training" at no time included manufacturing chemicals. Gould never received any sort of training in this field, held no chemistry degrees, and was never taught these skills by plaintiff during his employment. Accordingly, we hold the trial court did not prevent defendant Gould from working in his "field of training," and therefore did not abuse its discretion.

Next, defendants assert that the injunctive relief granted by the trial court was too broad, and that instead, the relief should be "limited to specific items or information and not be a widely encompassing order." Defendants' apparent objection here, is that the order permanently enjoined Gould from "the manufacture or sale of inorganic or organo-metallic chemical compounds" without listing specific compounds, thereby effectively enjoining defendants from the manufacture of any such compound. Defendants contend a much more reasonable approach would have been to enjoin the manufacture of the twenty-seven compounds listed on the "prep sheets" obtained by Gould. Again, we find no abuse of discretion on behalf of the trial court.

Defendants here are solely responsible for their plight by actively ignoring the terms of the preliminary injunction against them. In the preliminary injunction, the trial court stated: "Defendants Robin O. Gould and Gould Industries, Inc. shall not manufacture or sell any of the specialized chemical compounds whose formulation information was taken by Gould in the form of Prep Sheets. Attached as Exhibit A hereto is a list of those products." Exhibit A goes on to list the twenty-seven specific chemicals that defendants were prohibited from manufacturing. Then the trial court further ordered that: "Defendants Robin O. Gould and Gould Industries, Inc. shall not sell other prod-

ucts currently marketed by Barker to Barker's customers whose identities and purchasing habits are recorded on the address book compiled by Gould. . . . Attached as Exhibit C hereto is a list of those customers."

The trial court took great care in setting out the specific chemicals, customers, and suppliers to which the preliminary injunction applied. However, defendants tried to evade the trial court's order by adding trace amounts of chemicals to the compounds (which would not affect the compound's performance), then claiming that they were not the same chemicals covered by the preliminary injunction, and by selling to affiliates of plaintiff's customers instead of selling directly to the customers themselves. This is evidenced by the trial court's findings of fact in its supplemental preliminary injunction, where it found defendants had sold chemicals that were "either identical or insubstantially distinct" from chemicals it had been enjoined from manufacturing in the preliminary injunction, and that defendants sold its products to a customer that was affiliated with a prior Barker customer. In fact, the Barker customer and its affiliate shared the same telephone number, and the chemicals sold to the affiliate were sold at the same price, and in the same amount, as the chemical defendants had been enjoined from selling to the original Barker customer. The trial court also found that defendants were operating a website listing for sale many of the chemicals defendants were enjoined from manufacturing. We therefore find no abuse of discretion on the part of the trial court in enjoining Gould from the manufacture or sale of inorganic and organo-metallic compounds.

Defendants' last argument against the injunction is that defendants cannot be enjoined from the manufacture of products that differ from those that plaintiff manufactures. Defendants assert that the chemicals they produced were of an "industrial grade," and that plaintiff sold only the highest purity chemicals, and would not produce lower quality products. Nevertheless, we conclude the trial court was within its discretion to enjoin Gould as it did.

We note that broad injunctive relief is available where there has been some showing of bad faith or underhanded dealings on the part of the party to be enjoined, or where the party plainly lacks comparable skills so that misappropriation can be inferred. *FMC Corp. v. Cyprus Foote Mineral Co.*, 899 F.Supp. 1477, 1482 (W.D.N.C. 1995). It is also " 'well settled that an injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential informa-

tion.' " *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 594, 424 S.E.2d 226, 229 (1993) (quoting *Travenol Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E.2d 478, 483 (1976)).

It is apparent that the trial court felt it necessary to broaden the injunctive relief, given the defendants' past history. As noted above, after the preliminary injunction was filed, defendants added trace amounts of chemicals to their products and sold them to affiliates of plaintiff's customers in an attempt to evade the trial court's order. In fact, the trial court expressly stated in the supplemental preliminary injunction, that "[u]nless more expansively restrained, Gould and Gould Industries will continue to use Barker's own trade secrets to its irreparable injury," whereupon it added additional restraints to the preliminary injunction.

Nonetheless, even with full knowledge of the preliminary injunction and the more restrictive supplemental preliminary injunction, defendants continued to avail themselves of plaintiff's trade secrets by manufacturing and selling the enjoined products to plaintiff's customers from whom defendants had been expressly banned. Not only does this show bad faith and underhanded dealings, but it shows that defendants would very likely continue to try to evade the trial court's order. Further, as defendants had no skills in this area apart from the trade secrets Gould misappropriated from plaintiff, the trial court's broad injunctive relief was well within its discretion to award, and did not constitute an abuse of that discretion.

[3] Defendants next find fault with the amount of compensatory damages awarded by the trial court in its 30 November 1999 order. The trial court awarded plaintiff $72,666.30 in compensatory damages due to unjust enrichment. Under North Carolina's Trade Secrets Protection Act, N.C. Gen. Stat. §§ 66-152 to 66-157 (1999), in addition to injunctive relief, a party may recover actual damages "measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater." N.C. Gen. Stat. § 66-154(b) (1999). Defendants contend that the evidence introduced by plaintiff to show unjust enrichment was "factually flawed" because plaintiff did not prove a causal link between the wrong committed and the damages incurred.

To the contrary, our review of the evidence reveals plaintiff provided ample proof that defendants were unjustly enriched due to sales of Barker products to Barker's customers. Plaintiff's exhibit forty-two lists the dates, quantities, prices, and products sold by

defendants to plaintiff's customers. The net result of those sales was income to defendants in the amount of $72,666.30, and it is evident that these sales were a direct result of Gould's misappropriation of plaintiff's trade secrets. Although defendants complain that the unjust enrichment figures did not take into account defendants' manufacturing, sales, and shipping costs, defendants presented no evidence as to these costs. Therefore, we conclude the trial court did not err in awarding compensatory damages in the amount of $72,666.30.

[4] Defendants' last assignment of error regarding the 30 November 1999 order, is that the trial court erred in its additional award of $19,000.00 in attorneys' fees to plaintiff. Although N.C. Gen. Stat. § 66-154(d) (1999) does authorize the trial court to award reasonable attorneys' fees if a "willful and malicious misappropriation exists," the trial court must still make sufficient findings of fact regarding how the award was calculated. "[I]n order for the appellate court to determine if the statutory award of attorneys' 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." *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991). In the case *sub judice*, however, it is unclear from the record how the trial court arrived at this figure. It is therefore necessary to remand this issue to the trial court for proper findings.

Defendants' final assignments of error involve the 26 January 2000 order of the trial court, denying defendants' motions for new trial, amendment of judgment, relief from judgment, and stay of enforcement of judgment. These motions were based on the same issues as the preceding assignments of error. Having found no error at the trial level, and having remanded the issue of counsel fees for further findings by the trial court, we find these assignments of error to be without merit.

Affirmed in part and remanded in part.

Judges BIGGS and SMITH concur.

STATE OF NORTH CAROLINA v. DARIAN WAYNE PARKS, DEFENDANT

No. COA00-1275

(Filed 16 October 2001)

1. Appeal and Error— appealability—appeal following guilty plea—writ of certiorari

A criminal defendant was entitled to appellate review after pleading guilty without withdrawing that plea where the Court of Appeals allowed his motion for a writ of certiorari.

2. Sentencing— habitual felon—equal protection—selective prosecution

Defendant's indictment as an habitual felon did not violate equal protection in that the district attorney of defendant's county prosecutes everyone eligible for prosecution as an habitual felon while similarly situated persons in other counties may not be prosecuted.

3. Sentencing— habitual felon—no conflict with Structured Sentencing

The Habitual Felon Act is not impliedly repealed by the later Structured Sentencing Act. Although defendant argues that the two acts are irreconcilable, the Structured Sentencing Act applies to all people committing misdemeanors or felonies as a mechanism for determining sentence while the Habitual Felon Act only attaches to a defendant who has committed three prior non-overlapping felonies and elevates that person's status within Structured Sentencing. Moreover, the Habitual Felon Act has been amended since Structured Sentencing and it is presumed that the General Assembly would not amend a statute it had repealed in a more recent statute.

Appeal by defendant from judgment entered 16 August 2000 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 15 August 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn Jones Cooper, for the State.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for defendant-appellant.

HUDSON, Judge.

Defendant appeals the denial of his motion to dismiss his indictment as an habitual felon in case number 99 CRS 2414. Defendant was found guilty of felonious larceny and felonious possession of stolen goods by a unanimous jury on 16 August 2000 in case number 98 CRS 4106. Defendant had attempted to steal a riding lawnmower from the parking lot of a Wal-Mart store, but was not able to get the mower off of the premises. Based upon defendant's previous felony convictions in 1990, 1992, and 1994, defendant was indicted as an habitual felon pursuant to North Carolina's Habitual Felon Act. *See* N.C. Gen. Stat. §§ 14-7.1 to -7.6 (1999). On the same day that the jury returned the verdict above, 16 August 2000, the trial court denied defendant's motion to dismiss the habitual felon indictment. Defendant was subsequently arraigned on the indictment and pled guilty to habitual felon status. The plea was accepted and the two cases consolidated for sentencing; defendant was sentenced to a minimum term of ninety-six months and a maximum term of 126 months. Defendant filed notice of appeal based on the same four arguments in defendant's motion to dismiss his indictment in case number 99 CRS 2414. We affirm.

[1] Before reaching defendant's four issues, we must first respond to the State's contention that defendant is not entitled to appellate review. Under N.C. Gen. Stat. § 15A-1444(e) (1999), a defendant is "not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court." In the present case, defendant entered a guilty plea in superior court and has not made a motion to withdraw that plea. *See id.* The State moved to dismiss this appeal; the defendant responded, and in the alternative, moved for a writ of certiorari. *Accord State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995). Even though defendant pled guilty to the charge of being an habitual felon and did not attempt to withdraw that plea, we hereby allow the defendant's motion for a writ of certiorari in order to address the issues raised by defendant.

Defendant raised four issues in his motion to dismiss, which he brings forward on appeal: (1) whether the Habitual Felon Act violates the separation of powers clause found in Article I, Section 6 of the North Carolina Constitution, (2) whether the prosecution of defendant by the Moore County District Attorney violates defendant's right to equal protection pursuant to the Fourteenth Amendment of the United States Constitution, (3) whether the Structured Sentencing Act, N.C. Gen. Stat. § 15A-1340.10 to -1340.23 (1999), impliedly

repealed the Habitual Felon Act, and (4) whether the combined use of the Habitual Felon Act and the Structured Sentencing Act violates the Double Jeopardy Clause of the North Carolina Constitution and the United States Constitution.[1] The trial court denied the motion in open court, without going into detail.

The first issue, concerning separation of powers, was addressed by this Court in *State v. Wilson*, 139 N.C. App. 544, 533 S.E.2d 865, *appeal dismissed and review denied*, 353 N.C. 279, 546 S.E.2d 395 (2000), and the fourth issue concerning double jeopardy has been addressed by this Court in *State v. Brown*, 146 N.C. App. 299, — S.E.2d — (Sept. 18, 2001) (No. COA00-1039). We are bound by these opinions concerning separation of powers and double jeopardy, and affirm as to these issues. This opinion addresses the second and third issues raised on appeal: the equal protection claim and defendant's claim that the Structured Sentencing Act impliedly repealed the Habitual Felon Act.

[2] Defendant argues that his indictment as an habitual felon violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. Defendant argues that because the District Attorney of Moore County has a policy of prosecuting all persons potentially eligible for habitual felon status, such persons are treated differently in Moore County from the way similarly situated persons are treated in other North Carolina counties, where they may or may not be prosecuted as habitual felons. Defendant argues that he belongs to a protected class of individuals that can be precisely described, and that a fundamental right is involved. As such, he argues, the Moore County prosecutor has violated his right to equal protection as protected by the Fourteenth Amendment of the United States Constitution. We do not agree.

Around the country and in this State habitual felon laws have withstood scrutiny when challenged on Fourteenth Amendment equal protection grounds. *See Oyler v. Boles*, 368 U.S. 448, 455-56, 7 L. Ed. 2d 446, 452-53 (1962) (upholding West Virginia's recidivism statute); *McDonald v. Massachusetts*, 180 U.S. 311, 45 L. Ed. 542 (1901) (upholding Massachusetts' recidivism statute). In *Oyler v.*

1. Although defendant has raised four separate legal issues, he has made only one assignment of error. As the Rules of Appellate Procedure require that each assignment of error be "confined to a single issue of law," the practice that would clearly comply with the rule would have been four assignments of error, one per issue. *See* N.C. R. App. P. 10(c)(1). However, in our discretion, we have allowed defendant's motion for writ of certiorari to address these issues. *See* N.C. R. App. P. 2.

Boles, the United States Supreme Court held that there was no valid challenge to West Virginia's recidivist statute (habitual felon act) on equal protection grounds unless the prosecutor indicted felons "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. at 456, 7 L. Ed. 2d at 453. North Carolina courts have reiterated this standard for determining whether a prosecutor's discretion is inappropriate. This Court held in *State v. Wilson*, that when a prosecutor makes a decision to prosecute, not applying some illegal standard or classification, he applies his discretion in a constitutional manner. *See Wilson*, 139 N.C. App. at 550-51, 533 S.E.2d at 870 (citing *State v. Garner*, 340 N.C. 573, 459 S.E.2d 718 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985)). In *Wilson*, the defendant argued this issue on appeal; this Court declined to address it directly since it had not been raised in the trial court. However, in its discussion of the separation of powers, the Court explained the appropriate exercise of prosecutorial discretion under the Habitual Felon Act:

> Our courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees. *See State v. Hairston*, 137 N.C. App. 352, 354, 528 S.E.2d 29, 31 (2000) (citing [*State v.*] *Todd*, 313 N.C. at 118, 326 S.E.2d at 253), and *State v. Hodge*, 112 N.C. App. 462, 468, 436 S.E.2d 251, 255 (1993) (upholding Habitual Felon Act against due process, equal protection, and double jeopardy challenges). . . .
>
> . . . .
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> It is well established that
>
> there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.

Wilson, 139 N.C. App. at 550, 533 S.E.2d at 870 (internal citations omitted). Here, the District Attorney for Moore County has exercised his discretion in deciding to prosecute all persons eligible for habitual felon status. We hold that the District Attorney of Moore County has not abused his prosecutorial discretion in deciding to seek indictments against all eligible individuals.

[3] Defendant's remaining argument, that the Structured Sentencing Act impliedly repeals the Habitual Felon Act, is based on defendant's contention that there exists an "irreconcilable conflict" between the two Acts. We find no "irreconcilable conflict" between the two Acts and note that North Carolina appellate courts have repeatedly upheld the use of the two Acts together, as long as different prior convictions justify each. *See e.g., State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985); *Wilson*, 139 N.C. App. 544, 533 S.E.2d 865; *State v. Truesdale*, 123 N.C. App. 639, 473 S.E.2d 670 (1996); *State v. Bethea*, 122 N.C. App. 623, 471 S.E.2d 430 (1996). *See also State v. Aldridge*, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108 (1985) (noting that North Carolina's Habitual Felon Act is constitutional). Defendant argues that the two Acts are irreconcilable because the Habitual Felon Act punishes people who have committed non-overlapping felonies (felonies committed after the date of conviction for a previous felony) and the Structured Sentencing Act enhances punishment for people who commit overlapping felonies (felonies committed after the date of commission, but before the date of conviction for a previous felony). Defendant asserts that these two Acts reflect opposite public policies as to which type of felon is deserving of enhanced punishment, the non-overlapping repeat offender or the overlapping repeat offender. Consequently, defendant argues, the two schemes irreconcilably conflict with one another. We do not agree. We believe that the two Acts are different, but not conflicting. The Acts reveal that the General Assembly intended to enhance punishments for both types of repeat offenders, but by different means. Structured sentencing applies to all persons committing misdemeanors or felonies, as a mechanism for determining sentences based on the seriousness of the crime and the extent of the defendant's previous record. *See* N.C.G.S. §§ 15A-1340.10 to -1340.23. Habitual felon status only attaches to a defendant who has committed three prior non-overlapping felonies and is then convicted of a fourth felony. The Habitual Felon Act elevates the convicted person's status within Structured Sentencing so that the person is eligible for longer minimum and maximum sentences. *See* N.C.G.S. §§ 14-7.1 to -7.6.

Defendant cites *State v. Greer* for the principle that "repeal by implication is not a favored rule of statutory construction," but that a latter statute controls if the two statutes are truly irreconcilable. 308 N.C. 515, 518, 302 S.E.2d 774, 777 (1983) (internal citations omitted). In *Greer*, the Court of Appeals held that the two statutes at issue were in direct conflict with each other and could not

both apply. *See Greer*, 58 N.C. App. 703, 294 S.E.2d 745 (1982). The Supreme Court reversed, holding that the statutes at issue were not irreconcilably in conflict. *See Greer*, 308 N.C. 515, 302 S.E.2d 774. Here, however, there is no direct conflict between the Habitual Felon Act and the Structured Sentencing Act, although the two are plainly different. In fact, the Habitual Felon Act has been amended since the enactment of the Structured Sentencing Act in 1994. *See* N.C.G.S. § 14-7.6 (amended 1994). We presume that the North Carolina General Assembly would not amend a statute that it had repealed by its own actions in a more recent statute. Therefore, we conclude that the Structured Sentencing Act did not impliedly repeal the Habitual Felon Act.

In summary, we are not persuaded by the defendant's arguments that the Habitual Felon Act was unlawfully applied to him. The Moore County District Attorney did not abuse his discretion by deciding to prosecute all persons eligible for habitual felon status. Upon the defendant's subsequent conviction, the trial judge acted properly and within his discretion in sentencing the defendant using the Structured Sentencing Act in conjunction with the Habitual Felon Act, in that the latter has not been impliedly repealed. We are bound by the previous decision of this Court in *State v. Brown*, 146 N.C. App. 299, —— S.E.2d —— (Sept. 18, 2001) (No. COA00-1039), to hold that there is no double jeopardy violation. We are also bound to reject the defendant's separation of powers claim due to this Court's decision in *Wilson*, 139 N.C. App. 544, 533 S.E.2d 865. Finding no error in the trial court's denial of defendant's motion to dismiss the habitual felon indictment, we affirm.

State's "Motion to Dismiss" denied. Defendant's "Petition for Writ of Certiorari" allowed.

Affirmed.

Judges WALKER and McGEE concur.

MELBA WILDER (NOW LEE), PLAINTIFF v. DENNIS B. WILDER, DEFENDANT

No. COA00-1121

(Filed 16 October 2001)

Civil Procedure; Divorce— equitable distribution—failure to prosecute claim—dismissal with prejudice

The trial court erred by dismissing with prejudice under N.C.G.S. § 1A-1, Rule 41(b) plaintiff's claim for equitable distribution based on plaintiff's alleged failure to prosecute the claim, because: (1) the trial court failed to consider lesser sanctions before dismissing the case; and (2) before dismissing for failure to prosecute under Rule 41(b), the trial court must address the three factors of whether plaintiff acted in a manner which deliberately or unreasonably delayed the matter, the amount of prejudice to defendant, and the reason that sanctions short of dismissal would not suffice.

Appeal by Plaintiff from judgment entered 9 May 2000 by Judge Thomas R.J. Newbern in Hertford County Superior Court. Heard in the Court of Appeals 15 August 2001.

Louie Wilson III, for plaintiff-appellant.

Larry S. Overton, P.A., by Larry S. Overton, for defendant-appellee.

HUDSON, Judge.

Plaintiff appeals an order entered 9 May 2000 by Judge Thomas R.J. Newbern dismissing plaintiff's action for equitable distribution. Plaintiff originally filed a complaint on 29 September 1987 requesting a divorce from bed and board, alimony, alimony *pendente lite*, and child support from defendant. Plaintiff also preserved her interest in the equitable distribution of marital property. In his Answer and Counterclaim, filed 2 November 1987, Defendant stated that he would be seeking equitable distribution "[a]t an appropriate time" in the future. Defendant filed a motion on 18 April 2000 to dismiss plaintiff's claim for equitable distribution. The plaintiff argued the motion *pro se* and defendant was represented by his attorney. Judge Newbern dismissed plaintiff's 1987 action for equitable distribution pursuant to North Carolina Rule of Civil Procedure 41(b). In his order, the trial judge found that plaintiff had not pursued her claim for equitable dis-

tribution, but made no mention as to whether the defendant had pursued his claim. We reverse and remand for the trial court to consider and make further findings as to whether lesser sanctions than dismissal were appropriate.

Plaintiff and defendant were married in 1964 and had three children. After discord in their relationship increased, plaintiff filed for divorce from defendant. The court entered an order on 30 November 1987 settling issues of child custody, child support, alimony, and temporary possession of marital property. In 1990, the court awarded plaintiff an absolute divorce from defendant. The court never determined plaintiff's claim for equitable distribution of marital property which was contained in her original Complaint filed 29 September 1987, nor did the court determine defendant's claim for equitable distribution mentioned in his Answer and Counterclaim filed 2 November 1987. In granting plaintiff an absolute divorce from defendant 18 May 1990, the court noted that plaintiff's claim for equitable distribution was still pending. After plaintiff sought to have the court approve and sign a Qualified Domestic Relations Order regarding a pension plan of defendant's, defendant filed a motion to dismiss plaintiff's claim for equitable distribution on 18 April 2000. After a hearing, the trial court concluded that plaintiff had failed to prosecute her equitable distribution claim, which materially prejudiced the defendant. The court dismissed plaintiff's claim for equitable distribution with prejudice.

Plaintiff's only assignment of error asserts that the "trial court erred in dismissing plaintiff's claim for equitable distribution for failure to prosecute without considering appropriate sanctions short of dismissal." The trial court dismissed plaintiff's claim for equitable distribution pursuant to Rule 41(b). Rule 41(b) provides for the involuntary dismissal of a cause of action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." In general, a trial court is required to "consider lesser sanctions before dismissing an action under Rule 41(b)." *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 158 (1993) (remanding case to trial court to consider less severe sanctions than dismissal for violation of Rule 37(d) of the North Carolina Rules of Civil Procedure).

Rule 41(b) provides that a claim may be dismissed for one of three reasons: failure to comply with the rules, failure to comply with a court order, or failure to prosecute. Most of the cases cited in the plaintiff's brief specifically concern dismissals under Rule 41(b) for failure to "comply with these rules or any order of court," and not dis-

missals for failure to prosecute. *See Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992) (consideration of lesser sanctions than dismissal with prejudice under Rule 41(b) for violation of Rule 8(a)(2)); *Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d 847 (1986) (consideration of lesser sanctions than dismissal for failure to comply with court order). These cases require that a trial court consider lesser sanctions before dismissing a claim pursuant to Rule 41(b). Although the general rule stated in *Goss* supports this Court's holding, no North Carolina cases specifically state that lesser sanctions must be considered by a trial court before dismissing a claim pursuant to Rule 41(b) for *failure to prosecute*. Because we believe that the cases on Rule 41(b) point most logically in this direction, we hold that the trial court must also consider lesser sanctions when dismissing a case pursuant to Rule 41(b) for *failure to prosecute*.

We reach this conclusion for two reasons. First, from the cases involving dismissals under Rule 41(b), we can discern no reason to treat a dismissal for failure to prosecute different from dismissals for other reasons permitted by Rule 41(b), when the question is whether lesser sanctions suffice. And second, because the cases concerning dismissal under Rule 41(b), few though they are, appear to compel this conclusion.

Dismissal is the most severe sanction available to the court in a civil case. *See Daniels*, 81 N.C. App. at 604, 344 S.E.2d at 849. An underlying purpose of the judicial system is to decide cases on their merits, not dismiss parties' causes of action for mere procedural violations. *See Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981) (holding that the trial court correctly refused to grant a motion to dismiss for failure to prosecute); *Green v. Eure, Secretary of State*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 600 (1973) (holding that the trial court erred in dismissing plaintiff's action for failure to prosecute). In accord with this purpose, claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation. *See Daniels*, 81 N.C. App. at 604, 344 S.E.2d at 849; *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984).

Defendant relies upon *Foy v. Hunter* to illustrate the issues North Carolina case law presents on this subject. There, the trial court dismissed plaintiffs' claims with prejudice based on plaintiffs' alleged failure to prosecute and on an alleged failure to comply with the Rules of Civil Procedure, specifically Rule 8(a)(2). *See id.* at 619, 418 S.E.2d at 302. In considering the dismissal for failure to prosecute,

this court applied the standard from *Green* and *Link v. Wabash R. Co.*, 370 U.S. 626, 8 L. Ed. 2d 734 (1962): "[u]nder Rule 41(b), 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 toward its conclusion' by engaging in some delaying tactic." *Foy*, 106 N.C. App at 618, 418 S.E.2d at 302 (quoting *Green*, 18 N.C. App. at 672, 197 S.E.2d at 600-01; *Jones*, 52 N.C. App. at 505, 279 S.E.2d at 15) (emphasis added). This Court reversed the dismissal for failure to prosecute, because the evidence in the record did not support the finding that *plaintiff* intended to thwart progress in the action. Additionally, the trial court failed to make any findings as to whether plaintiff's *attorneys* failed to prosecute the action. Because the findings were not supported, this Court declined to uphold the dismissal for failure to prosecute on this basis. *See Foy*, 106 N.C. App. at 619, 418 S.E.2d at 303.

However, this Court in *Foy* considered the dismissal for violation of Rule 8(a)(2) separately. The Court noted that when a party violates a rule, the trial court may dismiss for failure to comply with the Rules of Civil Procedure if it has first determined the appropriateness of lesser sanctions. *See id.* at 620, 418 S.E.2d at 303. "[T]he trial court must make findings and conclusions which indicate that it has considered . . . less drastic sanctions." *Id.* (citing *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 421, 378 S.E.2d 196, 201 (1989)). Because the trial court had not made such findings, the court reversed the dismissal of the complaint and remanded for reconsideration of appropriate sanctions for the violation of Rule 8(a)(2). *See id.*

Here, the trial court made some findings of fact and conclusions of law concerning plaintiff's failure to prosecute. However, we find that the trial court did not consider in the record whether lesser sanctions were appropriate for plaintiff's failure to prosecute. "If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion." *Foy*, 106 N.C. App. at 620, 418 S.E.2d at 303 (citing *Miller v. Ferree*, 84 N.C. App. 135, 137, 351 S.E.2d 845, 847 (1987) (holding that the trial court did not abuse its discretion in considering lesser sanctions than dismissal with prejudice when deciding to dismiss plaintiff's action without prejudice)).

We also note that the Fourth Circuit has ruled accordingly in interpreting the same rule. Although we are not bound by these cases,

they can have instructional value, especially when considered in conjunction with the preceding state law analysis. *See State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (1999) (noting that "federal appellate decisions are not binding upon either the appellate or trial courts of this State"). The pertinent language of Rule 41 of the Federal Rules of Civil Procedure is identical to Rule 41 of the North Carolina Rules of Civil Procedure. The Fourth Circuit has held that before dismissing a claim for *failure to prosecute* under Federal Rule of Civil Procedure 41(b) the trial court must consider four factors: "(1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *Hillig v. Commissioner of Internal Revenue*, 916 F.2d 171, 173 (4th Cir. 1990).

We believe that the factors recognized in *Hillig*, as well as in our previous cases, together give rise to three factors that the trial judge must address before dismissing for failure to prosecute under Rule 41(b). They are: (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice. Here, the trial court did not fully address any of these factors. The only mention of prejudice to the defendant in the order is contained in finding number 17, which reveals no factual basis and thus is actually a conclusion of law. *See Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 91 (2000) (conclusions of law, even if erroneously labeled as findings of fact, are reviewable *de novo* on appeal). We hold that the conclusion that there was prejudice to the defendant is insufficiently supported by factual findings, and must be vacated.

In sum, we hold that the trial judge must address the three factors previously enumerated before deciding whether to dismiss the plaintiff's claim with prejudice under Rule 41(b), for failure to prosecute. Accordingly, the trial court's order dismissing with prejudice plaintiff's claim for equitable distribution is vacated, and this case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WALKER and McGEE concur.

GUILFORD COUNTY, PLAINTIFF-APPELLEE v. BENJAMIN SAMUEL ELLER AND WIFE, BRENDA DENNIS ELLER, DEFENDANT-APPELLANT

No. COA00-1155

(Filed 16 October 2001)

Judgments— consent—absent party—attorney's authority—presumption not overcome

The fact that one of two defendants was not present and did not sign a memorandum of judgment was not alone sufficient to reverse the trial court's entry of a consent judgment where one attorney represented both defendants and there were no findings for the appellate court to review to determine whether the attorney had the consent of the absent defendant.

Judge BIGGS dissenting.

Appeal by defendant from memorandum of judgment/order entered 22 May 2000 and from judgment and injunction entered 21 September 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals on 23 August 2001.

Office of the Guilford County Attorney, by Assistant County Attorney Mercedes O. Chut, for plaintiff appellee.

Mary K. Nicholson for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from a memorandum of judgment entered 22 May 2000 and judgment and injunction entered 21 September 2000. The parties stipulated that no evidence was introduced at the trial level, and also that Brenda Eller was not present at the hearing on 22 May 2000.

This case involves several properties owned by defendants in Guilford County where defendants maintained junked motor vehicles as defined and prohibited by the respective zoning designation of each of the several properties. Defendants admitted receiving numerous notices of violations and civil penalty citations. A hearing was calendared for 22 May 2000 by plaintiff for summary judgment and to dismiss defendant's counterclaims. By the time of this hearing defendants owed Guilford County over $300,000 in civil penalties.

The parties entered into a consent judgment on 22 May 2000. Defendant Benjamin Eller, the Ellers' attorney, and the County Attorney were present. Defendant Brenda Eller was not present. Defendant Benjamin Eller was placed under oath by the court and read the handwritten memorandum of judgment. When asked if he understood what was happening in the proceedings, defendant answered in the affirmative. All those present signed the memorandum of judgment. The assistant clerk of superior court made the following notation on the docket for 22 May 2000:

> Parties advise Court that settlement has been reached. Mr. Eller sworn; Memo of Judgment handed up and read over by Court to Mr. Eller to make sure he has a clear understanding as to what was going on. Memo of Judgment signed and taken downstairs.

The memorandum stated that it constituted an entry of judgment and that further signatures were not necessary. It provided for the County Attorney to hand up a formal written version within three days.

Defendants filed notice of appeal on 21 June 2000 from the memorandum of judgment and a motion to stay the execution of the judgment on 28 June 2000. On 21 September 2000, a formal written judgment of the memorandum of judgment was signed by the court. Defendants again gave notice of appeal on 3 October 2000, specifically from this entry of judgment.

Defendant makes three assignments of error: (1) that the trial court erred in entering a consent judgment without consent of all defendants; (2) that the trial court erred in entering a judgment in which defendants did not receive proper notice; and (3) that the trial court signed the written judgment and thus erred by entering a further judgment not consented to by all the parties and in allowing the appellee's motion to dismiss and for summary judgment.

Defendants' first assignment of error is that the trial court erred in entering the consent judgment without consent of all defendants. Our discussion of this assignment of error also applies to defendants' third assignment of error, asserting that it was error for the trial court to sign and enter the written judgment not consented to by all parties.

In *Milner v. Littlejohn*, 126 N.C. App. 184, 484 S.E.2d 453, *disc. reviews denied*, 347 N.C. 268, 493 S.E.2d 458 (1997), this Court reviewed the law on consent judgments:

> A consent judgment is a contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. It is well-settled that " '[t]he power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.' " "[A] consent judgment is void if a party withdraws consent before the judgment is entered." If a consent judgment is set aside, it must be set aside in its entirety. The person who challenges the validity of a consent judgment, bears the burden of proof to show that it is invalid.

Id. at 187, 484 S.E.2d at 455 (citations omitted).

The record in the present case reveals that only one attorney represented both Mr. and Mrs. Eller at the trial level. Their attorney filed an answer for the Ellers, and filed a motion to dismiss on behalf of Mrs. Eller. He appeared in court on 22 May 2000 and entered into a consent judgment stating, "An Order of Abatement is entered against the Defendants, Mr. and Mrs. Eller . . ." and further referred to "The Ellers" throughout the memorandum.

It is stipulated by the parties that those present on 22 May 2000 included the County Attorney, the Ellers' attorney and Mr. Eller. Mrs. Eller was not present at the time the consent judgment was entered. On appeal, defendants base their argument that the consent judgment is void solely on the facts that Mrs. Eller was not present and did not sign the memorandum. We hold that these facts alone are insufficient to reverse the trial court's entry of the consent judgment.

In North Carolina, when an attorney acts on behalf of his client, a presumption arises that the attorney so acts within his authority and with the consent of the client. *Howard v. Boyce*, 254 N.C. 255, 118 S.E.2d 897 (1961). A more precise definition of the presumption can be found in *Ledford v. Ledford*, 229 N.C. 373, 49 S.E.2d 794 (1948), where the North Carolina Supreme Court said:

> "A judgment entered of record, whether in *invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client, and not to have betrayed his confidence or to have sacrificed his right. The law does not presume that a wrong has been done. It would greatly impair the integrity

> of judgments and destroy the faith of the public in them if the principles were different."

Id. at 375, 49 S.E.2d at 796 (quoting *Gardiner v. May*, 172 N.C. 192, 196, 89 S.E.2d 955, 957 (1916)). *See also Royal v. Hartle*, 145 N.C. App. 181, 183, 551 S.E.2d 168, 170 (2001) ("Without his client's consent, an attorney has no inherent authority to enter into a settlement agreement that is binding on his client.").

The case of *Nye, Mitchell, Jarvis & Bugg v. Oates*, 109 N.C. App. 289, 426 S.E.2d 291 (1993) is instructive. In that case, Mrs. Oates denied that she was bound by a consent judgment on the basis that she had not received proper service and the fact that she had not signed the consent judgment. *Id.* at 290-91, 426 S.E.2d at 292-93. The Court noted that "the dispositive question is whether the attorneys who signed the consent judgment, representing themselves as the attorneys for Mrs. Oates, had the authority to appear and approve a judgment on behalf of Mrs. Oates." *Id.* at 293, 426 S.E.2d at 294. Thus, this Court found:

> The fact that Mrs. Oates' signature does not appear on the consent judgment is not conclusive on the issue of her consent. There is a presumption that the attorneys who signed the consent judgment and represented themselves to the court as the attorneys for Mrs. Oates, did so with authority and with her consent. Unless this presumption is rebutted, the consent of the attorney to a judgment of the court precludes any challenge by the represented party to the validity of the judgment on the ground of absence of jurisdiction over the person. The party challenging the actions of the attorney as being unauthorized has the burden of rebutting the presumption . . . .

Id. at 292, 426 S.E.2d at 294 (citations omitted).

There are no findings of fact for this Court to review in the present case to determine whether or not the Ellers' attorney had Mrs. Eller's consent to enter into the consent judgment. We know that she was not present and that her signature is not on the judgment; however, the *Oates* case stands for the proposition that such evidence is not enough to rebut the presumption. This Court must rule on the basis of the record as it currently exists. The appellant has the burden of ensuring that the record is in the most favorable posture possible.

Because there is nothing in the record to overcome the applicable presumption, we must affirm. This assignment of error is overruled.

We have carefully considered defendant's final assignment of error and find it to be without merit, and it is therefore overruled.

Affirmed.

Judge MARTIN concurs.

Judge BIGGS dissents.

BIGGS, Judge Dissenting.

I respectfully dissent. As noted by the majority, there are no findings of fact for this Court to review to determine whether or not the Ellers' attorney had Mrs. Eller's consent to enter into the consent judgment. I would remand for findings by the trial court.

Defendants' decision to appeal the entry of judgment by the trial court directly to this Court prior to filing a motion pursuant to Rule 60(b), has precluded the trial court from making findings on the dispositive issue in this appeal. Defendants in their brief offer the following explanation:

> The Defendant Appellants note to the Court that a Rule 60 Motion does not toll the period for filing appeal. In the case before the Court the Defendant Appellants proceeded with Notice of Appeal in order not to waive any right of appeal. A later Notice of Appeal from the written judgment was also filed in order not to waive right of appeal. The period to file such appeal was insufficient to allow the time necessary to proceed with a Rule 60 motion prior to filling [sic] Notice of Appeal. The parties have stipulated that the Defendant Brenda Dennis Eller was not present at the entry of [the] consent judgment. Rule 60 of the North Carolina Rules of Civil Procedure state that a Rule 60 motion to set aside a judgment may be filed within a reasonable time but such does not prevent other relief from being obtained from the court. Defendant Appellants have filed a Rule 60 motion.

While I offer no opinion on defendants' decision to proceed as they did, the effect of that decision has been to leave this Court with an insufficient basis upon which to decide the issue of consent. In addition, it has taken away defendant's (Mrs. Eller's) opportunity to present her claim or defense.

This Court in *Royal v. Hartle*, 145 N.C. App. 181, — S.E.2d — (filed 17 July 2001) stated:

> 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.

This Court in *Nye v. Oates*, 109 N.C. App. 289, 426 S.E.2d 291 chose not to rely on the presumption of validity to uphold the consent judgment in that case, but rather to remand for findings on whether the attorney had consent. I believe that a remand would better facilitate a decision based on the merits.

BRUCE FARLEY, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF LABOR, DEFENDANT

No. COA00-1158

(Filed 16 October 2001)

Workers' Compensation–permanent partial disability–lump sum payment–permanent total disability–overlapping benefit periods

Where plaintiff employee was paid a lump sum pursuant to N.C.G.S. § 97-31 for permanent partial disability covering a period of 150 weeks, plaintiff was thereafter awarded permanent total disability under N.C.G.S. § 97-29, and the payment periods of permanent partial disability and permanent total disability overlapped for 81 weeks, the lump sum payment should have been treated as if plaintiff had received weekly payments for 150 weeks and, in order to prevent a double recovery, defendant employer should not have been required to pay plaintiff permanent total disability during the 81 weeks in which the two benefit periods overlapped. N.C.G.S. § 97-34.

Appeal by defendant from opinion and award entered 4 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2001.

H. Russell Vick & Associates, by Marty Houglan, for plaintiff-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert T. Hargett, for the State.

MARTIN, Judge.

Defendant appeals from an opinion and award of the North Carolina Industrial Commission awarding plaintiff benefits for total and permanent disability, and denying defendant's request for credit for a portion of a lump sum payment previously made to plaintiff for permanent partial disability.

The record shows that plaintiff began employment with the North Carolina Department of Labor (defendant-employer) as a boiler inspector in February 1992. Prior to his employment with defendant-employer, plaintiff had a history of medical problems with his right hip, and sometime prior to 1973, had undergone surgery on his right hip. However, the nature of that surgery is unclear since no medical records with respect thereto were submitted into evidence. In 1973, plaintiff underwent a cup arthroplasty to his right hip, which was effective until 1 September 1993, when plaintiff fell while working for defendant-employer and suffered injury to his right hip. Plaintiff's fall caused his right hip replacement prosthesis to loosen making it necessary for plaintiff to undergo a third hip surgery in December 1993 for removal and replacement of loose parts. Pursuant to a Form 21 Agreement between the parties, approved by the Commission on 10 November 1993, plaintiff was paid benefits for temporary total disability from 2 September 1993 until 19 June 1994, when he returned to work. He was rated with a seventy-five percent permanent impairment of his right hip and a Form 26 agreement was executed by the parties and approved by the Industrial Commission on 28 June 1995. Pursuant to this agreement and G.S. § 97-31, plaintiff was to be paid compensation for permanent partial disability from 20 June 1994 for 150 weeks at an average weekly compensation rate of $442.00. In accordance with plaintiff's request, the payment was made in a lump sum of $66,300 on or about 1 July 1995.

In August 1995, plaintiff alleged a change in his condition; defendant-employer began paying plaintiff temporary total disability bene-

fits on or about 25 October 1995 at the rate of $442.00 per week. Plaintiff underwent additional surgery in December 1995, however his condition has continued to deteriorate and he has been unable to return to work. Defendant-employer accepted liability for plaintiff's additional medical expenses but denied that plaintiff is entitled to benefits for permanent total disability under G.S. § 97-29 (Compensation Rates for Total Incapacity) because plaintiff had already elected and received an award pursuant to G.S. § 97-31 (Schedule of Injuries).

After a deputy commissioner ordered defendant-employer to pay plaintiff benefits for permanent total disability and concluded that it was "not entitled to a credit toward total permanent disability benefits for the compensation previously paid for Plaintiff's permanent impairment rating to his right leg," defendant-employer appealed to the Full Commission. The Full Commission issued its opinion and award concluding that plaintiff was permanently disabled and was entitled to recover permanent total disability benefits pursuant to G.S. § 97-29. Defendant was ordered to "pay plaintiff ongoing benefits at the rate of $442.00 per week until further order of the Commission . . . ", and to "continue to pay all medical expenses which may be incurred for reasonably necessary medical treatment of plaintiff's right hip, including any future surgery which may be necessary." The Commission concluded that defendant-employer was not entitled to any credit toward permanent disability benefits for the compensation which it had previously paid plaintiff for permanent partial disability pursuant to G.S. § 97-31. The Full Commission noted that "[i]f the compensation had been paid on a weekly basis it would have been superseded by the total disability payments. However, as paid in a lump sum it was due and payable when paid and N.C. Gen. Stat. § 97-24 [sic] does not provide a credit."[1] Defendant-employer appeals.

Defendant-employer contends the Full Commission erred in failing to award it credit for 81 weeks of permanent partial disability payments which it made to plaintiff pursuant to G.S. § 97-31. Defendant-employer argues the permanent partial disability payments, though paid in a lump sum, were actually paid for time periods which overlapped the payments ordered for permanent total disability, so that

1. The Commission's reference to G.S. § 97-24 is apparently a typographical error as it is clear that the Commission meant to refer to G.S. § 97-42, which governs the provision of credit to an employer.

the Commission's refusal to grant a credit resulted in a double recovery by plaintiff.

The North Carolina Workers' Compensation Act provides compensation to an employee who suffers an injury by accident arising out of and in the course of his employment. N.C. Gen. Stat. § 97-2(6) (1999). Plaintiff was compensated under both G.S. § 97-31 and G.S. § 97-29. G.S. § 97-31

> provides for compensation for temporary disability during the healing period of the injury and for permanent disability at the end of the healing period, when maximum recovery has been achieved. Disability compensation under G.S. 97-31 is awarded for physical impairment irrespective of ability to work or loss of wage earning power, and is *in lieu of all other compensation.*

Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 288, 229 S.E.2d 325, 328 (1976) (emphasis added), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977). Additionally, according to G.S. § 97-31, "a disability is deemed to continue after the employee's healing period, and the employee is entitled to compensation for the number of weeks specified in the statute." *Gray v. Carolina Freight Carriers, Inc.*, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). G.S. § 97-29, on the other hand, provides for compensation when an employee's injury is total and permanent causing the employee to be incapable of working. Under G.S. § 97-29, the employer must pay compensation to the injured employee during the employee's lifetime. *Gray*, 105 N.C. App. at 484, 414 S.E.2d at 104. An employee may not receive compensation under G.S. § 97-31 and G.S. § 97-29 at the same time. N.C. Gen. Stat. § 97-34. However, the employee may choose the more favorable remedy. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986). According to G.S. § 97-34:

> If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in G.S. 97-31; but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this Article.

Our Court has concluded that the legislature intended this Act to prevent "the stacking of total benefits on top of partial benefits, *for the*

same time period . . . ." *Smith v. American and Efird Mills*, 51 N.C. App. 480, 490, 277 S.E.2d 83, 89 (1981), *modified by* 305 N.C. 507, 290 S.E.2d 634 (1982).

Defendant-employer contends that it is entitled to a partial credit for payments made to plaintiff pursuant to G.S. § 97-31 for the permanent partial disability rating of his right hip. Plaintiff was paid a lump sum payment of $66,300 pursuant to G.S. § 97-31 for the permanent partial disability rating of seventy-five percent of his right hip, covering a period of 150 weeks from 20 June 1994 at a weekly compensation rate of $442. Plaintiff was also paid total disability benefits pursuant to G.S. § 97-29 beginning 25 October 1995 and continuing to the present. Therefore, the payment periods of permanent partial disability benefits and permanent total disability benefits overlap for 81 weeks, and defendant-employer argues that it is entitled to a credit for those weeks.

It is clear from G.S. § 97-34 that the General Assembly intended to prevent double recovery of workers' compensation benefits when an employee is entitled to disability benefits under both G.S. § 97-29 and G.S. § 97-31. Therefore, we believe the correct interpretation of G.S. § 97-34 is that the payment periods may not overlap regardless of whether the employee is "still receiving" compensation or currently "entitled to compensation." Surely the legislature's intention could not have been to allow employees who received a lump sum instead of weekly payments to receive double recovery for the overlap of time periods. Thus, a lump sum payment should be treated as if the employee had received weekly payments for the applicable payment period under G.S. § 97-31 in order to prevent double recovery.

The Industrial Commission noted in its opinion and award that it was unable to credit defendant-employer for the overlapping 81 weeks because G.S. § 97-42 (the statute providing credit for employers) did not cover this case. We acknowledge that this Court has stated in several cases that G.S. § 97-42 is the only statutory authority for allowing an employer in North Carolina any credit against workers' compensation payments due an injured employee. *Gray*, 105 N.C. App. at 484, 414 S.E.2d at 104; *Johnson v. IBM*, 97 N.C. App. 493, 389 S.E.2d 121 (1990). G.S. § 97-42 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. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment (emphasis added).

As applied to these facts, the Commission reasoned that the lump sum payment for which defendant is requesting partial credit, was "due and payable when made" and therefore, G.S. § 97-42 would not allow defendant to receive credit for it. We agree that the lump sum payment was "due and payable when made" since defendant-employer had accepted plaintiff's injury as compensable under workers' compensation at the time the payment was made. *See Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987). However, this is not a "credit" case and therefore, G.S. § 97-42 is not applicable. This case involves the Commission's duty to adjust plaintiff's compensation to comply with G.S. § 97-34 so that the G.S. § 97-29 award does not overlap with the G.S. § 97-31 award. The lump sum payment should have been treated as if plaintiff had been paid each week for 150 weeks. Therefore, in the case *sub judice*, the Commission had a duty to order that defendant begin paying the total disability payments after the 150 weeks (period of time that the permanent partial disability lump sum payment was to cover) had expired. Thus, defendant should not have been required to pay plaintiff permanent total disability payments for 81 weeks after the Commission's opinion and award. Since the Commission failed to so order, we must now hold that defendant-employer is entitled to refrain from making permanent total disability payments to plaintiff for 81 weeks in order to prevent double recovery.

Reversed.

Judges McCULLOUGH and BIGGS concur.

STATE OF NORTH CAROLINA v. JAMES THOMAS BROWN, DEFENDANT

No. COA00-1057

(Filed 16 October 2001)

1. Sentencing— Habitual Felons Act—constitutionality

The Habitual Felons Act is not unconstitutional and it does not violate the separation of powers clause under N.C. Const. art. I, § 6; the double jeopardy clause under U.S. Const. amends. V, XIV, and N.C. Const. art. I, § 19; or defendant's equal protection rights under U.S. Const. amend. XIV and N.C. Const. art. I, § 19.

2. Sentencing— Habitual Felons Act—ambiguity

The Habitual Felons Act is not ambiguous with regard to when a person becomes an habitual felon since a defendant becomes an habitual felon when he is convicted of the third qualifying felony, and therefore, the rule of lenity does not apply.

3. Sentencing— habitual felon—presumptive range—mitigating range

The trial court did not abuse its discretion by sentencing defendant as an habitual felon for sale and delivery of marijuana at the low end of the presumptive range rather than in the mitigated range even though defendant presented evidence of mitigating factors, because the trial court is required to make findings of mitigating factors only if it departs from the presumptive range of sentences specified under N.C.G.S. § 15A-1340.17(c)(2).

Appeal by defendant from judgment entered 14 April 2000 by Judge Catherine C. Eagles in Moore County Superior Court. Heard in the Court of Appeals 15 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for defendant-appellant.

HUDSON, Judge.

Defendant appeals his sentence as an habitual felon for sale and delivery of marijuana. We overrule all assignments of error.

Defendant was indicted on 6 April 1998 on charges of possession with intent to manufacture, sell, and deliver marijuana and sale and delivery of marijuana. On 14 September 1998, Defendant was indicted as an habitual felon. Defendant was tried before a jury and, on 13 April 2000, Defendant was convicted of two counts of possession with intent to sell or deliver marijuana, two counts of sale of marijuana, and of being an habitual felon. The trial court arrested judgment on the possession convictions, consolidated the remaining convictions, and sentenced Defendant as an habitual felon to 80-105 months imprisonment. Defendant appeals his sentence.

Additionally, on 12 October 2000, Defendant filed a motion for appropriate relief ("MAR") with this Court, pursuant to N.C. Gen. Stat. §§ 15A-1415, -1418(a) (1999). Defendant alleges in his MAR that the Moore County District Attorney abused his discretion by failing to exercise it, and that this abuse of discretion resulted in violations of Defendant's constitutional rights.

I.

[1] In his first assignment of error, Defendant argues that the Habitual Felons Act ("the Act"), *see* N.C. Gen. Stat. §§ 14-7.1 to -7.6 (1999), is unconstitutional on the following grounds: (1) the Act violates the Separation of Powers Clause of the North Carolina Constitution, *see* N.C. Const. art. I, § 6; (2) the combined use of the Act and Structured Sentencing, *see* N.C. Gen. Stat. §§ 15A-1340.10 to -1340.23 (1999), violates the Double Jeopardy Clause of the U.S. Constitution, *see* U.S. Const. amends. V, XIV, and the North Carolina Constitution, *see* N.C. Const. art. I, § 19; and (3) the Moore County District Attorney's policy of indicting as habitual felons all persons eligible under the Act is an abuse of discretion and violated Defendant's equal protection rights under the U.S. Constitution and the North Carolina Constitution, *see* U.S. Const. amend. XIV; N.C. Const. art. I, § 19. We overrule this assignment of error on all grounds.

This Court has previously rejected the argument that the Act violates the separation of powers. *See State v. Wilson*, 139 N.C. App. 544, 533 S.E.2d 865, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000). This panel has rejected Defendant's remaining arguments in *State v. Brown*, 146 N.C. App. 299, — S.E.2d — (Sept. 18, 2001) (No. COA00-1039) (rejecting the claim that the combined use of the Habitual Felon Act and Structured Sentencing subjects a defendant to double jeopardy), and in *State v. Parks*, 146

N.C. App. —, — S.E.2d — (Oct. 16, 2001) (No. COA00-1275) (rejecting the claim that indicting as habitual felons all eligible defendants violates equal protection). In particular, this Court held in *Parks* that the Moore County District Attorney did not abuse his discretion by adopting a policy of prosecuting all defendants who qualify as habitual felons. We are bound by those decisions. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, this assignment of error is overruled. Because we have found that the Moore County District Attorney did not abuse his discretion, we deny Defendant's MAR.

II.

[2] In his second assignment of error, Defendant argues that the Habitual Felon Act is ambiguous with regard to when a person becomes an habitual felon, and consequently, the rule of lenity requires that his indictment as an habitual felon be dismissed. Because we find no such ambiguity, we overrule this assignment of error.

The Act provides in relevant part that "[w]hen an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article . . . be sentenced as a Class C felon." N.C.G.S. § 14-7.6. An "habitual felon" is defined as follows: "Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof *is declared to be* an habitual felon." *Id.* § 14-7.1 (emphasis added). To be convicted as an habitual felon, a defendant who commits a felony after he has qualified as an habitual felon must be charged as an habitual felon in the indictment charging the principal felony, and there must be a separate indictment charging the defendant with being an habitual felon. *See id.* § 14-7.3. Only after the jury finds the defendant guilty of the principal felony may the bill of indictment charging the defendant as an habitual felon be presented to the same jury. *See id.* § 14-7.5.

Defendant argues that the language of the statute indicates that a defendant is not an habitual felon until the jury finds him guilty of being an habitual felon. Thus, according to Defendant, he did not become an habitual felon until the jury returned its verdict to that effect on 13 April 2000, which occurred after Defendant had committed the instant offense. Defendant concludes that he was

not an habitual felon when he committed the instant offense, and it was error for the trial court to sentence him as an habitual felon.

Anticipating the contrary argument that the statute provides that a defendant becomes an habitual felon once he has been convicted of the third qualifying felony, *see id.* § 14-7.1, Defendant argues that this interpretation would render superfluous the jury's role in convicting a defendant of being an habitual felon, *see id.* § 14-7.5. Thus, Defendant contends that the statute is internally inconsistent and ambiguous.

We find the statute to be clear. A defendant becomes an habitual felon when he is convicted of the third qualifying felony. The jury's role in convicting the defendant of being an habitual felon is not, however, superfluous; rather, the requirement that a jury convict a defendant of being an habitual felon safeguards the defendant's rights in that the State must prove to the satisfaction of a jury that the defendant has in fact been convicted of three qualifying felonies. Because the statute is not ambiguous, the rule of lenity has no application here. Accordingly, this assignment of error is overruled.

III.

[3] Finally, Defendant argues that the trial court erred by failing to sentence him in the mitigated range. Specifically, Defendant asserts that he presented uncontradicted evidence of mitigating factors. He interprets the trial court's statement that "I will not make any findings in aggravation or mitigation, but I have considered all the factors in sentencing at the lower end of the presumptive range and consolidating, as well as all the other factors which would make that appropriate" to indicate that the court thought a mitigated sentence was appropriate and justified, based on Defendant's evidence on mitigation, yet sentenced Defendant in the presumptive range. Defendant contends that the court erred in sentencing Defendant at the low end of the presumptive range instead of in the mitigated range.

Defendant was sentenced within the presumptive range. Thus, he is not entitled as a matter of right to appeal his sentence. *See* N.C. Gen. Stat. § 15A-1444(a1) (1999). Defendant has not petitioned for a writ of certiorari. *See id.* Accordingly, we would ordinarily be without jurisdiction to hear this issue. *See State v. Waters*, 122 N.C. App. 504, 505, 470 S.E.2d 545, 546 (1996) (per curiam). However, we treat Defendant's argument on this issue as a petition for writ of certiorari,

which we allow, and thus reach the merits of the issue. *See State v. Jarman*, 140 N.C. App. 198, 201, 535 S.E.2d 875, 878 (2000).

Although the trial court must consider evidence of aggravating or mitigating factors, it is within the court's discretion whether to depart from the presumptive range. *See* N.C.G.S. § 15A-1340.16(a); N.C.G.S. § 15A-1340.16(b) ("If the court finds that aggravating or mitigating factors exist, it *may* depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." (emphasis added)). Additionally, the court is required to make findings of mitigating factors "only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." N.C.G.S. § 15A-1340.16(c).

The court here, after hearing Defendant's evidence regarding mitigation, determined, in its discretion, not to depart from the presumptive range; hence, as the court explained, it did not make findings of mitigating factors. We find no abuse of discretion. *See State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (finding no error when court imposed presumptive sentence despite defendant's undisputed evidence in mitigation). Accordingly, this assignment of error is overruled.

"Motion for Appropriate Relief" denied.

No error.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. WARREN JARMINE STREETER

No. COA00-1163

(Filed 16 October 2001)

1. Assault— deadly weapon with intent to kill inflicting serious injury—victim seriously injured

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by concluding that the evidence supports a finding that the victim was seriously injured, because: (1) the record shows a bullet pierced the victim's shoulder, ricocheted off his shoulder blade, and exited his body and created two holes in his upper body; (2) the victim tes-

tified that the pain really struck when everything calmed down and he looked at the bullet hole that was in his shoulder; and (3) the victim reported pain at the site of the injury to the emergency medical technicians.

2. Sentencing— mitigating factors—defendant paid child support and maintained a full-time job—presumptive range

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property case by allegedly failing to find the existence of the statutory mitigators that defendant paid child support and maintained a full-time job and by imposing an aggravated range sentence without finding the existence of an aggravating factor, because: (1) the decision to depart from the presumptive range is within the trial court's discretion; (2) the need for findings is only triggered by N.C.G.S. § 15A-1340.16(c) when a court moves outside the presumptive range; and (3) the trial court did not depart from the presumptive range.

3. Sentencing— Structured Sentencing Act—trial court's discretion—constitutionality

The trial court did not abuse its discretion or violate defendant's constitutional rights by following the Structured Sentencing Act in an assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property case, because: (1) the due process clause is not violated when a trial court exercises broad discretion in sentencing when it is bound by the range of sentencing options prescribed by the legislature; (2) defendant's equal protection rights are not violated by his not being treated similarly to other defendants with no aggravators and statutory mitigators present when the judge has had the opportunity to hear the facts, observe the parties to the proceedings, and, after verdict, to inquire into the habits, mentality and past record of the person to be sentenced before imposing punishment within the statutory limits; and (3) the cruel and unusual punishment clause is not violated as long as the judge sentences within the limits established by the legislature.

4. Appeal and Error— preservation of issues—failure to present authority—failure to present argument

Although defendant contends the trial court erred by failing to merge the charge of discharging a weapon into occupied property into the charge of assault with a deadly weapon with intent

to kill inflicting serious injury, this assignment of error is abandoned because: (1) defendant failed to present authority or argument to support his contention; and (2) defendant acknowledges existing case law that contravenes his assignment of error.

Appeal by defendant from judgment entered 11 May 2000 by Judge Michael E. Beale in Superior Court, Moore County. Heard in the Court of Appeals 12 September 2001.

Attorney General, Roy Cooper, by Assistant Attorney General Marc D. Bernstein, for the State.

Cunningham, Dedmond, Petersen, & Smith, L.L.P., by Bruce T. Cunningham, Jr., for the defendant-appellant.

WYNN, Judge.

From a jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property, defendant appeals. We find no error in his trial.

The State's evidence tended to show that Constance Wall had a child by defendant, but the two were no longer seeing each other when she and Antonio Tanner started dating in March 1998. On 5 April 1998 Tanner noticed defendant trying to "flag [him] down" in his car. Tanner responded by pulling into the parking lot. Defendant also pulled into the lot along the passenger side of Tanner's car and asked, "What is up with you and my girl?" Immediately thereafter, defendant began shooting at Tanner. When Tanner got out of his car and started running away, defendant shot five rounds, hitting Tanner once in the back. That bullet ricocheted off Tanner's right shoulder blade and exited, leaving two bullet holes in his upper back. Initially, Tanner did not feel pain, "[b]ut after everything calmed down . . . that's when the pain really struck." Someone, out of several witnesses to the incident, called 911 which dispatched an ambulance that took him to the hospital.

The issues on appeal are whether: (I) The evidence supported a finding that the victim was seriously injured; (II) the trial court failed to follow the sentencing procedures contained in Article 81B; (III) a trial court can either comply with the structured sentencing law at its discretion; and (IV) the trial court erred in not merging the charge of discharging a weapon into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury.

[1] First, defendant contends that the evidence did not support a finding that the victim was seriously injured. We disagree.

> The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.

State v. Jones, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). Serious injury is a "physical or bodily injury" that is "serious." *State v. Williams*, 29 N.C. App. 24, 222 S.E.2d 720, *cert. denied*, 289 N.C. 728, 224 S.E.2d 676 (1976). "A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991).

In the subject case, the record shows that the bullet pierced Tanner's shoulder, ricocheted off his shoulder blade, and exited his body and created two holes in his upper body. Furthermore, Tanner testified that "after everything calmed down . . . , that's when the pain really struck, you know, when I looked at the bullet hole that was in my shoulder." Tanner also reported pain at the site of the injury to the emergency medical technicians. This was sufficient evidence for a jury to determine that Tanner sustained a serious injury. *See State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Thus, this assignment of error is rejected.

[2] Second, defendant contends that the trial court failed to follow the Sentencing Procedures contained in Article 81B. He specifically argues that the trial court failed to find the existence of uncontroverted statutory mitigators and considered aggravating factors, but did not consider mitigating factors, in violation of N.C. Gen. Stat. § 15A-1340.16. We disagree.

During the sentencing hearing, defendant argued that three statutory mitigators existed. Defendant presented evidence that he paid child support and that he maintained a full-time job. The trial court also asked defendant directly for evidence in mitigation. Then, the trial court considered evidence supporting aggravating factors. After considering mitigation and aggravation evidence, the trial court stated: "I'm choosing not to find aggravated or mitigated [factors]. Sentencing in the presumptive, which I have the discretion to do."

The trial court imposed two sentences in the presumptive range, 100 to 129 months and 24 to 38 months consecutively.

N.C. Gen. Stat. § 15A-1340.16(a) (1999) provides in part that "[t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." Since the decision to depart from the presumptive range is within the trial court's discretion, we must reject defendant's argument on this issue.

Defendant also argues that the trial court imposed an aggravated range sentence without finding the existence of an aggravating factor in violation of N.C. Gen. Stat. § 15A-1340.16 (b) and 1340.13(e). We disagree.

N.C. Gen. Stat. § 15A-1340.17(c)(2) (1999) provides that:

> A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated range or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

According to N.C. Gen. Stat. § 15A-1340.16(c), the need for findings is triggered when a court moves outside the presumptive range. "[T]he Act dictates that once a minimum sentence is determined, the corresponding maximum sentence is specified in a table set forth in the statute. Thus, N.C. Gen. Stat. § 15A-1340.17 (1999) does not provide for judicial discretion in determination of maximum sentences." *State v. Parker*, 143 N.C. App. 680, 686, 550 S.E.2d 174, 177 (2001).

Here, the trial court did not depart from the presumptive range. Defendant was sentenced for a Class C felony with Prior Record Level II for a minimum of 100 months. *See* N.C. Gen. Stat. § 15A-1340.17(c) (1999). The maximum sentence specified under N.C. Gen. Stat. § 15A-1340.17(e) for a minimum term of 100 months is 129 months. The trial court as required by statute sentenced defendant for a maximum of 129 months. Therefore, we reject this assignment of error.

[3] Third, defendant contends that if a trial judge can either comply or not comply with the structured sentencing law at his discretion,

then the portion of the Structured Sentencing Act allowing such discretion is unconstitutional. We cannot agree.

Defendant specifically argues that the power of a judge to opt out of complying with the requirement of finding uncontroverted statutory mitigators violates his right to due process. A trial judge may "exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246, 93 L. Ed. 1337, 1341 (1954). Recently, the United States Supreme Court pointed out that: "We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case." *Apprendi v. New Jersey*, 530 U.S. 466, 481, 147 L. Ed. 2d 435, 449 (2000) (emphasis omitted). In *Apprendi*, the Supreme Court noted that trial courts exercise "broad discretion in sentencing" which is "bound by the range of sentencing options prescribed by the legislature." *Id.* Thus, we find the Due Process Clauses of our federal and State Constitutions are not offended by the Structured Sentencing Act.

Defendant also argues that his equal protection rights were violated by not being treated similarly to other defendants with no aggravators and statutory mitigators present. Our Supreme Court addressed this issue in *State v. Jenkins*, 292 N.C. 179, 191, 232 S.E.2d 648, 655 (1977):

> The Legislature has granted a wide discretion to the trained presiding judge who has had the opportunity to hear the facts, observe the parties to the proceeding and, after verdict, to inquire into the habits, mentality and past record of the person to be sentenced before imposing punishment within the statutory limits. The use of this discretionary power by the trial judge is not a denial of equal protection of the laws.

Defendant next argues that the Structured Sentencing Act is arbitrary, in violation of the cruel and unusual punishment clauses of the United States Constitution. Our Supreme Court has found that as long as the judge sentences within the limits established by the legislature, the Eighth Amendment is not offended. *See State v. Cameron*, 284 N.C. 165, 200 S.E.2d 186 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974); *see also State v. Jenkins*, *supra*. In the present case, the trial judge followed the Structured Sentencing Act and did not abuse his discretion. Therefore, we find defendant's arguments without merit and reject this assignment of error.

[4] In his final argument, defendant contends the trial court erred by not merging the charge of discharging a weapon into an occupied property and assault with a deadly weapon with intent to kill inflicting serious injury because each offense contains an element distinct from the other. We cannot agree.

"Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5) (1999); *see also State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991); *State v. Thompson*, 110 N.C. App. 217, 429 S.E.2d 590 (1993) (holding that where appellant fails to cite authority in support of an argument, the assignment of error upon which that argument is based will be deemed abandoned). We deem this assignment of error to be abandoned because the defendant presented no authority or argument to support his contention. Moreover, defendant acknowledges existing case law that contravenes his assignment of error. *See State v. Rollins*, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

In summation, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges HUNTER and TYSON concur.

SANDRA K. COLLINS AND HUGH COLLINS, PLAINTIFFS V. DARRYL ROGER TALLEY, DENNIS OVERHOLT, INDIVIDUALLY, MICHAEL OVERHOLT, INDIVIDUALLY, AND DENNIS OVERHOLT AND MICHAEL OVERHOLT D/B/A JONES AUTO PARTS, DEFENDANTS

No. COA00-1248

(Filed 16 October 2001)

Uniform Commercial Code— bulk sales law—motion for election of remedies

The trial court did not err by denying plaintiff creditors' motion for election of remedies and entering judgment in the amount of the jury verdict of $1,000 instead of the $75,000 bond posted by defendant transferees to secure the release of the pertinent property from attachment even though the jury verdict

established that the transfer of inventory to defendants was done in violation of the bulk transfer laws under N.C.G.S. § 25-6-101 et seq., because: (1) the amount of the bond does not establish an independent measure of damages in the principal action; (2) the jury's verdict that defendants had violated the bulk sales law meant simply that the transferor's transfer of the inventory to defendant transferees was ineffectual as to plaintiff creditors and that such property was available to satisfy the transferor's debt owed to plaintiffs; and (3) plaintiffs are entitled to proceed against the bond only in the event defendants do not pay the judgment and costs assessed by the trial court, and then, only to the extent of the judgment and costs.

Appeal by plaintiffs from judgment entered 29 June 2000 by Judge Zoro J. Guice in Macon County Superior Court. Heard in the Court of Appeals 13 September 2001.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones, for plaintiff-appellants.

No brief filed for defendant-appellees.

MARTIN, Judge.

Plaintiffs brought this action alleging claims against defendant Darryl Roger Talley for breach of contract, fraud, unfair and deceptive practices, conversion, and for money due on a promissory note, all arising out of defendant Talley's operation of a business known as "R & S Auto Parts." Plaintiffs also asserted a claim against defendant Talley and defendants Overholt, alleging that Talley transferred in bulk all of the inventory, equipment, and other assets of R & S Auto Parts to defendants Overholt, doing business as "Jones Auto Parts," without complying with the provisions of G.S. § 25-6-101 *et seq.*, North Carolina's bulk sales law. Simultaneously, plaintiffs sought attachment of defendants' property.

Defendants Overholt filed an answer in which they admitted that Talley had sold the inventory, equipment and other assets of R & S Auto Parts to them for $60,000; alleged that plaintiffs had been given notice of the sale; asserted affirmative defenses, including estoppel, to plaintiffs' claim for violation of the bulk sales law; and asserted a counterclaim. Defendants Overholt obtained an order discharging the attachment of their property upon posting a bond in the amount of $75,000.

Though it is not clear from the record filed with this Court, defendant Talley was apparently dismissed from the action and the case proceeded to trial upon the single claim against defendants Overholt for violation of the bulk sales law. The trial court submitted three issues to the jury, which were answered as follows:

> 1. Did the sale of R & S Auto Parts to the defendants, Dennis and Michael Overholt, violate the North Carolina Bulk Sales Act?
>
> ANSWER: YES
>
> 2. Are the plaintiff, Sandra and Hugh Collins, estopped from asserting a violation of the North Carolina Bulk Sales Act?
>
> ANSWER: NO
>
> 3. What amount, if any, are the plaintiffs, Sandra and Hugh Collins, entitled to recover from the defendants, Dennis and Michael Overholt?
>
> ANSWER: $1000.00 (One Thousand Dollars)

Prior to the entry of judgment, plaintiffs moved to elect as their remedy, in lieu of the damages awarded by the jury, the recovery of the $75,000 bond. The trial court denied the motion and entered judgment on the verdict. Plaintiffs gave notice of appeal from the judgment.

In their sole assignment of error, plaintiffs contend the trial court erred in denying their motion for election of remedies and for entry of judgment in the amount of the bond. Plaintiffs argue that because the jury verdict established that the transfer of R & S Auto Parts' inventory to defendants Overholt was done in violation of G.S. § 25-6-101 *et seq.*, plaintiffs were entitled to recover the amount of the bond posted by defendants to secure the release of the property from attachment. Their argument has no merit.

Article 6 of the Uniform Commercial Code, as set out in Chapter 25 of the North Carolina General Statutes, governs bulk transfers. A bulk transfer "is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory . . . ." N.C. Gen. Stat. § 25-6-102(1). Such a transfer "is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of

the transfer in the manner and to the persons hereafter provided." N.C. Gen. Stat. § 25-6-105. Under the statute, the sanction for noncompliance with the bulk transfer law is that the transfer is ineffective against creditors of the transferor. Article 6 is designed to prevent a merchant from suddenly selling all or most of his inventory and then making off with the proceeds of the sale without satisfying his creditors, Official Comment, G.S. § 25-6-101, and enables the creditors of the transferor to avoid the transaction and levy on the transferred property to satisfy the transferor's debts. North Carolina Comment to G.S. § 25-6-104, 25-6-105; *see Raleigh Tire & Rubber Co. v. Morris*, 181 N.C. 184, 106 S.E. 562 (1921) (decided under former N.C. Bulk Sales Law). Article 6 does not establish any tort liability against the transferee nor does it give the creditor the right to recover from the transferee personally on the transferor's debt, unless the transferred property has become so commingled with the transferee's other property so as to be untraceable. Lawrence's Anderson on the Uniform Commercial Code, Vol. 7A, §§ 6-101:29 & 6-101:33, 3rd Edition (2001).

In the present appeal, plaintiffs, as appellants, have included neither a statement of the evidence nor a transcript of the trial proceedings as a part of the record on appeal. *See* N.C.R. App. P. 9(a)(1)e. Therefore, we are without a means to determine the evidentiary basis upon which the damage issue was submitted to, or answered by, the jury. Appellate review is based "solely upon the record on appeal," N.C.R. App. P. 9(a); it is the duty of the appellants to see that the record is complete. *Tucker v. General Telephone Co.*, 50 N.C. App. 112, 272 S.E.2d 911 (1980). We will not engage in speculation as to the legal or factual basis for the jury award of damages, *Pharr v. Worley*, 125 N.C. App. 136, 479 S.E.2d 32 (1997), and will presume that the jury was properly instructed and that such verdict was supported by competent evidence. *See In re Botsford*, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Attachment is an ancillary proceeding to a pending action for a money judgment which enables a plaintiff to bring the property of a defendant within "the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action." N.C. Gen. Stat. § 1-440.1(a); *see Edwards v. Brown's Cabinets*, 63 N.C. App. 524, 305 S.E.2d 765, *disc. review denied*, 309 N.C. 632, 308 S.E.2d 64 (1983). When a plaintiff prevails in the principal action,

> the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:
>
> > (1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.

N.C. Gen. Stat. § 1-440.46(a)(1). When the judgment and all costs have been paid, "the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof." N.C. Gen. Stat. § 1-440.46(e).

The attachment of a defendant's property may be discharged upon the defendant giving a bond, which takes the place of the property to secure the payment of the judgment. N.C. Gen. Stat. § 1-440.39. In such event, a plaintiff who prevails in the principal action may recover the amount of the judgment rendered from the surety on the bond if the defendant fails to satisfy the judgment. However, the amount of the bond does not, as plaintiffs seem to argue, establish an independent measure of damages in the principal action.

In the present case, the jury's verdict that defendants had violated the bulk sales law meant simply that Talley's transfer of the inventory to defendants was ineffectual as to plaintiffs and that such property was available to satisfy Talley's debt owed to plaintiffs. Plaintiffs attached the property in the hands of defendants Overholt, rendering the property subject to the payment of any money judgment which they obtained in the principal action. Defendants Overholt secured the release of the property by posting a bond pursuant to G.S. § 1-440.39, which bond was conditioned upon their payment to plaintiffs of "the amount of the judgment and all costs that the defendant may be ordered to pay." According to the jury's verdict, that amount was determined to be $1,000. Plaintiffs are entitled to proceed against the bond only in the event defendants do not pay the judgment and costs assessed by the trial court, and then, only to the extent of the judgment and costs. The judgment of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and BIGGS concur.

IN RE T.J.

[146 N.C. App. 605 (2001)]

IN THE MATTER OF: T. J.

No. COA00-835

(Filed 16 October 2001)

Juveniles— probation violation—authority to extend original probation

The juvenile court did not err by finding that a juvenile violated his terms of probation and by extending the juvenile's probation after the expiration of his original term of probation, because: (1) N.C.G.S. § 7B-2510 confers limited discretion on the trial court to modify probation within a reasonable time after its expiration; (2) the determination of what amount of time is reasonable should be made in light of the time necessary to schedule a hearing on a juvenile's probation and the time needed by the juvenile and the State to prepare for such a hearing; and (3) the juvenile counselor in this case was affording the juvenile an extended opportunity to complete his required hours of community service, but to no avail.

Appeal by juvenile from order entered 14 February 2000 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 16 May 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Lisa Granberry Corbett, for the State.

UNC Clinical Programs, by Joseph E. Kennedy, for juvenile-appellant.

WALKER, Judge.

The juvenile was initially adjudicated delinquent for possession of stolen property. On 2 February 1999, the juvenile was placed on probation for a period of one year and ordered to complete 48 hours of community service. On 21 January 2000, prior to the expiration of the juvenile's probation, his court counselor filed a motion for review alleging he had not completed the required hours of community service. A hearing was held on 14 February 2000, at which the juvenile admitted violating his probation. The juvenile court extended the juvenile's probation for six months on the condition that he complete the remaining hours of community service.

The sole question on appeal is whether the juvenile court, upon a motion for review and a finding that a violation of probation had occurred, had the authority to extend the juvenile's probation after the expiration of his original term of probation.

When the juvenile was placed on probation, N.C. Gen. Stat. § 7A-649(8) was in effect. This statute was repealed and replaced by N.C. Gen. Stat. § 7B-2500 et seq. effective 1 July 1999. While review would be appropriate under N.C. Gen. Stat. § 7A-649(8), all relevant portions of this statute have been carried forward into N.C. Gen. Stat. § 7B-2510(c), upon which we base our analysis.

We note at the outset that the purpose of the juvenile code is to "give to delinquent children the control and environment which may lead to their reformation and enable them to become law abiding and useful citizens . . . ." *In re Whichard*, 8 N.C. App. 154, 161, 174 S.E.2d 281, 285 (1970). Juvenile dispositions should emphasize "accountability and responsibility." N.C. Gen. Stat. § 7B-2500(2) (1999).

The juvenile court's authority to modify an order is contained in N.C. Gen. Stat. § 7B-2600(c) (1999). This statute provides, in part, that where a juvenile has been found delinquent, the juvenile court has authority to modify any order or disposition "during the minority of the juvenile" or "until terminated by order of the court." However, when considering probation modifications, this authority must be considered in connection with N.C. Gen. Stat. § 7B-2510 (1999).

The juvenile contends the authority of the juvenile court to extend the period of probation is governed by N.C. Gen. Stat. § 7B-2510(c) which provides:

> (c) An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the court may extend it for an additional period of one year after a hearing, if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile.

The juvenile argues this statute only permits the juvenile court to review a juvenile's probation "prior to the expiration of the order" and that once the original probation period has expired, the juvenile court is without authority to extend probation. The State contends that subsection (c) is applicable only when "the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile." The State further argues that subsection (c) must be

interpreted in connection with sections (d) and (e) of the statute which provide, in pertinent part:

> (d) On motion of the court counselor or the juvenile, or on the court's own motion, the court may review the progress of any juvenile on probation **at any time during the period of probation or at the end of probation**. The conditions or duration of probation may be modified only as provided in this Subchapter and only after notice and a hearing.
>
> (e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, **the court may continue the original conditions of probation, modify the conditions of probation**, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. In the court's discretion, part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508. (emphasis added).

Sections (d) and (e) of the statute give the juvenile court the authority to review the progress of the juvenile "at any time during the period of probation or at the end of probation." In contrast, the statute governing the extension and modification of probation for adults specifically states that such alterations must be made "prior to the expiration or termination of the probationary period." N.C. Gen. Stat. § 15A-1344(d) (1999). Furthermore, the adult statute outlines specific situations in which the probationary period may be tolled to allow modifications after the original expiration date. *Id.* We hold the lack of such specificity in N.C. Gen. Stat. § 7B-2510 exhibits an intent by the legislature that the juvenile court not be bound by a rigid requirement that probation be modified or extended before the expiration of the probationary period. Rather, the legislature's edict that modification and alteration may occur "at the end" of the probationary period confers limited discretion on the trial court to modify probation within a reasonable time after its expiration. The determination of what amount of time is reasonable should be made in light of the time necessary to schedule a hearing on a juvenile's probation and the time needed by the juvenile and the State to prepare for such a hearing.

Here, after the juvenile's court counselor filed a motion for review before the expiration of his probationary period and held a

timely hearing, it found the juvenile violated the terms of his probation. The juvenile asserts his violation was alleged to have occurred in November 1999 but the motion to review was not filed until January 2000. It is apparent the juvenile counselor was affording the juvenile an extended opportunity to complete his required hours of community service, but to no avail.

In keeping with the underlying purpose of the juvenile code, it is obvious the legislature intended N.C. Gen. Stat. § 7B-2510(d) and (e) to authorize the juvenile court to deal with precisely the type of situation which confronted the court here. We conclude the juvenile court properly reviewed the progress of the juvenile and extended his probation. Therefore, the order of the juvenile court is

Affirmed.

Judges McCULLOUGH and THOMAS concur.

COREEN ANGLIN-STONE AND EDWIN STONE, PLAINTIFFS V. SCOTT CURTIS, DEFENDANT

No. COA-00-1211

(Filed 16 October 2001)

Appeal and Error— appealability—sufficiency of service of process—interlocutory order

Defendant's appeal from the trial court's order finding under N.C.G.S. § 1A-1, Rule 60(b) that plaintiff had obtained sufficient service of process over defendant in an automobile negligence action is dismissed as interlocutory even though the trial court certified the appeal under N.C.G.S. § 1A-1, Rule 54(b), because: (1) a trial judge cannot denominate his decree as a final judgment and make it immediately appealable under Rule 54(b) if it is not such a judgment; and (2) a motion raising a question of sufficiency of service or process is interlocutory and does not fall within N.C.G.S. § 1-277(b).

Appeal by defendant from order entered 14 July 2000 by Judge Henry V. Barnette, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 12 September 2001.

Patterson, Dilthey, Clay & Bryson, L.L.P., by G. Lawrence Reeves, Jr., and Currie, Becton & Stewart, by Elwood Becton for plaintiff-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio and Christopher G. Smith for defendant-appellant.

WYNN, Judge.

Defendant argues on appeal that the trial court erred in finding under Rule 60(b) that plaintiff had obtained sufficient service of process over him. However for controlling reasons set forth in *Metcalf v. Palmer*, 46 N.C. App. 622, 265 S.E.2d 484 (1980) and *Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825 (1984), we must dismiss this appeal as interlocutory.

Plaintiff brought this automobile negligence action against "Scott Curtis"; in fact, defendant's name is "Curtis Scott." Apparently, the confusion in inverting defendant's name originated with the accident report which on one page identified defendant as "Scott Jerome Curtis" but on the second page identified him as "Curtis Jerome Scott."

Initially, the trial court granted defendant's motion to dismiss this action under Rule 12(b)(2)(4) and (5), finding that "there was no evidence of proper service on Curtis Jerome Scott" and that "[t]he statute of limitations of this matter is expired." Subsequently, the trial court granted plaintiff relief from that dismissal under Rule 60(b) finding that (1) "Scott Curtis" was a misnomer that did not invalidate either the Complaint or Summons and (2) correcting the name to "Curtis Jerome Scott" does not constitute another party. The trial court concluded that "amending the Summons and Complaint to correct the misnomers contained therein relates back to the date original Summons and Complaint were filed." Thereafter, the trial court certified this matter for review under Rule 54(b), and defendant brought this appeal.

Preliminarily, it should be noted that "Rule 54(b) of the Rules of Civil Procedure allows appeal if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason to delay appeal." *Cagle v. Teachy*, 111 N.C. App. 244, 246, 431 S.E.2d 801, 803 (1993) (emphasis omitted). "[A] trial judge by denominating his decree a final judgment cannot make it immediately appealable under Rule 54(b) if it is not such a

judgment." *Tridyn Indus., Inc. v. American Mut. Ins.* Co., 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). *See also Morris Commun. Corp. v. City of Asheville*, 145 N.C. App. 597, — S.E.2d — (August 21, 2001). In *Metcalf v. Palmer, supra*, this Court dismissed a defendant's attempt to appeal from a granted Rule 60(b)(1) motion holding that:

> The order appealed from is interlocutory. It does not affect any substantial right of defendants which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits. Its only effect is to require defendants to face a trial on the merits . . . .

46 N.C. App. at 624, 265 S.E.2d 484. *Accord Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980) (An order allowing a motion under Rule 60(b) is not appealable because it is interlocutory and does not affect a substantial right.); *Blackwelder v. Dept. of Hum. Res.*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983) (An appeal is interlocutory "if it does not determine the issues but directs some further proceeding preliminary to final decree.").

Moreover, in determining the appealability of a personal jurisdiction issue, this Court in *Berger v. Berger, supra*, held that:

> [i]f defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such a motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b).

67 N.C. App. at 595, 313 S.E.2d at 828-29.

In the present case, defendant does not question whether his contacts with North Carolina were sufficient to justify the court's jurisdictional powers over him. Rather, the underlying basis of defendant's argument concerns whether there was proper or sufficient service over him.

Since *Berger* prohibits such appeals as interlocutory and certification of the case under Rule 54(b) does not make it a final judgment, we dismiss this appeal as premature.

Appeal dismissed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. JAMES WOODROW RAMER

No. COA00-1094

(Filed 16 October 2001)

1. Confessions and Incriminating Statements— intelligent and understanding waiver of Miranda rights—defendant with third grade reading ability

The trial court did not err in a first-degree statutory sexual offense case under N.C.G.S. § 14-27.4(a)(1) by denying defendant's motion to suppress the statement defendant gave to detectives even though defendant contends his third grade reading ability prevented him from intelligently and understandingly waiving his Miranda rights because the trial court found that defendant understood his rights, and therefore, defendant's reading ability is not material to this inquiry.

2. Evidence— expert testimony—opinion—sexual abuse

The trial court did not err in a first-degree statutory sexual offense case under N.C.G.S. § 14-27.4(a)(1) by allowing a licensed clinical social worker accepted as an expert at trial to testify the child was sexually abused, because: (1) an expert may testify to his opinion that a child has been sexually abused as long as this conclusion relates to a diagnosis based on the expert's examination of the child during the course of treatment; and (2) even though the expert testified he based his opinion in part on statements the child made to him during treatment, the expert was qualified to provide his opinion when he provided therapy to the child over a period of several months prior to his testimony.

On writ of certiorari to review order dated 22 May 1998 by Judge C. Preston Cornelius in Davidson County Superior Court. Heard in the Court of Appeals 18 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

James Woodrow Ramer pro se defendant-appellant.

GREENE, Judge.

James Woodrow Ramer (Defendant), by writ of certiorari, appeals his conviction of first-degree statutory sexual offense, N.C.G.S. § 14-27.4(a)(1) (1994), for engaging in a sexual act with a child under the age of thirteen.

[1] Defendant makes two arguments in support for a new trial. We reject both of these arguments. Defendant first argues the trial court erred in denying his motion to suppress the statement he gave to detectives of the Davidson County Sheriff's Department. Defendant contends his third grade reading ability (a fact not in dispute) prevented him from intelligently and understandingly waiving his Miranda rights. The trial court found Defendant "was read the standard [Miranda] rights form [and] indicated that he understood that form." The trial court then concluded the statement was "freely and voluntarily given." A defendant's statement given after Miranda warnings is admissible if the defendant is fully aware of the nature of the rights being waived and the consequence of such a waiver.[1] *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986). In this case, the trial court found Defendant understood his rights, and Defendant's reading ability is therefore not material to this inquiry.[2]

[2] Defendant finally argues the trial court erred in allowing a licensed clinical social worker, accepted as an expert by the trial

1. Of course, the statement must also be the product of a free and deliberate choice, *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986), but Defendant does not argue police coercion on this appeal.

2. Defendant also argues that because he could read at only a third grade level, it was error to allow the State to present into evidence his written statement given to the sheriff detectives. Our review of the record, however, does not reveal this statement was presented into evidence at trial. In any event, the undisputed evidence is that the written statement (prepared by one of the detectives) was read to Defendant and he agreed before signing the statement that it correctly reflected his oral statement. Thus, the failure of the trial court to make findings on Defendant's ability to read and understand the written statement is not material. *See State v. Hipps*, 348 N.C. 377, 400, 501 S.E.2d 625, 639 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999) (rejecting argument that the defendant's statement written by a police officer and read back to the defendant for verification should be suppressed because of defendant's reading impairment and low IQ rendered him unable to understand and knowingly waive his rights).

court, to testify the child was sexually abused. We disagree. "[A]n expert may testify to his opinion that a child has been sexually abused as long as this conclusion relates to a diagnosis based on the expert's examination of the child during the course of treatment." *State v. Youngs*, 141 N.C. App. 220, 227, 540 S.E.2d 794, 799 (2000), *cert. denied*, 353 N.C. 397, 547 S.E.2d 430 (2001). In this case, the expert had provided therapy to the child over a period of several months prior to his testimony and thus was qualified to offer his opinion that the child was sexually abused. This is so even though the expert testified he based his opinion in part on statements the child made to him during the treatment. *See State v. Stancil*, 146 N.C. App. 234, 240, —— S.E.2d ——, —— (2001) (expert is precluded from offering opinion that child has been sexually abused if child's statement is the only foundation). Accordingly, we find no error.

Affirmed.

Judges CAMPBELL and THOMAS concur.

KENNETH L. MARAMAN, SR. AND MILDRED MARAMAN, ADMINISTRATORS THE ESTATE OF KENNETH L. MARAMAN, JR., PLAINTIFFS V. COOPER STEEL FABRICATORS AND JAMES N. GRAY COMPANY, DEFENDANTS

No. COA00-396

(Filed 6 November 2001)

1. Employer and Employee— *Woodson* claim—subcontractor

The trial court erred by directing verdict in favor of defendant subcontractor employer under N.C.G.S. § 1A-1, Rule 50 on a *Woodson* claim concerning whether the employer intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death to decedent employee while the employee was performing steel construction work, because: (1) a supervisor of defendant subcontractor ordered removal of safety lines in an area where steel erection was completed so that the lines could be used in a forward section of the project; (2) evidence was introduced tending to show some lines had been moved near the crane but were never used in the connector area; (3) at the time of decedent's fall, the supervisor was in charge of

work and standing on the ground in view of crew members; (4) substantial evidence indicated decedent was working as a connector over thirty feet above the ground without a safety line having been installed when he was struck by a large iron joist raised by the crane, which was in violation of the employer's policy and OSHA regulations; (5) the subcontractor employer was cited for two serious violations of OSHA standards and the violations indicated a strong probability both of accident and injury or death in the event of noncompliance; (6) the subcontractor employer had the authority to control safety on the job, but had been previously caught for safety violations; and (7) evidence was introduced describing the actions of the supervisor employer and other employees following decedent's death in installing a safety line at the location of decedent's fall and in tampering with the memory of the crane involved in the incident.

2. Employer and Employee— *Woodson* claim—general contractor—right to control method and manner of work—inherently dangerous work

The trial court did not err by directing verdict in favor of defendant general contractor under N.C.G.S. § 1A-1, Rule 50 on a *Woodson* claim concerning whether the general contractor intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death to decedent subcontractor's employee while the employee was performing steel construction work, because: (1) defendant general contractor did not retain the right to control the method and manner in which defendant subcontractor performed its job since the general contractor maintained a supervisory role only, was not present on the job site the day of the accident, and played no role in the events leading up to this accident or the subcontractor's conduct after the accident; (2) steel construction work was not inherently dangerous work; (3) any negligence on the part of defendant subcontractor with respect to safety precautions cannot be imposed to defendant general contractor and employer; and (4) defendant general contractor took the necessary precautions to control the attendant risks, was not aware that defendant subcontractor had dropped the safety lines, and did not proximately cause the injury to decedent employee.

Judge TYSON dissenting.

MARAMAN v. COOPER STEEL FABRICATORS

[146 N.C. App. 613 (2001)]

Appeal by plaintiffs from orders entered 22 March 2000 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals

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

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellee Cooper Steel Fabricators.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Neil P. Andrews, for defendant-appellee James N. Gray Company.

JOHN, Judge.

Plaintiffs Kenneth L. Maraman, Sr. (Kenneth, Sr.), and Mildred Maraman appeal the trial court's orders directing verdicts in favor of defendants Cooper Steel Fabricators (Cooper Steel) and James N. Gray Company (Gray). Plaintiffs are awarded a new trial as to Cooper Steel, but no error is found as to Gray.

Plaintiffs filed the instant action 12 December 1997 in Mecklenburg County Superior Court. Each defendant answered plaintiffs' complaint, cross claimed against the other for contribution or indemnity, and filed subsequent motions for summary judgment. The latter were denied by the trial court.

Trial commenced 25 October 1999. Plaintiffs' evidence tended to show the following: Gray served as general contractor for construction of a warehouse in Huntersville, North Carolina, and entered into a contract with Cooper Steel to perform steel fabrication and erection work at the job site. Kenneth L. Maraman, Jr. (decedent), and his father, Kenneth, Sr., were employed by Cooper Steel as steel erectors. Decedent was twenty-four years old and had worked in steel erection for approximately seven years.

On 15 December 1995, decedent and his father were working at the Huntersville warehouse job site. The building was being constructed by creation of a concrete pad and establishment of a series of columns rising upwards from ground level. Steel girders connected column to column and metal joists were assembled which connected girders to girders "cross ways," filling the space between them.

Equipment on the job included a man-lift, consisting of a bucket on a hydraulic lift with a telescoping pole. Steel erectors (workers)

such as decedent utilized nylon safety belts equipped with lanyards that hooked to "D-rings" on the belts and to "tie-offs" on the bucket. When required to stand on steel components of the structure, workers would tie onto a safety line or "rat line," described as

> a cable that generally runs from column to column. It is tied off on the [girder] but basically across the [girder], it should be from one end of the [girder] to the other.

Hooking the lanyard onto the safety line would enable workers to move from column to column while being tied off, and having the lanyard thus tied off to a safety line would prevent workers from falling more than six feet.

Kenneth, Sr., testified that on 15 December 1995 at about 1:00 p.m., he and a co-worker were ordered by Robert Marlowe (Marlowe), "senior man" for Cooper Steel at the site, to drop the safety lines from an area of the project where erection was complete so that the lines could be used in a forward section. Kenneth, Sr., recollected that some of the lines "got moved right up under the crane," but "were never used," and that he dropped safety lines "all the way up to two bays before I got to the connectors, which it didn't have no safety lines at that point any way."

Approximately four hours later that day, decedent was working as a "connector" at the open end of the building where erection was ongoing. According to Cooper Steel employee James Fults (Fults), a "connector's" job was to "catch" iron joists raised by the crane, "set [them] in place, and weld [them] down or bolt [them] up." Decedent went up in the man-lift some thirty-one and one-half feet above the ground to help place large joists into position. Fults described the joists as "huge," "the biggest joists I ever seen[,] 85 feet long. . . ."

Kenneth, Sr., testified that upon exiting the bucket onto a girder, decedent looked for a safety line upon which to attach his lanyard, but "there was no line there." Kenneth, Sr., further related that the ground crew raising the joist by means of a crane experienced a problem:

> So they flew it back down, and then rerigged it. And then they brought it back up. And when it started back up, it done the same thing. And then it I'm not mistaken, I heard somebody holler, bring it back down, and then somebody else hollered, no, let it fly. Just take it on up.

While standing on the girder, decedent reached out to position the joist. When he did so, the joist bounced and struck decedent in the head, knocking him to the ground. He was transported to the hospital by ambulance and pronounced dead a few hours later.

At all pertinent times during the incident, Marlowe was in charge at the site and standing on the ground in view of crew members, including decedent and Kenneth, Sr. Although no Gray representative was present on the date of decedent's fall, Gray maintained a supervisory trailer at the construction site and a Gray representative visited the site on a regular basis.

Kenneth, Sr., and Fults testified that Marlowe subsequently organized a group to return to the job site that night where, as Fults described it,

> we put up a rat line, and they got . . . Marlowe and Tadpole got in the crane and done something, and I don't know exactly what it was they done. But I had asked them, and they told me that it was something to the effect of messing with the memory of the crane, because to the effect that OSHA can pull the memory of the crane, and tell every move that crane had made.

Fults related that the rat line was installed at the location of decedent's fall using the headlights of trucks for illumination, and that "there was no rat line where Kenny was [working]" at the time of the accident."

John Francis (Francis), a North Carolina Department of Labor, Occupational Safety and Health Division investigator, conducted an on-site investigation the following day. Francis described the "hazard level" of steel erection as "rather high" and related the minimum standard fall protection in steel erection projects. He indicated that for work more than thirty feet "outside a structure," such as that in issue, the standard required one hundred per cent tie off to "an eye somewhere attached that would support [a] five thousand pound shock load."

Francis stated that information he received at the job site indicated decedent had unhooked his lanyard from a safety line so as to move around a girder and then snap it back onto the safety line. Decedent reportedly was struck by the joist "while he was unfastened from his rat line," and fell. Francis testified that

> [b]ased on the information I got during the inspection, I received from the folks involved, there was no doubt in my mind there was a rat line in place

at the time of decedent's fall.

Upon completing his investigation, Francis cited Cooper Steel for "serious" violation of OSHA standards as follows:

> continuous fall protection was not in use at the time of the incident, even though [Cooper Steel's] safety rules required it, and there was a foreman on-site to enforce it[,] . . . and not controlling a load with a tag line.

Questioned about evidence that a safety line may not have been installed at the location where decedent was working at the time of his fall, Francis replied:

> if . . . we have the decedent standing on a length of any description without the appropriate anchor point, then we're going to be confronted with the same thing that we were even with the rat line there. . . .
>
> [I] would [not] have changed [my] citation even if there had been no rat line at all. . . .

Francis related that certain violations classified as "wilful serious" and "wilful" went "even beyond" the "serious" violations with which Cooper Steel was charged. However, he characterized Cooper Steel's violations as "high/high," meaning that "as a result of the standard's violation particularly as it's looked at through that industry," there existed a high probability that an accident would occur and that, should it occur, "there [wa]s going to be a high severity, permanent disability, or death." Each "high/high" violation customarily carried a base penalty of $7,000, but Francis reduced each fine to $3500.00 in light of Cooper Steel's clean history and its large employee compliment of approximately one hundred employees. Francis did not cite Gray for any OSHA violations, indicating "[he] was given to understand that Gray was the general contractor."

At the close of plaintiffs' evidence, each defendant moved for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50 (1999). The trial court allowed both motions, and plaintiffs appeal.

By their sole assignment of error, plaintiffs contend the trial court committed reversible error by "granting a direct[ed] verdict to the

Defendants Cooper Steel and Gray Construction." It is well established that

> [a] directed verdict should be granted only if the trial judge could properly conclude that no reasonable juror could find for [the nonmoving party]. All conflicts in the evidence must be resolved in favor of [the nonmoving party,] [] the evidence must be viewed in a light most favorable to [the nonmoving party,]

Estate of Smith v. Underwood, 127 N.C. App. 1, 13, 487 S.E.2d 807, 815 (1997), 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). To survive a directed verdict motion, the non-moving party must have presented evidence adequate to sustain a jury verdict in its favor or must have offered sufficient evidence "to present a question for the jury." *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)).

> 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). Bearing these principles in mind, we proceed to a consideration of plaintiffs' arguments as they relate to each defendant.

I. Defendant Cooper Steel

[1] Turning first to plaintiffs' assignment of error challenging the entry of directed verdict in favor of decedent's employer Cooper Steel, we note that notwithstanding the exclusivity provisions of the Workers Compensation Act (the Act), *see* N.C.G.S. §§ 97-9 (employer subject to the Act is liable to employee injured in course of employment only "to the extent and in the manner" provided in the Act), and 97-10.1 (1999) (if employer and employee have complied with the Act, rights and remedies granted therein "shall exclude all other rights and remedies"), an exception was created in *Woodson v. Rowland*, 329 N.C. 330, 340-1, 407 S.E.2d 22, 28 (1991), allowing an injured employee under certain circumstances to pursue a independent civil action against his or her employer.

> The elements of a *Woodson* claim are: (1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct.

Pastava v. Naegele Outdoor Advertising, 121 N.C. App. 656, 659, 468 S.E.2d 491, 494, *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996).

In support of the trial court's action, Cooper Steel relies upon several decisions in which our appellate courts have rejected *Woodson* claims. *See, e.g., Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 436 S.E.2d 145 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 516 (1994); *Canady v. McLeod*, 116 N.C. App. 82, 446 S.E.2d 879, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994); *Powell v. S & G. Prestress Co.* 342 N.C. 182, 463 S.E.2d 79 (1995); *Echols v. Zarn, Inc.*, 342 N.C. 184, 463 S.E.2d 228 (1995); *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995); *Jones v. Willamette Industries*, 120 N.C. App. 591, 463 S.E.2d 294 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 714 (1996); *Kelly v. Parkdale Mills, Inc.*, 121 N.C. App. 758, 468 S.E.2d 458 (1996); *Rose v. Isenhour Brick & Tile Co., Inc.* 344 N.C. 153, 472 S.E.2d 774 (1996); and *Tinch v. Video Industrial Services, Inc.*, 129 N.C. App. 69, 497 S.E.2d 295 (1998).

However, plaintiffs counter by citing decisions in which *Woodson* claims were allowed to proceed. In *Arroyo v. Scottie's Professional Window Cleaning, Inc.*, 120 N.C. App. 154, 461 S.E.2d 13, *disc. review allowed*, 342 N.C. 190, 463 S.E.2d 231 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996), for example, this Court reversed dismissal for failure to state a claim under N.C.G.S. § 1A-1, Rule 12 (b)(6) (1994) (Rule 12(b)(6), of an injured window washer's *Woodson* complaint against his employer. *Id.* at 159-60, 461 S.E.2d at 17. The window washer had alleged a supervisor required him to lean outward from a small ledge without fall protection equipment and refused to allow fellow employees to hold onto him, that the employer was aware safe work methods were not being practiced, and that the employer knew of the supervisor's past record of ignoring safety requirements. *Id.* We held the

> allegations [we]re sufficient to state a legally cognizable claim under *Woodson* that defendant [employer] intentionally engaged

in conduct that it knew was substantially certain to cause serious injury or death.

Id. at 160, 461 S.E.2d at 17; *see also Regan*, 118 N.C. App. at 330-31, 454 S.E.2d at 852 (Rule 12(b)(6) dismissal of *Woodson* claim reversed where employee was injured cleaning a paint machine and had alleged prior serious injuries and deaths in operation of machine and non-operability of emergency switch on machine in conjunction with employer's knowledge of non-functioning switch and failure to advise employee of this circumstance), and *Pastava v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 657, 468 S.E.2d 491, 494, *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996) (Rule 12 (b)(6) dismissal of *Woodson* claim reversed where employee was injured when working on billboard which collapsed and had alleged employer's actual knowledge of billboard's unsafe and dangerous condition, its failure to perform billboard inspections or to provide workplace safety training, and its previous citations and fines for workplace safety violations).

No one factor is determinative of the viability of a *Woodson* cause of action, but rather all facts and circumstances taken together must be considered. *Mickles v. Duke Power Co.*, 115 N.C. App. 624, 628, 446 S.E.2d 369, 372 (1994), *rev'd on other grounds*, 342 N.C. 103, 463 S.E.2d 206 (1995). To uphold the trial court's directed verdict in the instant case, we must determine the evidence at trial was insufficient as a matter of law to present a question for the jury, *see Beam*, 120 N.C. App, at 210, 461 S.E.2d at 917, regarding plaintiffs' *Woodson* claim. We conclude the trial court erred.

First, it was undisputed that Marlowe, a Cooper Steel supervisor, ordered removal of safety lines in an area where steel erection was completed so that the lines could be used in a forward section of the project. Evidence was introduced tending to show some lines had been moved near the crane, but "were never used" in the connector area. At the time of decedent's fall, Marlowe was in charge of work and standing on the ground in view of crew members, including decedent and Kenneth, Sr. Further, despite Cooper Steel's policy of "a hundred percent tie off when working six feet out in the air" and OSHA regulations requiring "one hundred percent tie off" for work more that thirty feet "outside a structure," and the presence of Marlowe on site to enforce such rules, substantial evidence indicated decedent was working as a "connector" over thirty feet above the ground without a safety line having been installed when he was struck by a large

iron joist raised by the crane. Indeed, Cooper Steel was cited by Francis for two "serious" violations of OSHA standards, the absence of continuous fall protection and failing to "control[] a load with a tag line." *See Lane v. R.N. Rouse & Co.*, 135 N.C. App. 494, 498, 521 S.E.2d 137, 140 (1999) (evidence of OSHA violations "following a death" relevant to issues of "negligence and gross negligence"). Significantly, moreover, Francis characterized Cooper Steel's OSHA violations as "high/high," indicating a strong probability both of accident and injury or death in the event of noncompliance.

In addition, according to Kenneth, Sr., both Cooper Steel and Gray "had authority to control safety on the job." Yet Fults described previous safety violations by Cooper Steel at the site, acknowledging he once had been "caught" failing to tie off. Fults also stated there had been "occasions" during the Huntersville construction upon which Gray representatives stopped work until safety rules were complied with when "[a Cooper Steel employee] was not tied off", and also when Cooper Steel supervisors had "turned their back[s]" on "risk[s] with [workers'] li[ves] 30 feet up in the air."

Finally, evidence was introduced describing the actions of Marlowe and other Cooper Steel employees following decedent's death in installing a safety line at the location of decedent's fall and in tampering with the memory of the crane involved in the incident. Without citing any authority, Cooper Steel maintains that

> such evidence is irrelevant to the *Woodson* inquiry: Whether prior to the accident, there was any intentional misconduct on the part of Cooper Steel Fabricators.

We agree with Cooper Steel's general statement of the law as it applies to subsequent repairs or precautions. *See* N.C.G.S. § 8C-1, Rule 407 (1999), and *Lane v. Rouse*, 135 N.C. App. at 498, 521 S.E.2d at 140 ("when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event"). However, evidence of subsequent repairs or precautions may be offered for other purposes, such as "proving . . . feasibility of precautionary measures, . . . or impeachment." *Id.* at 498-99, 521 S.E.2d at 140.

In any event, moreover, we do not share Cooper Steel's characterization by implication of the evidence as "remedial measures." Rather, the testimony regarding the nocturnal visit to the accident

scene by Marlowe and other Cooper Steel employees was more descriptive of obstructing investigation or tampering with evidence. Indeed, Cooper Steel itself in its appellate brief uses the phrase "alleged attempt to cover up the alleged absence of a [safety] line" to describe the late night actions of Marlowe and the other workers. Particularly as bearing upon the factors of intent and knowledge, *see Nadeau v. Employment Security Commission*, 97 N.C. App. 272, 276, 388 S.E.2d 145, 147 (1990) (repeated personal telephone calls on company time and company expense constituted "misconduct" justifying discharge of employee for good cause, and evidence of subsequent discovery of employee's tampering with company phone system to subvert prohibition against long distance calls "relevant to show [employee's] state of mind concerning use of employer's phone system"), and *State v. Goldston*, 343 N.C. 501, 504, 471 S.E.2d 412, 414 (1996) (that criminal defendant "went to considerable lengths to concoct a story that would explain his wound . . . [evidence of] guilty knowledge"); *see also Pratt v. Bishop*, 257 N.C. 486, 506, 126 S.E.2d 597, 611 (1962) (quoting Wigmore on Evidence, 3rd Ed., § 278) (in civil case, " 'a party's fabrication or suppression of evidence . . ., and *all similar conduct*, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit' "), *State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 179, 192 (1998) (criminal defendant's "attempts to cover up involvement" in crime among "circumstances from which pre-meditation and deliberation can be inferred"), and *Red Mill Hosiery Mill, Inc. v. Magnetek, Inc.*, 138 N.C. App. 70, 78, 530 S.E.2d 321, 328 (2000) ("party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case"), the inferences raised by the cover up and tampering evidence constituted factors to be considered by the trial court with all others, *see Mickles*, 115 N.C. App. at 628, 446 S.E.2d at 372, in ruling upon Cooper Steel's directed verdict motion.

In sum, we view plaintiff's evidence as adequate to have raised a jury question, *see Best*, 337 N.C. at 749, 448 S.E.2d at 510, as to whether Cooper Steel "intentionally engage[d] in misconduct knowing it [was] substantially certain to cause serious injury or death to [decedent]," *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228, and hold that the trial court erred in directing a verdict against plaintiffs on that issue.

II. Defendant Gray

[*N.B. In light of Judge Greene's concurrence with Judge Tyson's opinion regarding defendant Gray, the following discussion must be read as a dissent and Judge Tyson's opinion as the majority opinion regarding defendant Gray with Judge Greene concurring.*]

Plaintiffs next maintain the evidence adduced at trial was sufficient to raise a jury issue regarding their claim against Gray as general contractor.

Preliminarily, it may be noted that decedent's status as an employee of the subcontractor Cooper Steel and not of the general contractor Gray was uncontroverted. Therefore, the exclusive remedy provisions of the Act, *see* G.S. §§ 97-9 and 97-10.1, were not implicated regarding plaintiffs' claim against Gray.

Ordinarily, "a general contractor is not liable for injuries sustained by a subcontractor's employees." *Hooper v. Pizzagalli*, 112 N.C. App. at 403, 436 S.E.2d at 148. However, plaintiffs rely upon two recognized exceptions to the general rule of no liability. The first involves those "situations where the contractor retains control over the manner and method of the subcontractor's substantive work." *Id.* at 404, 436 S.E.2d at 148 (citation omitted). The second concerns circumstances wherein

> the independent contractor is hired to perform an inherently dangerous activity, and the general contractor 'knows or should know of the circumstances creating the danger.'

Dunleavy v. Yates Construction Co., 114 N.C. App. 196, 202, 442 S.E.2d 53, 56 (1994) (quoting *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992)). Accordingly, if an independent subcontractor is negligent thereby causing injury to its employee and at least one of the foregoing exceptions is present, then the general contractor may not "escape liability by merely relying on the legal ground that [the subcontractor] was an independent contractor." *Woodson*, 329 N.C. 330, 357, 407 S.E.2d 222, 238 (1991).

Plaintiffs first argue Gray maintained control over the manner and method of Cooper Steel's work. Thorough examination of the record reveals the evidence adduced at trial was adequate to present a jury question as to this issue. *See Best*, 337 N.C. at 749, 448 S.E.2d at 510.

First, Gray's construction contract with the owner of the Huntersville tract included the following provisions:

> 6.1 [Gray] shall be responsible for initiating, maintaining and providing supervision of safety precautions and programs in connection with the [Huntersville project].
>
> 6.2 [Gray] shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: (1) employees on the [project] and other persons who may be affected thereby;. . . .
>
> 6.3 [Gray] shall give notices and comply with applicable laws, ordinances, rules, regulations and orders of public authorities bearing on the safety of persons and property and their protection from damages, injury or loss.

Next, the contract between Gray and Cooper Steel provided as follows:

> 2.1 SUBCONTRACTOR'S WORK. Gray contracts with the Subcontractor as a independent contractor to perform the work described in the Scope of Work . . . under the general direction of Gray and in strict accordance with the Agreement and the Subcontract Documents. . . . .
>
> 8.11.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by Gray and, in addition, comply with occupational safety and other applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property, and in accordance with requirements of the Subcontract Documents. . . .
>
> 8.11.2 Subcontractor shall comply with Gray's Safety Requirements.

In addition, plaintiffs point to evidence that

> Gray maintained a supervisory trailer on the job site within sight of where the steel erection was occurring and that a Gray employee was sometimes in the area,

and to testimony that Gray and Cooper Steel were "equally responsible for job safety." Moreover, Gray required "a safety session" before allowing subcontractor employees on the job site, which session included "orientation into the fact that you need[ed] to be

one hundred percent attached when you're up in the air above six feet. . . ."

Finally, Kenneth, Sr., testified as follows:

Q. Did you ever see an occasion where someone from James N. Gray saw someone not tied off, and said don't worry about it?

A. I've seen occasions that people worked for Gray walked up and said make that man tie off.

Q. So if they saw—if they saw someone violating one of their safety rules, they would make that person . . . get back into compliance?

A. Yes.

Q. Before they let them go on working?

A. Yes.

The foregoing evidence, giving plaintiffs "the benefit of all reasonable inferences that may be drawn," *Abels*, 335 N.C. at 214-15, 436 S.E.2d at 825, therefrom, was sufficient for submission to the jury of the first exception issue, that is, whether Gray "retained the right to control the method and manner in which [Cooper Steel] and its employees performed their job." *Hooper*, 112 N.C. App. at 404, 436 S.E.2d at 148. As opposed to the exercise of "a general supervisory role," *id.* at 405, 436 S.E.2d at 149, evidence was introduced tending to show Gray "interfer[ed] with [Cooper Steel's work] or [some] part of its work so as to retain control and thereby make itself liable," *id.*

The second exception was described in *Woodson* as follows:

> one who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others.

Woodson, 329 N.C. at 352, 407 S.E.2d at 235. The Court therein explained:

> Imposition of this nondelegable duty of safety reflects 'the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.' By holding both an employer and its independent contractor responsible for injuries that may result from inherently dangerous activities, there is a greater likelihood

> that the safety precautions necessary to substantially eliminate the danger will be followed.

Id.

In defining "inherently dangerous," our Supreme Court observed that "[i]t is not essential . . . that the work should involve a major hazard." *Id.* at 351, 407 S.E.2d at 235. Rather,

> [i]t is sufficient if there is a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger.

Id. In addition, "inherently dangerous activities are susceptible to effective risk control though the use of adequate safety precautions." *Id.* at 351, 407 S.E.2d at 234.

The principle that

> where reasonable minds could differ as to whether an activity is inherently dangerous, the determination is a question of fact to be determined by the fact-finder,

McMillan v. U.S., 112 F.3d 1040, 1044 (9th Cir. 1997) (citation omitted), has essentially been adopted in decisions of both our Supreme Court, *see Woodson*, 329 N.C. at 353, 407 S.E.2d at 236 (although "some activities are always inherently dangerous while other may never be, . . . we do not believe every act can be defined as inherently dangerous or not, regardless of the attendant circumstances") and this Court, *see Lilley v. Blue Ridge Electric Membership Corporation*, 133 N.C. App. 256, 260, 515 S.E.2d 483, 486-7) (1999) (between "spectrum of activities, some of which are never inherently dangerous, as a matter of law, and some of which are always dangerous, as a matter of law," are sets of "circumstances [which] fall squarely at [n]either end of the spectrum," and determination of whether the latter constitute an inherently dangerous activity is for the jury).

To sustain the trial court's directed verdict on this issue, we must determine that the evidence presented at trial failed as a matter of law to raise a jury question as to whether the activity at issue was inherently dangerous. *See Beam,*, 120 N.C. App. at 210, 461 S.E.2d at 917. In making such determination, the focus is not upon the work activity in a generalized sense, but rather upon the specific work

being done at the time at issue under the particular "attendant circumstances," *id.* at 260, 515 S.E.2d at 487 (citation omitted), then existing, *see Woodson*, 329 N.C. at 356, 407 S.E.2d at 237 (citation omitted) ("the focus is not on some abstract activity called 'trenching' "; rather, "the focus is on the particular trench being dug and the pertinent circumstances surrounding the digging").

In the case *sub judice*, the specific work engaged in by decedent involved attempting to stabilize, and then weld to a girder, an unusually large, eighty-five foot length of steel joist being hoisted by a crane while decedent was standing upon a narrow girder thirty-one and one-half feet above the ground. Although, as Gray points out, construction of a building generally has been held by our Supreme Court not to be

> of that character which the policy of the laws requires that the owner shall not be permitted to free himself from liability by contract with another for its execution,

Vogh v. F.C. Geer Co., 171 N.C. 672, 676, 88 S.E. 874, 876 (1916), the foregoing specific "attendant circumstances," *Lilley*, 133 N.C. App. at 260, 515 S.E.2d at 487, appear

> at a minimum, [to] present[] a factual question of whether 'there is a recognizable and substantial danger inherent in the work,'

id. at 261, 515 S.E.2d at 487 (quoting *Woodson*, 329 N.C. at 351, 407 S.E.2d at 235), being performed by decedent, *see also Lane v. Rouse*, 135 N.C. App. at 497, 521 S.E.2d at 139 (concrete finishing during which worker was required "to walk backwards while paying close attention to the work in front of him" presented issue for jury as to whether work was inherently dangerous).

Without belaboring the point, moreover, other indications of the inherent danger of decedent's work activity included Francis' description of the "hazard level" of steel erection work as "rather high," his notation of violations of OSHA fall protection regulations at the time of decedent's fall, *see Woodson*, 329 N.C. at 351, 407 S.E.2d at 234 ("inherently dangerous activities are susceptible to effective risk control through the use of adequate safety procedures"), and also his characterization of those violations as "high/high," that is, a high probability of accident coupled with an additional high probability that serious injury or death would result in the event of such accident.

There remains the question of Gray's "knowledge of the circumstances creating the danger," *Dunleavy*, 114 N.C. App. at 202, 442 S.E.2d at 56. If

> the activity is inherently dangerous *and* the [party who hired the independent contractor] knows or should know of the circumstances creating the danger, then [it] has [a] nondelegable duty to the independent contractor's employees. . . .

Cook v. Morrison, 105 N.C. App. 509, 515-16, 413 S.E.2d 922, 926 (1992) (emphasis added).

In advancing the contention that it lacked either actual or constructive knowledge of "the circumstances creating the danger," *id.*, Gray highlights the uncontradicted evidence it had no representative at the site either when Marlowe ordered dismantling of the safety lines or when decedent later went up in the man-lift to assist in placement of a large joist. Gray's reasoning is misdirected.

In *Lilley*, this Court delineated a distinction between a general contractor's actual or constructive knowledge of the inherently dangerous work at issue as opposed to the allegedly negligent performance of that work by the subcontractor:

> [the general contractor] focuses upon its knowledge of use of the rock bar, as opposed to its knowledge of setting poles on steep terrain . . . .
>
> [The general contractor] planned the project and designed its power line to run over the steep and difficult terrain [at issue]. Given its knowledge of the topography, [the general contractor] is chargeable . . . with an awareness based upon experience and common sense that the ability of workers installing utility poles to stand and use their regular equipment [on that terrain] would, at a minimum, be significantly challenged.

Lilley, 133 N.C. App. at 263, 515 N.C. at 488.

Imposition of the prerequisite, to rephrase Gray's argument, that a general contractor possess actual or constructive knowledge of the specific negligence of the subcontractor at issue rather than of the inherently dangerous work would eviscerate the public policy behind creation of the second exception, that is, preventing employers from escaping liability by hiring others to perform the work for them and increasing the "likelihood that the safety precautions necessary to substantially eliminate the danger will be followed." *Woodson*, 329

N.C. at 352-53, 407 S.E.2d at 234-35 (citations omitted). Further, it is not negligence which creates the "recognizable and substantial danger inherent in the work," *id.* at 351, 407 S.E.2d at 235 (citation omitted) (emphasis omitted); instead, negligence is the alleged cause of injury, *see id.* at 352, 407 S.E.2d at 235 (citation omitted) (" '[t]here is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted' ").

The nondelegable duty engendered under the second exception, therefore, rests upon the general contractor's actual or constructive knowledge of the inherently dangerous work. *See Lilley* at 263, 515 S.E.2d at 488. In the instant case, suffice it to state that evidence of Gray's awareness of "the recognizable and substantial danger inherent in the work," *Woodson*, 329 N.C. at 351, 407 S.E.2d at 235, performed by decedent was plenary, *see Lane v. Rouse*, 135 N.C. App. at 497, 521 S.E.2d at 139 (record reflected that general contractor was "aware of the floor openings and of the need to cover them for the safety of workers").

In sum, plaintiffs having presented evidence sufficient "to present a question for the jury," *Best*, 337 N.C. at 749, 448 S.E.2d at 510, as to: 1) the issue of the latter's retention of control over the method and manner in which Cooper Steel performed its work at the Huntersville construction site, and 2) the issue of whether decedent's work constituted an inherently dangerous activity and whether Gray "had knowledge of the circumstances creating the danger," *Lilley*, 133 N.C. App. at 263, 515 S.E.2d at 488, the trial court erred in directing a verdict in favor of defendant Gray on those issues. Nothing else appearing, should the jury at retrial return verdicts favorable to plaintiffs on either of these issues or both *and* upon the issue of the negligence of Cooper Steel proximately causing injury to decedent, such verdicts would support a judgment against Gray in consequence of the latter's nondelegable and "continuing responsibility to see that adequate safety precautions [we]re taken." *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235.

Notwithstanding, Gray insists *Woodson* indicates that Gray's liability, if any, for the negligence of Cooper Steel "is direct and not derivative," *id.*, and that short of "assigning a permanent supervisor to observe every action of each employee, [] Gray did all it could to enforce safety." Although examination of the sources relied upon by

our Supreme Court in making the statement in *Woodson* relied upon by Gray indicates the latter has misinterpreted the purport of that statement, such confusion is understandable in light of recent decisions of this Court which likewise have cited the identical portion of *Woodson*.

As the source of the phraseology relied upon by Gray, the *Woodson* Court quoted its earlier decision in *Dockery v. Shows*, 264 N.C. 406, 410, 142 S.E.2d 29, 32 (1965). *Dockery* in turn cited identical language in *Evans v. Rockingham Homes*, 220 N.C. 253, 259, 17 S.E.2d 125, 129 (1941). That case dealt with a circumstance wherein the plaintiff elected to take a voluntary dismissal as to her claim against the independent subcontractor, but continued to pursue her action against the general contractor. *Id.* at 261, 17 S.E.2d at 132. The Court stated that although the independent contractor might also be liable based upon the "want of due care in not taking the necessary precautions, for the omission of which the [general contractor] becomes liable," *id.*, the liability of the general contractor was "not imputed, but [rather] original and independent as a violation of duty which the policy of the law makes nondelegable." *Id.* Hence the general contractor was directly" responsible to the plaintiff and "the voluntary [dismissal] taken as to the [subcontractor] left the cause of action as to the [general contractor] unaffected." *Id.* Significantly, the Court also noted the trial court erred in instructing the jury on the theories of the relation of master and servant, *respondeat superior* and agency, *id.*, traditional examples of "derivative" liability wherein failure of a claim against an employee or agent would extinguish any claim against the principal.

In *Evans*, therefore, the Court simply held that while the general contractor was liable based upon the independent subcontractor's negligent "omission," *id.*, in failing to "tak[e] the necessary precautions," *id.*, the plaintiff might nonetheless proceed "directly" against the general contractor without pursuing her action against the subcontractor, *id.* Indeed, notwithstanding the argument discussed herein, Gray implicitly acknowledged this principle by including cross-claims against Cooper Steel for contribution and indemnity in its answer to plaintiff's complaint.

Regarding Gray's assertion it had "done all it could," an observation of our Supreme Court that

> "the cases of 'non-delegable duty' . . . hold the [contractor] liable for the negligence of the [subcontractor] although [the

> contractor] has [it]self done everything that could reasonably be required of [it],"

Hendricks v. Fay, Inc., 273 N.C. 59, 62, 159 S.E.2d 362, 366 (1968) (quoting Prossser on Torts, 3rd Ed., § 70, 480), controls, *see Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (N.C. Court of Appeals has responsibility to follow decisions of North Carolina Supreme Court "until otherwise ordered" by that Court).

Notwithstanding, in *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 511 S.E.2d 313 (1999), this Court, citing only the above language from *Woodson*, and in *Kinsey v. Mann*, 139 N.C. App. 370, 533 S.E.2d 487 (2000), citing *Woodson* and *O'Carroll*, delineated the elements of "an inherently dangerous activity claim," *Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 492, as follows:

> [f]irst, the activity must be inherently dangerous. Second, at the time of the injury, the employer knew or should have know that the activity was inherently dangerous. Third, the employer failed to take the necessary precautions to control the attendant risks. And, fourth, this failure by the employer proximately caused injury to plaintiff.

Id.

In contrast with *Dockery*, *Evans* and *Hendricks*, therefore, *O'Carroll* and *Kinsey* placed the focus upon the acts or omissions of the general contractor as opposed to those of the independent contractor. Because the latter decisions rely upon *Woodson*, a decision in which the Supreme Court itself in turn relied upon its earlier opinions in *Dockery* and *Evans*, and because neither of these decisions nor *Hendricks* have been overruled by our Supreme Court, we must follow *Dockery*, *Evans* and *Hendricks* even though opinions of this Court may conflict therewith. *See Cannon v. Miller*, 313 N.C. at 324, 327 S.E.2d at 888, and *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (Court of Appeals is "responsib[le] to follow" decisions of the North Carolina Supreme Court).

To capsulize, therefore, in plaintiffs' action against Gray for breach of its "nondelegable duty" occasioned either by Gray's retention of control over Cooper Steel's performance of its work or by decedent's work constituting an inherently dangerous activity, or both, there is no requirement, to paraphrase Gray's argument, that there be proof of an additional element that the general contractor Gray failed to "do all it could," *see Hendricks* at *id.*, 159 S.E.2d at 366,

or that Gray "failed to take the necessary precautions to control the attendant risks," *Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 492.

Finally, Gray maintains the trial court's directed verdict in its favor was proper in light of the lack of evidence as to Cooper Steel's alleged negligence as well as of the conclusive nature of the evidence of decedent's contributory negligence. However, the record reflects that the trial court in ruling upon Gray's directed verdict motion made no mention of these issues, stating simply that the evidence presented contained "nothing which would indicate that [] Gray had any kind of notice that anything at all was wrong." Indeed, the primary thrust of Gray's oral argument to the trial court focused upon its contentions regarding the matters discussed above, *i.e.*, whether decedent's work constituted an inherently dangerous activity, whether Gray had "done all it could," etc. Save for generalized assertions that decedent "was aware of the circumstances" and "aware of the danger," moreover, contributory negligence was not orally cited by Gray to the trial court as a grounds for its motion. *See Merrick v. Peterson*, 143 N.C. App. 656, 662, 548 S.E.2d 171, 175 (2001) (requirement of N.C.G.S. § 1A-1, Rule 50(a) (1999) "that specific grounds for a motion for directed verdict be stated is to give the trial court and the adverse party notice of the grounds for the motion"); *see also* G.S. § 1A-1, Rule 50(a) ("motion for directed verdict *shall* state the *specific* grounds therefor" and "grounds not asserted in the trial court may not be asserted on appeal" (emphasis added)). Further, Gray filed no written motion specifying its grounds.

In any event, assuming *arguendo* preservation of the questions of Cooper Steel's negligence and decedent's contributory negligence for appellate review, *see Merrick*, 143 N.C. App. at 662, 548 S.E.2d at 175 (in reviewing trial court's grant of directed verdict, appellate court "may consider all of the grounds specifically stated by the moving party in its motion to the trial court"; Rule 50(a) "does not allow a moving party to make an argument in support of the directed verdict for the first time on appeal"), *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 650, 535 S.E.2d 55, 65 (2000) (denial of directed verdict not preserved for appellate review when movant failed to assert in trial court grounds raised on appeal), and N.C.R. App. 10(b) ("to preserve a question for appellate review, a party must have presented to the trial court a timely . . . motion, stating the specific grounds for the ruling the party desired the court to make"), upholding the trial court's directed verdict under Gray's final argument would in any event require holding the record evidence inadequate as a matter of

law to raise a jury question as to the negligence of Cooper Steel, *see Beam*, 120 N.C. at App. 210, 461 S.E.2d at 917, or, alternatively, that the evidence established decedent's contributory negligence as a matter of law. Succinctly stated, careful review of the record dictates that neither course would be appropriate. *See Benton v. Hillcrest Foods., Inc.*, 136 N.C. App. 42, 48, 524 S.E.2d 53, 58 (1999) (citation omitted) ("[g]enerally, the issue of negligence as a basis for recovery or, in the alternative, contributory negligence as a bar to recovery, is for the jury"), and *Wolfe v. Wilmington Shipyard, Inc.*, 135 N.C. App. 661, 667, 522 S.E.2d 306, 311 (1999) (quoting *Dunbar v. City of Lumberton*, 105 N.C. App. 701. 703, 414 S.E.2d 387, 388 (1992) ("a plaintiff is contributorily negligent as a matter of law, thereby entitling a defendant to a directed verdict, when 'the evidence taken in the light most favorable to [the] plaintiff established [the latter's] negligence so clearly that no other reasonable inferences or conclusions may be drawn therefrom' ").

New trial as to defendant Cooper Steel [Judge Greene concurring in Part I of Judge John's opinion], Judge Tyson dissenting; no error as to defendant Gray [Judge Greene concurring in Judge Tyson's opinion dealing with part II of Judge John's opinion regarding defendant Gray], Judge John dissenting.

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion and would affirm the trial court's orders granting a directed verdict for defendants Cooper Steel and Gray. The evidence presented by plaintiffs at trial, allowing all inferences of fact in favor of the plaintiffs, was clearly insufficient to support a *Woodson* claim as to both defendants Cooper Steel and Gray.

I. Defendant Cooper Steel

The Workers' Compensation Act generally provides the exclusive remedy for employees injured in a workplace accident. N.C. Gen. Stat. § 97-9, 97-10.1 (1999). However, in *Woodson*, our Supreme Court created a narrow exception to the general rule when it held that if an "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct," an employee may maintain a tort action against the employer. *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991). Substantial certainty is

more than a possibility or substantial probability of serious injury or death but is less than actual certainty. *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 658-59, 468 S.E.2d 491, 493 (1996).

The elements of a *Woodson* claim are: (1) employer misconduct; (2) intentionally engaged in; (3) knowledge that the conduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured due to the misconduct. *Id.* at 659, 468 S.E.2d at 494. Plaintiffs fail to show that defendant Cooper Steel intentionally engaged in misconduct, knowing that its misconduct was substantially certain to cause death or serious injury and was so egregious as tantamount to an intentional tort.

The record establishes that defendant Cooper Steel maintained a safety policy requiring 100% tie-off when employees were working at heights over six feet, exceeding the OSHA requirement of tie-off at heights of twenty-five to thirty feet. Marlowe ordered the safety lines moved from the back bays where construction was complete to the front bays where construction was continuing. Defendant Cooper Steel furnished a safety manual, safety orientation, safety seminars, and held a safety "tool box" meeting at least once a week.

Plaintiffs' decedent had worked in steel erection for approximately seven years. Decedent was aware of the "tie-off" requirement and could have tied-off to the steel girder he was standing on. Though not tied-off, decedent knowingly continued to work.

The record shows no evidence that defendant Cooper Steel had prior OSHA violations or prior similar accidents. Mr. Francis, the OSHA investigator, stated that defendant Cooper Steel had a good commitment to safety. Defendant Cooper Steel was cited for two serious OSHA violations after the accident, which were reduced by OSHA. Mr. Francis testified that OSHA has both a "willful serious" and a "serious" violation, neither of which was found in this case.

Woodson is a narrow exception based on extreme facts. *Dunleavy v. Yates Constr. Co.*, 114 N.C. App. 196, 201, 442 S.E.2d 53, 55 (1994). The fact which clearly distinguishes this case from *Woodson*, and those cases finding a *Woodson* claim, is that defendant Cooper Steel did not instruct plaintiffs' decedent to work without being attached to a safety line. *See Woodson*, 329 N.C. 330, 407 S.E.2d 222 (employee killed when a trench collapsed, employer had four previous OSHA violations, knew the trench would fail, and knowingly refused to

allow worker to use a trench box); *Arroyo v. Scottie's Prof. Window Cleaning*, 120 N.C. App. 154, 461 S.E.2d 13 (1995) (employee injured while washing windows, employer had been previously cited for OSHA violations, provided no safety training, ordered employee to lean outward from a small ledge without fall protection equipment, and refused to allow a fellow employee to anchor); *Pastva*, 121 N.C. App. 656, 468 S.E.2d 491 (employee was injured when a billboard collapsed, employer had been cited and fined for numerous safety violations, did not provide safety training, and employer knowingly ordered employee to work on the billboard); *Cf. Regan v. Amerimark Building Products, Inc.*, 127 N.C. App. 225, 489 S.E.2d 421 (1997) (employer was aware paint machine was unguarded, that emergency switch was not working and did not advise employee, held not sufficient to prove that employer knew its action requiring employee to operate the machine was substantially certain to cause serious injury); *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993) (employee injured when employer instructed him to work at a machine knowing that dangerous parts were unguarded, held insufficient to establish a *Woodson* claim).

The majority's opinion refers to the installation of a safety line and tampering with the memory of the crane, by defendant Cooper Steel's employees the night after the accident, as indicative of intent and knowledge on the part of defendant Cooper Steel. These facts do not show an intent, by defendant Cooper Steel, to engage in misconduct, prior to the accident, with knowledge that the misconduct was substantially certain to cause serious injury or death to an employee. Mr. Francis testified that even if there had been no safety line present when he investigated the job site, he would not have changed the citation given to defendant Cooper Steel.

The evidence clearly does not support the inference that defendant Cooper Steel intended to injure plaintiffs' decedent or was manifestly indifferent to the consequences of its actions. I would affirm the trial court's granting of a directed verdict in favor of defendant Cooper Steel.

II. Defendant Gray

[2] North Carolina has long recognized that a general contractor is not liable for injuries sustained by a subcontractor's employee. *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234. A general contractor does not have a duty to furnish a subcontractor or the subcontractor's employees with a safe place to work. *Hooper v. Pizzagalli Constr.*

Co., 112 N.C. App. 400, 403-4, 436 S.E.2d 145, 148 (1993) (citing *Brown v. Texas Co.*, 237 N.C. 738, 76 S.E.2d 45 (1953)). North Carolina does recognize a few exceptions to the general rule of no liability: (1) situations where the contractor retains control over the manner and method of the subcontractor's substantive work, (2) situations where the work is deemed to be inherently dangerous, and (3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor. *Id.* at 404, 436 S.E.2d at 148 (citing *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991)). Plaintiffs argue that this case falls within the first and second exceptions.

A. Sufficient control over the subcontractor's work

The record conclusively establishes that defendant Gray did not retain the right to control the method and manner in which the subcontractor, defendant Cooper Steel, performed its job. The contract between Gray and Cooper Steel provided: (1) that Gray contracted with Cooper Steel as an independent contractor to perform steel fabrication and erection work under the general direction of Gray, and (2) that Cooper Steel shall take reasonable safety precautions and comply with safety measures or requirements initiated by Gray. Judge John's opinion states that Gray maintained a supervisory trailer on the job site, that a Gray employee was "sometimes" in the area, and that Gray required "a safety session" before the subcontractor's employees were allowed on the job site. Judge John would hold that this evidence tended to show that defendant Gray "interfered with Cooper Steel's work or some part of its work." To the contrary, the uncontroverted facts indicate that defendant Gray maintained a supervisory role only, was not present on the job site the day of the accident, and played no role in the events leading up to this accident, or Cooper Steel's conduct after the accident.

As this Court stated in *Hooper*, this evidence shows only that Gray had a general supervisory role, and does not support the proposition that Gray interfered with or retained control over the work performed by Cooper Steel and its employees. *See Hooper*, 112 N.C. App. at 404-05, 436 S.E.2d at 148-49 (while general contractor maintained a supervisory role, the subcontractor was expected to comply with the plans and was free to perform its job according to its own independent skill, knowledge, training, and experience); *Denny v. City of Burlington*, 155 N.C. 33, 70 S.E. 1085 (1911) (merely taking steps to see that the contractor carries out his agreement does not make the employer liable); *Rivenbark v. Atlantic States Constr. Co.*, 14 N.C.

App. 609, 188 S.E.2d 747 (1972) (if the negligence which caused the injury was that of the injured person's own employer and his employer was an independent contractor, the general contractor is not liable unless he participated in the negligent act).

The evidence shows that defendant Gray did not retain any right to control the method and manner in which defendant Cooper Steel performed the work. A directed verdict in favor of defendant Gray was proper as to the first exception.

B. Inherently dangerous work

Judge John states in his opinion that erection of eighty-five foot steel joists at thirty-one feet above the ground is an inherently dangerous activity. An inherently dangerous activity has been defined as "work to be done from which mischievous consequences will arise unless preventative measures are adopted." *Greer v. Callahan Constr. Co.*, 190 N.C. 632, 637, 130 S.E. 739, 743 (1925). Our Supreme Court more recently described an inherently dangerous activity as that which has "a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger." *Woodson*, 329 N.C. at 351, 407 S.E.2d at 235. When an activity is inherently dangerous, there is a non-delegable duty on the party that employs the independent contractor to ensure that adequate safety precautions are taken. *Lane v. R.N. Rouse & Co.*, 135 N.C. App. 494, 497, 521 S.E.2d 137, 139 (1999) (citing *Woodson v. Rowland*, 329 N.C. 330, 351-53, 407 S.E.2d 222, 234-35 (1991)), *disc. review denied*, 351 N.C. 357, 542 S.E.2d 212 (2000).

In a case factually analogous, our Supreme Court found that steel and iron work, conducted on the fourth floor of a building and using planks across girders for footing, was not "intrinsically dangerous" work. *Vogh v. F. C. Greer Co.*, 171 N.C. 672, 748, 88 S.E. 874, 876 (1916). In *Woodson*, our Supreme Court stated that whether an activity is inherently dangerous is determined by the pertinent circumstances surrounding the activity. *Woodson*, 329 N.C. at 356, 407 S.E.2d at 237. The Court further stated that certain activities that result in injury are not inherently dangerous, including generally, building construction. *Id.* at 353, 407 S.E.2d at 236 (citing *Vogh v. F.C. Greer Co.*, 171 N.C. 672, 88 S.E. 874 (1916)). Similarly, this Court has held that plumbing work, conducted on the seventh floor of a building and using scaffolding thirteen feet off of the ground, was

not an "inherently dangerous" activity. *Hooper*, 112 N.C. App. at 405-06, 436 S.E.2d at 149.

The facts in the case at bar cannot be distinguished from *Vogh* and *Hooper*. The steel construction work here was not inherently dangerous work. If steel erection was presumed to be an inherently dangerous activity, plaintiffs must still satisfy four elements in order to substantiate an inherently dangerous activity claim: (1) the activity must be inherently dangerous; (2) at the time of the injury, defendant Gray must either know or should have known that the activity was inherently dangerous; (3) defendant Gray failed to take the necessary precautions to control the attendant risks; and (4) the failure by defendant Gray proximately caused the injury to plaintiffs. *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 312, 511 S.E.2d 313, 317-18 (1999), *disc. review denied*, 350 N.C. 834, 538 S.E.2d 198 (2000). Plaintiffs cannot satisfy any of these requirements.

The record clearly establishes that defendant Cooper Steel was required to take reasonable safety precautions, to comply with safety measures initiated by Gray, and to comply with occupational safety laws. Defendant Gray also required that all of the subcontractor's employees submit to a safety session before entering the job site. Defendant Gray enforced the tie-off requirement on those occasions where it identified violations of this requirement, conducted regular safety meetings, and counseled workers on the use of safety measures.

The record further establishes that Robert Marlowe, "senior man" for defendant Cooper Steel, ordered the safety lines dropped and moved on the day of the accident. Plaintiffs' decedent had worked in steel erection for approximately seven years. Decedent was aware of the "tie-off" requirement and could have tied-off to the steel girder where he was standing. Though not tied-off, decedent knowingly continued to work by reaching out to position the joist without being attached to a safety line or the girder.

Judge John relies on earlier decisions for the proposition that any negligence by the independent contractor shall be imputed to the employer, general contractor. *See Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 63, 159 S.E.2d 362, 366 (1968) ("But the cases of 'non-delegable duty'. . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him."); *see also Deitz v. Jackson*, 57 N.C. App. 275, 279, 291 S.E.2d 282, 285 (1982) ("This rule imposes liability on an

employer for the negligent torts of independent contractors performing, for the employer, an activity which would result in harmful consequences unless proper precautions are taken. . . ."), *abrogated by, Kinsey v. Spann*, 139 N.C. App. 370, 533 S.E.2d 487 (2000). These cases suggest the employer's liability is vicarious in nature. *Hendricks*, 273 N.C. at 62, 159 S.E.2d at 366.

This Court recently addressed the issue of negligence claims based upon inherently dangerous activities. We held that it is the negligence of the employer, not the independent contractor, that must be considered; liability is direct, not vicarious, in nature. *Kinsey v. Spann*, 139 N.C. App. 370, 375, 533 S.E.2d 487, 491 (2000) (citing *Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991) ("The party that employs an independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken. . . . The employer's liability for breach of this duty 'is direct and not derivative. . . .' ")); *see also Lane*, 135 N.C. App. at 497, 521 S.E.2d at 139; *O'Carroll*, 132 N.C. App. at 312, 511 S.E.2d at 317-18; *Dunleavy*, 106 N.C. App. at 153, 416 S.E.2d at 197. "Thus, liability will attach only if the *employer* failed to take the necessary precautions to control the risks associated with the activity." *Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 492 (citing *Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991)) (emphasis original). Any negligence on the part of defendant Cooper Steel, with respect to safety precautions, cannot be imputed to defendant Gray, the general contractor and employer. *Id.*

The evidence establishes that defendant Gray: (1) took the necessary precautions to control the attendant risks, and (2) was not present on the day of the accident, and (3) was not aware that defendant Cooper Steel had dropped the safety lines, and (4) did not proximately cause the injury to plaintiffs' decedent. The trial court's order granting a directed verdict in favor of defendant Gray should be affirmed.

III. Summary

Since plaintiffs fail to establish a *Woodson* claim as to either defendant, I would hold that the trial court properly granted a directed verdict in favor of both defendants Cooper Steel and Gray.

IN RE PIERCE

[146 N.C. App. 641 (2001)]

IN THE MATTER OF: KRISTINA TAYLOR LINDSEY PIERCE

No. COA00-1140

(Filed 6 November 2001)

1. Termination of Parental Rights— statutory requirement— diligent efforts to strengthen family ties

The trial court did not err in a parental rights termination case by failing to address whether the Department of Social Services (DSS) had made diligent efforts to strengthen family ties, because the statutory requirement under N.C.G.S. § 7A-289.32(3) regarding a parent's failure to show positive response to the diligent efforts of DSS was no longer applicable at the time the petition to terminate respondent's parental rights was filed.

2. Termination of Parental Rights— clear, cogent, and convincing evidence—substance abuse—domestic violence

Grounds for termination of respondent mother's parental rights have not been established by clear, cogent, and convincing evidence based on substance abuse and alleged domestic violence in the home, because: (1) the Department of Social Services failed to present any evidence on the issue of the alleged domestic violence; (2) the trial court placed upon respondent an inappropriately difficult burden of proof on the issue of the substance abuse since N.C.G.S. § 7A-289.32(3) only requires a showing of reasonable progress under the circumstances in correcting the conditions which led to the child's removal, and the evidence shows that respondent made reasonable progress under the circumstances in correcting the conditions which led to the removal of the child; and (3) the record is devoid of any evidence establishing that respondent has used drugs on even a single occasion since approximately August 1997.

3. Termination of Parental Rights— clear, cogent, and convincing evidence—neglect

Grounds for termination of respondent mother's parental rights have not been established by clear, cogent, and convincing evidence based on neglect as defined under N.C.G.S. § 7A-517(21) in a situation where the child had not been in the custody of respondent mother for a significant period of time prior to the termination hearing, because the trial court made no findings

regarding the determinative factors as they existed at the time of the hearing such as evidence of visitation or testimony to the effect that respondent has not made extensive efforts to create and continue a bond with the child.

Judge HUNTER concurring in part and dissenting in part.

Appeal by respondent from order entered 28 December 1999 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 7 June 2001.

Julia Talbutt, for petitioner-appellee.

R. Clarke Speaks, for respondent-appellant.

Regina Floyd-Davis, for the Guardian ad Litem.

HUDSON, Judge.

Dawn Allison Weitner Cole (respondent), the mother of Kristina Taylor Lindsey Pierce (the child), appeals from the trial court's order terminating her parental rights. We reverse.

We begin by providing a synopsis of the uncontroverted evidence presented at the termination hearing. In August of 1996, the New Hanover County Department of Social Services (DSS) first became involved with respondent and her two older children (fathered by Ronald Cole). The child in question was born to respondent and James Pierce (Pierce) on 28 June 1997. At the time of her birth, the child tested positive for cocaine. The child was initially placed in the care of her grandmother Linda Meeks (Pierce's mother) in June of 1997. In July of 1997, Meeks informed DSS that, because of her age, she was unable to provide care for the child. The child was then placed back in the care of respondent and Pierce for two weeks. At that time respondent was participating in a substance abuse treatment program called New Visions. After two weeks, DSS discovered that respondent had tested positive for cocaine on three occasions since the child was born.

In August of 1997, DSS petitioned the court for custody of the child and for custody of respondent's two older children, based upon the suspected substance abuse of respondent, and upon three alleged incidents of domestic violence. The court awarded custody of the child to DSS on 7 August 1997, and the child was placed in foster care. Neither the petition nor the order appears in the record on appeal, so

we are unable to discern the precise basis for the order. The court also awarded DSS custody of the two older children, who were placed with their father, Ronald Cole. On 17 October 1997, Pierce was arrested and incarcerated. In October or November of 1997, respondent moved from Wilmington, North Carolina to live with her mother in Maryland. In June of 1998, Pierce was released from prison. The child remained in foster care until 4 December 1998, at which time she was placed with Pierce's first cousin, Wendy Sellers, and her husband Jesse Sellers in Charlotte, North Carolina.

DSS filed a petition on 24 June 1999 to terminate respondent's parental rights to the child. A hearing was conducted over a period of two days on 28 October 1999 and 15 November 1999. At the time of the hearing, the child was two and a half years old and continued to live with Wendy and Jesse Sellers. Following the hearing, the trial court entered an order on 28 December 1999 terminating respondent's parental rights. Respondent appeals from this order, raising three assignments of error.

We first note that the record on appeal as settled and filed by the parties, does not contain a copy of a Notice of Appeal. Ordinarily, a Notice of Appeal must be timely filed in order to confer jurisdiction on this Court, and the Rules of Appellate Procedure require the Notice to be included in the Record on Appeal. *See* N.C. R. App. Pro. 3(b)(1). However, the Clerk of this Court has received by mail a certified copy of a Notice of Appeal, filed in this case on 23 November 1999. In our discretion and on our own motion, we hereby amend the Record on Appeal, to include the Notice of Appeal. *See State v. Morris*, 41 N.C. App. 164, 166, 254 S.E.2d 241, 242 (allowing the addition of the Notice of Appeal to the Record on Appeal), *cert. denied*, 297 N.C. 616, 267 S.E.2d 657 (1979).

[1] In her first and second assignments of error, respondent argues that (1) the trial court committed reversible error by failing to address whether DSS had made diligent efforts to strengthen family ties, and that (2) the record was insufficient to support a finding by clear, cogent, and convincing evidence, that DSS had made such efforts. Respondent contends that, pursuant to the holding in *In re Harris*, 87 N.C. App. 179, 360 S.E.2d 485 (1987), the petitioner must prove the absence of a positive response to agency efforts, which, in turn, requires DSS to prove that it made diligent efforts to encourage respondent to strengthen her parental relationship in the first place.

However, respondent's argument, and the requirements addressed in *Harris*, are based upon a statutory provision that was no longer applicable at the time the petition to terminate respondent's parental rights was filed. In *Harris*, the applicable statute provided that a court could terminate the parental rights upon a finding that:

> (3) The parent has willfully left the child in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child *or without showing positive response within 12 months to the diligent efforts of a county Department of Social Services . . . to encourage the parent to strengthen the parental relationship to the child* . . . .

N.C. Gen. Stat. § 7A-289.32(3) (1995) (emphasis added). However, subdivision (3) was amended in 1997, *see* 1997 N.C. Sess. Laws ch. 390, §§ 1 and 2, and the amended version became applicable to all actions commenced on or after 1 October 1997. At the time the petition was filed in the present case, on 24 June 1999, subdivision (3) of the statute provided that the court may terminate the parental rights upon a finding that:

> (3) The parent has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child.

N.C. Gen. Stat. § 7A-289.32(3) (Cum. Supp. 1998). Thus, at the time the petition was filed in this case, subdivision (3) of the statute no longer included the italicized language quoted above regarding a parent's failure to show positive response to the diligent efforts of DSS. Respondent's first two assignments of error are, therefore, without merit.

[2] Respondent's third assignment of error states: "The evidence at trial was insufficient to support the court[']s finding that Respondent-Appellant had failed to make substantial progress." We first note that the trial court did not expressly find that respondent has "failed to make substantial progress." However, in our discretion, pursuant to N.C. R. App. P. 2, we deem respondent's assignment of error sufficient to challenge findings numbered 8, 10 and 12, and the conclusion that

was entered by the trial court, that "the grounds for termination of the Respondent's parental rights have been established by clear, cogent and convincing evidence."

A proceeding for termination of parental rights involves two stages. At the adjudication stage, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the grounds warranting termination, as set forth in N.C.G.S. § 7A-289.32, exist. If one or more of the specific grounds listed in the statute is established, then the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights. *See* N.C. Gen. Stat. §§ 7A-289.30(e) and 7A-289.31 (1995); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). Here, because we hold that several of the findings are not supported by the evidence, and that the remaining findings do not support the conclusion that grounds for termination have been established, we do not reach any discussion of the disposition stage.

The petition filed by DSS alleges that termination of respondent's parental rights is warranted pursuant to both subdivision (2) and subdivision (3) of N.C.G.S. § 7A-289.32. The pertinent portion of this statute provides:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (2) The parent has . . . neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).
>
> (3) The parent has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child.

N.C.G.S. § 7A-289.32. Although the petition sets forth these two alternative grounds for termination, the trial court's order does not specify which of these two grounds it relied upon in terminating respondent's parental rights. As noted above, the conclusion of law regarding the grounds for termination states only that "the grounds for termination of the Respondent's parental rights have been established by clear, cogent and convincing evidence."

Upon a careful examination of the order, we believe the trial court intended to hold only that the evidence satisfied the grounds set forth in subdivision (3) of N.C.G.S. § 7A-289.32 (a failure to show "to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child"). Our interpretation of the order is supported by the fact that all three parties submitting briefs to this Court (petitioner, respondent, and the Guardian ad Litem) have similarly interpreted the trial court's order as a termination of parental rights based only upon subdivision (3) of the statute. However, in the interest of addressing all possible bases for the trial court's order, we have reviewed whether the evidence supports the conclusion that the grounds set forth in *either* subdivision (2) *or* (3) have been established. This review entails (1) whether the findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether these findings support the legal conclusion that grounds for termination of parental rights have been established pursuant to either subdivision (2) or (3) of N.C.G.S. § 7A-289.32.

We begin with subdivision (3), which requires a showing that the respondent has failed to make "reasonable progress under the circumstances . . . within 12 months in correcting those conditions which led to the removal of the child." N.C.G.S. § 7A-289.32. As noted above, the two concerns that prompted DSS to take custody of the child in August of 1997 were (1) substance abuse by respondent and Pierce, and (2) alleged domestic violence in the home. In its termination order, the trial court made no findings regarding evidence of domestic violence. Having carefully reviewed the evidence presented at the hearing, we believe the absence of any such findings in the order is consistent with the complete lack of evidence presented by DSS on this issue. Because the burden of proof is on the petitioner in a termination proceeding, and because DSS did not present evidence on this issue, termination of respondent's rights in this case would not be proper based upon a failure to show reasonable progress in correcting the alleged problems involving *domestic violence.*

Therefore, the remaining question in our analysis of the subdivision (3) allegations is whether there was clear, cogent, and convincing evidence indicating that respondent had failed to make reasonable progress under the circumstances in overcoming her substance abuse. We first review the findings of the trial court, and then the pertinent evidence presented on this issue, and then review and discuss whether the findings are supported by clear, cogent, and convincing evidence.

In its order, the trial court made the following findings:

> 8. That the initial removal of the child from the home of Respondent followed a failed attempt at in-patient treatment for substance abuse by the Respondent. That throughout the pendency of the neglect proceeding various demands were made by [DSS] and [the GAL] and Orders were entered [by the court] requiring Respondent to provide objective proof of participation in a program of drug rehabilitation which required regular, random drug screens. That Respondent has not provided such documentation or evidence. That the Respondent has clearly made herculean progress in overcoming her addictions but the Court does not have adequate objective evidence that the Respondent has totally resolved her problems of substance abuse. Respondent was advised to attend weekly session[s] of Narcotics Anonymous and has chosen to attend on an every-other-week basis. Respondent has not provided the results of long term regular random drug screens. That the evidence is not clear that for the long term, Respondent has resolved the issue of substance abuse which led to the removal of the child from her care.

We first note that in this finding, as well as in statements at the hearing, the trial court placed upon respondent an inappropriately difficult burden of proof on this issue. This burden of proof constitutes error because the statute requires only a showing of "reasonable progress under the circumstances" in correcting the conditions which led to the removal of the child. Thus, even if the evidence supported the trial court's finding that there was no "objective evidence" presented at the hearing that respondent has "totally resolved" her substance abuse "for the long term," this finding would not be relevant to whether the grounds set forth in subdivision (3) of the statute have been satisfied.

Additional findings bearing in part on this issue are the following:

> 10. That while Respondent has made substantial progress in getting her own life back together, she has done so in a place in which she has no substantial support system to the extent that she must resort to maintaining the relationship with the mother of the father of the child.
>
> . . . .
>
> 12. That in light of the progress made by the mother, the Respondent in overcoming her addictions and getting her life

> together, her decision to move out-of-state was a wise decision for her. However the decision to move out of state made visitation with her daughter difficult. Visitation was impeded by the mother's failure to produce objective evidence of participation in regular, random drug screens and an approved program of rehabilitation.

The remaining portions of these findings have no bearing on the issue of Respondent's progress in overcoming her addiction.

The pertinent evidence included Respondent's testimony that in 1992, Ronald Cole, her husband of many years and the father of her two older children, left her and the two children. Realizing that she needed additional income, respondent went back to school and earned a degree as a nurse while continuing to work full time. In 1994, Cole came back and he and respondent attempted to resolve the difficulties in their relationship. In December of 1995, Cole again left. In 1996, respondent began a relationship with Pierce and, several months thereafter, discovered that she was pregnant with his child; however, Pierce indicated that he did not want her to have the child. Respondent testified that it was around this time that she began using drugs, and she acknowledged that when the child was born the child tested positive for cocaine. Respondent sought counseling at the New Visions program in July of 1997, but she used drugs again in August of 1997. Respondent testified that she has not used drugs since that time.

Respondent testified that she attended a substance abuse treatment program in Maryland after moving there in 1997, and that she tested negative for drugs in May of 1998. She testified that the reason she left this program in June of 1998 was because she had been told that she had completed the program successfully, and because she had been told by her attorney that the court considered the program at that facility to be unprofessional. Respondent acknowledged that she visited Pierce in North Carolina when he was released from prison in June of 1998, but she denied that she had used drugs during this four-day visit.

Respondent did not seek to enter another program until November of 1998, at which time she entered the Counseling Services Alternatives (CSA) program. She testified that she successfully finished this program in May of 1999, and that she maintains an ongoing relationship with the counselors and the director at CSA. A letter from the director of CSA was admitted as evidence. This letter states

that respondent successfully completed the program, and further states that she tested negative in eleven random drug screens between November of 1998 and May of 1999. A second document was admitted, signed by a counselor at CSA, which states that respondent completed the 26-week treatment program. Also, a set of documents was admitted consisting of monthly summaries indicating respondent's attendance in the CSA program between November of 1998 and May of 1999. These documents include the results of respondent's drug screening tests during this period, which show that she tested negative each time. Respondent further testified that at the time of the hearing she was attending Narcotics Anonymous meetings about once every two weeks and that she was in contact with her sponsor two or three times each week. Finally, respondent testified that she had been tested for drugs before being hired by the hospital where she currently works, and that she assumes the results were negative since she was hired.

Johnny Bullard, a DSS caseworker, testified that the last time respondent tested positive for drugs was in August of 1997. Bullard also corroborated the following facts: that respondent participated in the New Visions program for a short period of time in 1997; that respondent began treatment again in Maryland in approximately January of 1998; that respondent remained in treatment in Maryland until approximately June of 1998; and that during this time, respondent attended treatment once or twice a week. However, contrary to respondent's testimony, Bullard testified that respondent was discharged unsuccessfully from the program because of attendance problems. Bullard testified that he has no knowledge of respondent's efforts to overcome her substance abuse after June of 1998. Bullard also testified that, in his opinion, DSS has never received information indicating that respondent has overcome her substance abuse.

The Guardian ad Litem (GAL) testified that she believes it is in the best interests of the child for respondent's parental rights to be terminated. However, despite taking a position generally adverse to respondent, the GAL testified that she had spoken with respondent's most recent substance abuse counselor, Betty Caldwell, who stated that respondent had done "very well" and "had completed her treatment." Caldwell did not indicate to the GAL that respondent had ever had any positive drug tests. Caldwell also told the GAL that attending Narcotics Anonymous meetings would provide "strong" follow-up treatment, and that respondent had told Caldwell that respondent was attending Narcotics Anonymous meetings about every other

week. The GAL also testified that she had been investigating the case for over two years prior to the time of the hearing (since August of 1997), and that during that time she had not found any evidence of drug use by respondent.

Based on this evidence, the trial court made several inconsistent findings (including those quoted above), some of which are supported by clear, cogent, and convincing evidence and some of which are not. For example, the trial court found that "Respondent has clearly made herculean progress in overcoming her addictions," that "Respondent has made substantial progress in getting her own life back together," and that "in light of the progress made by . . . the Respondent in overcoming her addictions and getting her life together," respondent's decision to move to Maryland to live with her mother was "a wise decision for her." The trial court also found that respondent's current employment "required drug screening and while Respondent does not have the results of such screening, her employment implies that the screening did not detect any illegal substance or usage." These findings are supported by clear, cogent, and convincing evidence.

However, the trial court also found that respondent failed to provide "objective proof of participation in a program of drug rehabilitation which required regular, random drug screens," and that respondent's progress had been made "in a place in which she has no substantial support system." The trial court further found that "the level of responsibility that Respondent has manifested in her relationship with the father of the child is very similar to the denial she manifested when first confronted with her efforts to overcome her addictions," and that respondent's visitation with the child "was impeded by the mother's failure to produce objective evidence of participation in regular, random drug screens and an approved program of rehabilitation." These findings of fact are not supported by clear, cogent, and convincing evidence.

Disregarding those findings of fact that are not supported by the evidence, the next question is whether the remaining findings support the conclusion that the grounds for termination set forth in subdivision (3) of the statute have been established. We believe they do not. In fact, we believe these findings, and indeed the entire body of evidence presented at the hearing, compel the opposite conclusion: that respondent has, in fact, made "reasonable progress under the circumstances" in correcting the conditions which led to the removal of

the child. Most significantly, we note that the record is utterly devoid of any evidence establishing that respondent has used drugs on even a single occasion since approximately August of 1997. Therefore, we reverse the trial court's conclusion that the grounds set forth in N.C.G.S. § 7A-289.32(3) have been established.

[3] Having concluded that the evidence and the trial court's findings regarding respondent's substance abuse do not support the conclusion that respondent has failed to make "reasonable progress under the circumstances," we now address the second ground for termination alleged in the petition: neglect. A "neglected juvenile" is defined as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7A-517(21) (1995). Where, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect. This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. *See In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984) (overturning the termination of the mother's parental rights). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*" *Id.* at 715, 319 S.E.2d at 232. Although prior adjudications of neglect may be admitted and considered by the trial court, they will rarely be sufficient, standing alone, to support a termination of parental rights, since the petitioner must establish that neglect exists at the time of the hearing. *Id.* at 713-14, 319 S.E.2d at 231. Thus, the trial court must also consider evidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect. *Id.* In addition, visitation by the parent is a relevant factor in such cases. *See In re White*, 81 N.C. App. 82, 90, 344 S.E.2d 36, 41 (holding that the trial court correctly terminated the father's parental rights by reason of neglect), *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).

As stated above, the order does not indicate that the trial court intended to terminate respondent's parental rights on the grounds of neglect. The parties submitting briefs to this Court have similarly interpreted the trial court's order as relying only upon the grounds set forth in subdivision (3) of the statute, and not upon a finding of neglect. Moreover, the findings of fact entered by the trial court would not support termination based upon neglect. However, because the petition alleges neglect as an alternate basis for termination, we have reviewed the record to determine whether there is sufficient evidence to establish neglect pursuant to N.C.G.S. § 7A-289.32(2). We conclude there is not.

Here, the trial court made no findings at all regarding the determinative factors as they existed at the time of the hearing. For example, as to visitation, the evidence showed that respondent visited with the child on more than a dozen occasions between August 1997 and the date of the hearing, and that she had attempted to do so even more frequently. Johnny Bullard testified regarding the visits that respondent "basically is able to have pretty good visits with the child. She has a way about her that, you know, the child seems to be at ease with her." There was no testimony to the effect that the respondent has not made extensive efforts to create and continue a bond with the child. In fact, the evidence from Bullard and the GAL was to the effect that after June of 1998, they focused their efforts entirely on termination, and made no effort to learn the status of respondent's efforts to improve her situation. In light of *Ballard*, we do not believe the evidence could have formed an adequate basis for findings or conclusions that grounds for termination existed based on neglect.

In sum, neither the evidence, nor those findings of fact that are supported by clear, cogent, and convincing evidence, support the conclusion that the grounds for termination in either subdivision (2) or (3) of N.C.G.S. § 7A-289.32 have been established.

Reversed.

Judge MARTIN concurs.

Judge HUNTER concurs in part and dissents in part.

HUNTER, Judge, concurring in part, dissenting in part.

I concur with the majority's opinion as to respondent's first two assignments of error. However, as to respondent's third assignment of error, I would affirm the trial court's conclusion of law that the evidence failed to show to the court's satisfaction that respondent made reasonable progress within the required time-frame for doing so. I therefore respectfully dissent.

I believe the majority opinion ignores two essential components of N.C. Gen. Stat. § 7A-289.32(3) (Cum. Supp. 1998): (1) that respondent must make reasonable progress *within twelve months* of the child's placement outside the home or in foster care; and (2) the reasonable progress must be *to the satisfaction of the court.* That subsection provides:

> (3) The parent has willfully *left the child in foster care or placement outside the home for more than 12 months* without showing **to the satisfaction of the court** that reasonable progress under the circumstances has been made *within 12 months* in correcting those conditions which led to the removal of the child.

N.C. Gen. Stat. § 7A-289.32(3) (emphasis added).

I would hold the evidence as to any progress made by respondent in the twelve months following the child's placement outside the home is clear, cogent and convincing evidence which supports the trial court's findings of fact relevant to N.C. Gen. Stat. § 7A-289.32(3).

"In a termination proceeding, the appellate court should affirm the trial court where the trial court's findings of fact are based upon clear and convincing evidence and the findings support the conclusions of law." *In re Small*, 138 N.C. App. 474, 477, 530 S.E.2d 104, 106 (2000).

The majority opinion extensively details all of the evidence presented at the hearing as to respondent's efforts to obtain treatment for her substance abuse problem and to undergo drug screening. The majority of this evidence, however, falls outside of the twelve-month time-frame enumerated in subsection (3) of N.C. Gen. Stat. § 7A-289.32. Case law applying this subsection requires that reasonable progress be made within the time-frame enumerated in the statute. *See, e.g., In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001) (holding subsection (3) met where "evidence demonstrated that [respondent] had left [the child] in foster care for over

twelve months without making reasonable progress toward reconciliation"); *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996) (subsection (3) met "because respondent left her minor child in foster care, for over twelve months, without showing reasonable progress"); *In re Taylor*, 97 N.C. App. 57, 63, 387 S.E.2d 230, 233 (1990) ("[w]e hold that the record demonstrates a failure on the part of the [respondents] to make reasonable progress toward improving the home conditions *during the period in which their children were in foster care*" (emphasis added)); *In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989) (assessing whether respondent made reasonable progress from point at which children removed from her custody); *In re Pierce*, 67 N.C. App. 257, 263, 312 S.E.2d 900, 904 (1984) (respondent's reasonable progress must be "concomitant" with child's placement in foster care for the statutory period enumerated in subsection (3)).

I agree that evidence of respondent's progress following the statutory twelve-month period is admissible and relevant to a degree. *See In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001) ("[e]vidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage"). However, the plain language of the statute is clear that reasonable progress must be made to the court's satisfaction within the twelve months following the child's placement outside the home or in foster care. Thus, the proper inquiry is whether the trial court's findings regarding respondent's lack of progress are supported by clear, cogent and convincing evidence of what transpired in the twelve months following the removal of the child.

DSS witness Johnny Bullard testified that the child was first placed outside the home in June 1997 after the child tested positive for cocaine after birth on 28 June 1997. DSS constructed a "protection plan" wherein the child went to live with the paternal grandmother. Thus, under the statute, the child was "in foster care or placement outside the home" under N.C. Gen. Stat. § 7A-289.32(3) in June 1997. In July 1997, the paternal grandmother informed DSS she was too old to care for the child. As a part of its protection plan, DSS then allowed the child to be placed back in respondent's home along with the child's paternal aunt who would assist in caring for the child. This arrangement only lasted for two weeks because respondent continued to test positive for cocaine. Bullard testified that respondent tested positive for cocaine three times since June 1997.

Bullard further testified DSS thereafter tried to get respondent involved in the New Visions treatment program. Bullard testified that respondent "went for a time and then she dropped out." Bullard further stated that he took respondent back to the program to try to get her re-involved in New Visions, but that "she never did get started in that."

The court awarded custody of the child to DSS on 7 August 1997 because respondent continued to test positive for cocaine. Respondent acknowledged using drugs in August 1997. According to Bullard's testimony, DSS got respondent involved in a substance abuse treatment program which she attended from 19 August 1997 until 2 September 1997. Following that program, respondent moved to Maryland. Respondent did not enter any further treatment for several months until she entered a program in Maryland around January or February of 1998.

Bullard testified that respondent attended the program in Maryland from January or February to June 1998 "when she was discharged unsuccessfully from that program." He stated that a letter from the treatment facility indicated they were discharging respondent because she had failed to return to the program. Respondent acknowledged that she knew the treatment facility had written a letter and delivered it to the court. Respondent testified the reason she left the treatment program was because her attorney suggested she seek treatment elsewhere. Respondent acknowledged that despite her attorney's advice to seek treatment elsewhere, she did not seek further treatment until five months later, in November 1998, long after twelve months had passed since the child had been placed outside the home. Respondent testified she did not participate or seek other treatment until November 1998 because she was "regrouping." Respondent testified she tested negative for drugs in May 1998.

In sum, the evidence shows that during the statutory twelve months in which the child was placed outside the home and in foster care, respondent tested positive for drugs various times during July and August 1997. Despite DSS' attempts to get her involved in the New Visions program, respondent dropped out after a time and did not respond to DSS attempts to get her re-involved in the program. Respondent attended a treatment program for only two weeks in late August and early September at the urging of DSS. Respondent did not seek further treatment until approximately four or five months later when respondent entered a treatment program in Maryland in early

1998. According to a letter from the facility, respondent was discharged unsuccessfully from that program because she failed to return and participate in the program. Respondent acknowledged that she failed to return to the program in June 1998, and that she did not seek any further treatment for several months. Bullard testified that respondent was never able to show DSS that she had successfully completed drug treatment.

The evidence also established that respondent continued to see James Pierce, the child's father, at various times throughout the twelve-month period following the child's placement outside the home. Respondent testified that after Pierce was released from prison in June of 1998, he came and stayed with her in Maryland for approximately six weeks. The visit coincided with respondent's failure to return to her treatment program. Ruth Ann Southworth, the child's guardian ad litem, testified that her primary concern for the child was respondent's inability to sever her relationship with Pierce. She testified that Pierce was a known substance abuser who could negatively impact respondent's ability to overcome her substance abuse. Respondent acknowledged that Pierce had a "substantial addiction to cocaine and other drugs." Respondent further admitted that Pierce was discharged unsuccessfully from a drug treatment program due to "an inappropriate visitation" from her in February 1998.

Based on this evidence, the trial court found the child was placed in foster care following a failed attempt at in-patient treatment for substance abuse by respondent. It found that throughout the pendency of the matter, DSS, the child's guardian ad litem, and court orders made various requests to respondent that she provide proof of her successful participation in a drug treatment program, and specifically, a treatment program that administered regular and random drug screens. The court found that respondent had failed to comply with the requests to provide any documentation or other evidence to show that she was being or had been successfully treated in any such program. The trial court further found that respondent had maintained her relationship with James Pierce, and that she had not been forthright and credible in her description of her relationship with Pierce.

I would hold that these findings by the trial court are supported by the clear, cogent and convincing evidence of respondent's progress or lack thereof in the twelve months following the child's placement

outside the home. Quite simply, DSS established that respondent failed to successfully complete a single substance abuse treatment program which included random drug screens during the entire statutory twelve months. Despite urging from DSS to continue in treatment, respondent's participation in such programs was sporadic at best, with gaps of several months during which respondent was receiving no treatment whatsoever for her addictions. The evidence was also clear that respondent maintained a relationship with Pierce throughout the twelve months, despite knowledge that Pierce was himself a substance abuser. Indeed, it was respondent's relationship with Pierce that resulted in his unsuccessful discharge from a drug treatment program.

Based on this evidence which clearly supports the trial court's findings, I would hold that the trial court appropriately exercised its discretion in concluding that respondent's parental rights should be terminated under N.C. Gen. Stat. § 7A-289.32(3). Although the trial court's findings must be supported by clear, cogent and convincing evidence, the language of the statute is clear that whether reasonable progress under the statute has been made is within the trial court's discretion and must be "to the satisfaction of the court." Thus, the discretion afforded the trial court in determining whether reasonable progress has been made is substantial.

The majority elects to substitute its own view of "reasonable progress" for the judgment of the trial court. I cannot hold, based on the evidence, that the trial court's conclusion that respondent failed to make reasonable progress within twelve months under N.C. Gen. Stat. § 7A-289.32(3) is an abuse of discretion, given that: (1) the evidence before the court establishes respondent was unable to successfully complete a single drug treatment program including random drug screens within a year of the child's removal, and (2) for a significant portion of the statutory twelve months respondent failed to obtain any type of substance abuse treatment whatsoever. I would affirm the order of the trial court. Accordingly, I respectfully dissent.

FINESSE G. COUCH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CARNELL SIMMONS COUCH, PLAINTIFF v. PRIVATE DIAGNOSTIC CLINIC AND DUKE UNIVERSITY, DEFENDANTS

No. COA00-1032

(Filed 6 November 2001)

1. Attorneys— attorney misconduct—sanctions—standard of review

The proper standard for appellate review of the propriety of a trial court's sanctions imposed upon an attorney for violations of the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct is abuse of discretion.

2. Attorneys— attorney misconduct—sanctions—attorney fees—inherent power of trial court

The trial court had authority to order plaintiff's attorney to pay attorney fees for her violations of the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct even though no statutory authority exists for the imposition of fees, because the trial court has inherent authority to sanction attorneys for misconduct including the imposition of attorney fees.

3. Appeal and Error— appealability—issue previously decided by Supreme Court

Although a pro hac vice attorney contends she was denied due process of law when our Supreme Court determined that she was in violation of the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct even though the Supreme Court allegedly failed to give her notice or an opportunity to be heard on the issue, the Court of Appeals is not at liberty to revisit issues previously decided by our Supreme Court and the only issue properly before the Court of Appeals is whether the trial court's imposition of sanctions was proper and appropriate as mandated by the Supreme Court.

4. Attorneys— misconduct—sanctions—attorney fees—customary fee for like work

Although the trial court did not abuse its discretion by imposing various sanctions on an attorney admitted in this state pro hac vice based on the attorney's misconduct concerning her charac-

terization of the veracity of defense witnesses and opposing counsel during her closing argument to the jury in a medical malpractice action, the record does not provide ample basis for determining whether the trial court's sanction of $53,274.50 in attorney fees is error because it cannot be held that it is reasonable to require opposing counsel to reimburse attorney fees that are not objectively reasonable based upon a determination of what is customarily charged for such services in the profession.

Appeal by Maria P. Sperando, attorney for plaintiff, from orders entered 31 March 2000 and 1 June 2000 by Judge Catherine C. Eagles in Durham County Superior Court. Heard in the Court of Appeals 15 August 2001.

McMillan, Smith & Plyler, by Stephen T. Smith, for appellant Maria P. Sperando.

North Carolina State Bar, by Carolin Bakewell; Attorney General Roy A. Cooper, III, by Assistant Attorney General Staci Tolliver Meyer, for the State.

HUNTER, Judge.

Appellant Maria P. Sperando ("Sperando") appeals an order of the trial court imposing sanctions for her violations of the North Carolina Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct. For reasons set forth herein, we reverse and remand on the issue of attorney's fees, but affirm the remainder of the trial court's order.

Sperando, an attorney licensed to practice in Florida and New York, was admitted *pro hac vice* to represent Finesse G. Couch ("Couch"), the plaintiff in the underlying medical malpractice action against Private Diagnostic Clinic and Duke University (collectively "defendants"). During trial, Sperando was delivering her closing argument to the jury when she made several statements regarding the veracity of the defense witnesses and opposing counsel.

Sperando characterized defense witnesses and opposing counsel as liars approximately nineteen times during her closing argument, including such statements as, defense witnesses "came up here and told lies. In your face lies"; " '[t]here is nothing worse than a liar because you can't protect yourself from a liar. . . . [T]hese people, and

all the doctors that they paraded in here who told you lie, after lie, after lie' "; " '[t]hey lied to your face, blatantly. They didn't care. They tried to make fools of everybody in the courtroom' "; ". . . '[t]hat's not even—that's not shading the truth . . . . How is that not a lie? How is that not a lie?' "; " '[s]o you see, when I say a lie, okay, I want the record to reflect that I mean a lie' "; ". . . 'how do you think that they intend to get out from under all these lies?' "; " '[t]his is another blatant lie' "; " '[defense counsel] parade[d] these witnesses in one after another and lied to your face. I mean, they were not even smooth about it.' " *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 97, 515 S.E.2d 30, 34-35, *affirmed*, 351 N.C. 92, 520 S.E.2d 785 (1999).

Sperando also questioned the veracity of defense counsel in front of the jury, referring to all of the lies that defense witnesses told and defense counsel ". . . 'knew before [the witnesses] put their hands on the Bible that they were going to tell those lies and [defense counsel] put them up anyway. That's heavy. That's a heavy accusation.' " *Id.* Defense counsel made one initial objection to Sperando's statements, which objection was overruled by the trial court.

At the close of the trial, the jury returned a verdict in favor of Couch. Defendants appealed. This Court reversed as to Private Diagnostic Clinic on an unrelated issue. *See Couch*, 133 N.C. App. at 104, 515 S.E.2d at 39. A divided panel affirmed the verdict against Duke University despite its argument that Sperando's conduct was prejudicial and required the granting of a new trial. *Id.* All three judges expressed concern over Sperando's conduct, with the dissent taking the position that Duke University was entitled to a new trial as a result of Sperando's "grossly improper" conduct. *Id.* at 105, 515 S.E.2d at 39.

Duke University then appealed to our Supreme Court on the sole ground that Sperando's conduct was prejudicial to the defense, requiring a new trial. The Supreme Court evenly split on the issue of remanding the case for a new trial, thereby allowing this Court's decision to affirm to stand without precedential value. *See Couch v. Private Diagnostic Clinic*, 351 N.C. 92, 520 S.E.2d 785. However, a unanimous Supreme Court characterized Sperando's conduct as "grossly improper." *Id.* at 93, 520 S.E.2d at 785. The Supreme Court determined that the trial court had erred in failing to sustain defense counsel's initial objection or to subsequently intervene *ex mero motu* to prevent Sperando's conduct. *Id.* A unanimous Supreme Court concluded:

> Furthermore, this Court, being of the opinion that plaintiff's counsel's conduct violated Rule 12 of the General Rules of Practice for the Superior and District Courts and was not in conformity with the Rules of Professional Conduct, remands this cause to the trial court for the determination of an appropriate sanction.

Id.

On remand, a hearing was held on 9 February 2000. The judge from the original trial testified that Sperando appeared to be professional throughout the trial. He also stated that he did not sustain the objection to Sperando's comments because he did not think that her conduct constituted a violation of any rule.

On 31 March 2000, the trial court entered an order imposing sanctions against Sperando. However, on 30 May 2000, the trial court entered an order withdrawing the 31 March 2000 order on its own motion. In the trial court's order of withdrawal, it noted that during the hearing, Sperando testified under oath that the only time she had ever been disciplined by a court or a state bar for improper conduct was when she "was late once and that was the only time." In its order of withdrawal, the trial court found that Sperando and her attorney had failed to disclose a 9 December 1999 order from the Superior Court of Guilford County which found Sperando to be in violation of several rules, including the Rules of Professional Conduct. The order from Guilford County determined that Sperando had "conducted herself in a reprehensible manner in wilful violation of [the rules]," and concluded that her *pro hac vice* status in that case must be revoked.

On 1 June 2000, the trial court entered an amended order sanctioning Sperando. The trial court's order, which included twenty-seven pages of extensive and thorough factual findings, authority, and conclusions, imposed the following sanctions upon Sperando: (1) a censure; (2) revocation of her *pro hac vice* status to represent Couch; (3) a partial reimbursement to Duke University for its attorney's fees in the amount of $53,274.50; (4) reimbursement to Couch for any costs she incurred in defending the appeal to the Supreme Court; (5) withdrawal from any cases pending in North Carolina in which Sperando represented clients, and a one year suspension of Sperando's ability to practice *pro hac vice* in North Carolina; (6) the requirement that Sperando report the order as an Order of Discipline when required to do so; (7) the requirement that prior to again being

admitted to practice in the State *pro hac vice*, Sperando attend continuing legal education classes, and attach a copy of the court's order and an affidavit showing compliance with the order to any motion to appear *pro hac vice* in North Carolina for the next five years; (8) that its order be delivered to the state bars of Florida and New York; and (9) that Sperando file an affidavit with supporting documentation by 14 July 2000 establishing her compliance with the order. Sperando appeals.

We address the following issues in this appeal: (1) the appropriate standard of appellate review of the trial court's order of sanctions; (2) Sperando's argument that the trial court was without authority to impose attorney's fees as a sanction; (3) Sperando's argument that she was denied due process of law when the Supreme Court determined her to be in violation of the Rules of General Practice and Rules of Professional Responsibility; (4) Sperando's argument that the trial court's imposition of sanctions was "excessive and disproportionate"; and (5) Sperando's argument that the trial court's findings and conclusions are not supported by sufficient evidence.

I. Standard of Review

[1] The State argues that the proper standard for this Court's review of the propriety of the trial court's sanctions is abuse of discretion. Sperando argues that this Court must sit as one of original jurisdiction on such issues. Indeed, it does not appear that this Court or our Supreme Court has clearly determined the proper standard for appellate review of the propriety of a trial court's sanctions imposed upon an attorney for violations of the General Rules of Practice for the Superior and District Courts and the Rules of Professional Conduct. However, we find instructive existing case law applicable to the review of sanctions imposed under our Rules of Civil Procedure, and in cases involving the trial court's exercise of its inherent authority.

In general, this Court exercises *de novo* review over whether to sanction an attorney under Rule 11 of our Rules of Civil Procedure. *Page v. Roscoe LLC*, 128 N.C. App. 678, 680, 497 S.E.2d 422, 424 (1998). However, once it is determined that sanctions were proper, ". . . 'we must review the actual sanctions imposed under an abuse of discretion standard.' " *Id.* at 680, 497 S.E.2d at 424 (quoting *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994)); *see also, e.g., VSD Communications, Inc. v. Lone Wolf Publishing Group*, 124 N.C. App. 642, 644-45, 478 S.E.2d 214, 216 (1996).

It is equally well-established that the propriety of sanctions imposed for violation of discovery orders or other rules violations is reviewed for abuse of discretion. *See State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988) (although trial court "not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, is within the trial court's discretion"); *see also, e.g., Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33-34 (1999); *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995); *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993).

Moreover, a trial court's revocation of an attorney's ability to practice *pro hac vice* is reviewed under an abuse of discretion standard. *Smith v. Beaufort County Hosp. Ass'n.*, 141 N.C. App. 203, 540 S.E.2d 775 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 435, *affirmed*, 354 N.C. 212, 552 S.E.2d 139 (2001). In *Smith*, this Court recognized that the plain language of N.C. Gen. Stat. § 84-4.2 (1999) (allowing summary revocation of *pro hac vice* status), gives the trial court discretion to summarily revoke an attorney's ability to practice *pro hac vice*. *Id.* at 210, 540 S.E.2d at 780. We stated that "the express language of N.C. Gen. Stat. § 84-4.2 allows a superior court judge the authority and discretion to summarily revoke an earlier order granting *pro hac vice* admission pursuant to § 84-4.1." *Id.*

Most importantly, the proper standard of review for an act of the trial court in the exercise of its inherent authority is abuse of discretion. In *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 115 L. Ed. 2d 27, *reh'g denied*, 501 U.S. 1269, 115 L. Ed. 2d 1097 (1991), the United States Supreme Court stated, "[w]e review a court's imposition of sanctions under its inherent power for abuse of discretion." *Id.* at 55, 115 L. Ed. 2d at 52.

North Carolina case law is equally clear that the exercise of a court's inherent authority is reviewed for abuse of discretion. *See, e.g., State v. Golphin*, 352 N.C. 364, 391, 533 S.E.2d 168, 190 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *In re Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999); *State v. Warren*, 347 N.C. 309, 324-25, 492 S.E.2d 609, 617 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998).

Sperando relies upon three cases for the proposition that our proper standard of review is one of "original jurisdiction." Upon close review, however, each of these cases is distinguishable from the

present case. Two such cases cited by plaintiff, *In re Robinson*, 37 N.C. App. 671, 247 S.E.2d 241 (1978), and *In re Dale*, 37 N.C. App. 680, 247 S.E.2d 246 (1978), arose out of the same factual background and contain identical language pertinent to the issue before us.

In those cases, however, we determined that the trial judge erred in failing to recuse himself from hearing the merits of the disciplinary proceedings, and we vacated the trial court's order of discipline in both cases. *Robinson*, 37 N.C. App. at 679, 247 S.E.2d at 246; *Dale*, 37 N.C. App. at 685, 247 S.E.2d at 249. Once the trial court's order of discipline was vacated, this Court invoked its own inherent authority to review, *de novo*, the merits of the disciplinary proceeding to prevent the need for remanding the case for a new hearing. *Robinson*, 37 N.C. App. at 679, 247 S.E.2d at 246; *Dale*, 37 N.C. App. at 685, 247 S.E.2d at 249. A close reading of *Robinson* and *Dale* reveals that this Court never reviewed the underlying order, but elected to exercise its own inherent authority. We were therefore well within our authority in those cases to review the imposition of sanctions *de novo*.

We do not find such cases instructive in the instant case. There are no allegations that the trial court's order in this case is affected by judicial misconduct, nor are there other factors which would require that the order be vacated. Unlike *Robinson* and *Dale*, we must review the order entered by the trial court.

Nor do we find instructive *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), *appeal dismissed and disc. review denied*, 296 N.C. 740, 254 S.E.2d 181 (1979), upon which Sperando also relies. This Court in *Swenson* did not review the propriety of a trial court's imposition of sanctions. Rather, we reviewed, *de novo*, whether the trial court correctly found that no ethical violations of the Code of Professional Responsibility occurred. *Id.* at 108, 250 S.E.2d at 299. Such a review is consistent with the standard we enumerated above as applied to Rule 11 of the Rules of Civil Procedure. *See Page*, 128 N.C. App. at 680, 497 S.E.2d at 424. To the extent *Swenson* cites and relies upon *Robinson* and *Dale*, we re-emphasize again that those cases did not involve review of an underlying disciplinary order, but rather, the exercise of this Court's own inherent authority.

In sum, Sperando has failed to cite persuasive authority for the proposition that this Court sits as one of original jurisdiction when reviewing the propriety of disciplinary sanctions imposed by a trial court. To the contrary, the case law involving our Rules of Civil Procedure and the exercise of the court's inherent authority to disci-

pline attorneys indicates that such a review warrants an abuse of discretion standard. Therefore, we review the trial court's order of sanctions in this case for abuse of discretion.

II. Attorney's Fees as a Sanction

[2] Sperando argues that the trial court's sanction of attorney's fees was error because the trial court did not have express statutory authority to impose fees in this context. Although we agree with Sperando that no statutory authority exists for the imposition of fees here, we nevertheless hold that the trial court had authority to order Sperando to pay attorney's fees for her violation of the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct.

In its order, the trial court addressed the issue of its authority to impose attorney's fees as a sanction. The trial court noted that the general rule requires express statutory authority for the imposition of attorney's fees; however, as the trial court noted, the court has inherent authority to sanction attorneys for misconduct, which sanctions may include the imposition of attorney's fees, irrespective of statutory authority.

All courts are vested with inherent " ' "authority to do all things that are reasonably necessary for the proper administration of justice." ' " *State v. Buckner*, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000) (citations omitted); *See Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). "Inherent power is that which a court necessarily possesses irrespective of constitutional provisions. . . . Such power may not be abridged by the legislature and is essential to the court's existence and the orderly and efficient administration of justice." *Buckner*, 351 N.C. at 411, 527 S.E.2d at 313.

"This Court has the inherent power to deal with its attorneys." *Beard*, 320 N.C. at 130, 357 S.E.2d at 696 (holding trial court has authority to order attorneys to make payments to Client Security Fund). " 'The power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice.' " *Id.* (quoting *In re Burton*, 257 N.C. 534, 542-43, 126 S.E.2d 581, 587-88 (1962)).

In *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977), our Supreme Court noted that this inherent authority encompasses

not only the "power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct." *Id.* (citing Canon 3B(3), N.C. Code of Judicial Conduct). "Unprofessional conduct subject to this power and duty includes 'misconduct, malpractice, or deficiency in character,' . . . and 'any dereliction of duty except mere negligence or mismanagement.' " *Id.* (quoting *Burton*, 257 N.C. at 542, 126 S.E.2d at 587). "Even absent an express grant of authority . . . trial courts have inherent authority to impose sanctions for wilful failure to comply with the rules of court." *Few v. Hammack Enter., Inc.*, 132 N.C. App. 291, 298, 511 S.E.2d 665, 670 (1999) (holding trial court has inherent authority to sanction parties for violation of Rules of Mediation); *see also Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 782 (1999) (trial court retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rules).

In *Robinson*, 37 N.C. App. at 676, 247 S.E.2d at 244, this Court noted that the inherent power of the court to discipline attorneys includes the imposition of monetary sanctions:

> There is no question that a Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment.

Id. (citations omitted); *see also, e.g., Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) ("[s]imilarly, we hold it to be within the inherent power of the trial court to order plaintiff to pay defendant's reasonable costs including attorney's fees for failure to comply with a court order").

In *Chambers*, 501 U.S. at 44, 115 L. Ed. 2d at 44, the United States Supreme Court reaffirmed that all courts have inherent authority to punish lawyers for ". . . 'disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.' " *Id.* (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798, 95 L. Ed. 2d 740 (1987)). It further stated that "[a] primary aspect of that discretion is the ability

to fashion an appropriate sanction for conduct which abuses the judicial process," including the "assessment of attorney's fees." *Id.* at 44-45, 115 L. Ed. 2d at 45.

In *Chambers*, the United States Supreme Court reviewed the propriety of the trial court's imposition of sanctions in the amount of the opposing party's full attorney's fees for the attorney's bad faith conduct. The Court determined that the trial court's imposition of attorney's fees as a sanction for the attorney's misconduct was not an abuse of discretion and was a proper exercise of the court's inherent authority. *Id.* at 55, 115 L. Ed. 2d at 52. We likewise hold that the trial court here had the inherent authority to impose attorney's fees as a sanction for Sperando's misconduct.

III. Due Process

[3] Sperando next argues that she was denied due process of law when the Supreme Court determined that she was in violation of the Rules of General Practice and the Rules of Professional Conduct because the Supreme Court failed to give her notice or an opportunity to be heard on the issue. This Court is "not at liberty to revisit" issues previously decided by our Supreme Court. *State v. Stephenson*, 144 N.C. App. 465, 478, 551 S.E.2d 858, 867, *appeal dismissed and disc. review denied*, 354 N.C. 227, 554 S.E.2d 829 (2001). "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (Parker, J., concurring in the result); *see also, D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966).

The issue of whether Sperando violated the Rules of General Practice and the Rules of Professional Conduct has already been determined by our Supreme Court. The only issue properly before this Court is whether the trial court's imposition of sanctions was proper and "appropriate," as mandated by the Supreme Court.

IV. Extent of Sanctions Imposed

[4] Sperando next maintains that the trial court's order must be reversed because the sanctions imposed are "excessive and disproportionate" to other sanctions that have been imposed in this State for similar misconduct. Again, we review the trial court's order for abuse of discretion. "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State*

v. Fowler, 353 N.C. 599, 620, 548 S.E.2d 684, 699 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The sole basis for Sperando's argument is that she cannot locate another case from this State wherein such severe sanctions have been imposed for similar misconduct. We agree with Sperando that there may not exist another case from this State wherein an attorney has received such harsh sanctions for similar conduct. However, the fact that no other court has imposed like sanctions for such behavior does not mandate a conclusion that the trial court has abused its discretion in ordering such sanctions here. Our Supreme Court has expressly rejected an identical argument in the context of attorney discipline. *See State Bar v. Frazier*, 269 N.C. 625, 636, 153 S.E.2d 367, 374, *cert. denied*, 389 U.S. 826, 19 L. Ed. 2d 81 (1967).

In *Frazier*, the appealing attorney had been suspended from the practice of law for one year for "corrupt" and "unprofessional conduct." Our Supreme Court noted:

> [The appealing attorney] complains that he has been singled out for prosecution; that others have been guilty of unethical conduct who have not been punished or who have not received as severe punishment as did he, and, in effect, because all have not been prosecuted and punished, he should not be.
>
> It is possible that others have not been apprehended, but if in the effort to enforce a high standard of conduct and ethics the Council should be required in each case to show the facts and results in every similar case it had investigated, the inquiry would go on endlessly.
>
> This is equivalent to the position that until all murderers, robbers, and other criminals have been convicted and punished, the remainder, even though their guilt is clearly established, should not be either. The fallacy of this position is apparent from a statement of his contentions.

Id. As stated in section .0100 of our State Bar Rules (Discipline and Disability of Attorneys):

> Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times, or that it has not been made the subject of earlier dis-

> ciplinary proceedings, will not be a defense to any charge of misconduct by a member.

R. N.C. St. B. B.0101, 2001 Ann. R. (N.C.) 317, 343.

Moreover, the recent trend in policing the legal profession more strictly renders prior case law on these issues less instructive. As our Supreme Court recently observed:

> We have viewed with concern the apparent decline in civility in our trial courts. This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to insure that the mandates of Rule 12 are strictly complied with in all cases and to impose appropriate sanctions if they are not.

State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999).

The most significant of the court's sanctions in this case are the immediate revocation of Sperando's ability to practice *pro hac vice* in North Carolina in all pending cases and for one year, and the order that she partially reimburse Duke University for attorney's fees in the amount of $53,274.50.

It is well-established that the " '[a]dmission of counsel in North Carolina *pro hac vice* is not a right but a discretionary privilege.' " *Smith*, 141 N.C. App. at 209, 540 S.E.2d at 779 (quoting *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (1982)). Such a right is "permissive and subject to the sound discretion of the Court." *State v. Hunter*, 290 N.C. 556, 568, 227 S.E.2d 535, 542 (1976), *cert. denied*, 429 U.S. 1093, 51 L. Ed. 2d 539 (1977)).

Further:

> The right to appear *pro hac vice* in the courts of another state is not a right protected by the Due Process Clause of the Fourteenth Amendment. The Federal Constitution does not obligate state courts to grant out-of-state attorneys procedural due process in the grant or denial of their petition for admission to practice *pro hac vice* in the courts of the state.

In re Smith, 301 N.C. 621, 630, 272 S.E.2d 834, 840 (1981) (citations omitted). The purpose of the statutes governing an attorney's ability to be admitted *pro hac vice* " 'is to afford [North Carolina] courts a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State.' " *Smith*, 141 N.C. App. at 209, 540 S.E.2d at 779 (citation omitted).

Under N.C. Gen. Stat. § 84-28, attorneys admitted to practice *pro hac vice* are subject to the same disciplinary jurisdiction of this State as are attorneys licensed to practice here. That statute provides that a violation of the Rules of Professional Conduct of this State "shall be grounds for discipline," including disbarment or "[s]uspension for a period up to but not exceeding five years." N.C. Gen. Stat. § 84-28(b), (c)(2) (1999). Clearly, N.C. Gen. Stat. § 84-28 contemplates that an attorney admitted to practice *pro hac vice* in this State may be "suspended" from doing so for an extended period of time. *See also*, *Robinson*, 37 N.C. App. at 676, 247 S.E.2d at 244 (sanctions available against attorneys practicing in North Carolina include "suspension for a limited time of the right to practice before the court, [and] suspension for a limited time of the right to practice law in the State"). Moreover, N.C. Gen. Stat. § 84-4.2, providing courts with the ability to summarily revoke an attorney's *pro hac vice* status, in no way limits a court's ability to do so, simply stating that the court may revoke the status "on its own motion and in its discretion." N.C. Gen. Stat. § 84-4.2.

The trial court here examined in detail a variety of possible sanctions it could impose upon Sperando. The court enumerated various factors it considered in deciding to suspend Sperando from the ability to practice in this State for one year. The trial court weighed possible sanctions "in light of all of the evidence and the Court's duty to protect the public and the administration of justice." The Court, having observed Sperando as a witness during the hearing, noted that it had "serious concerns about Ms. Sperando's continued representation of clients in North Carolina," in light of her "repeated[] and reckless[]" violation of "clear North Carolina rules without any inquiry into whether her conduct was appropriate," and her lack of candor before the court.

The trial court also explained in detail its "concern that [Sperando] in the future will disregard North Carolina rules when she does not agree with them," and that "[h]er testimony and her conduct further demonstrate that she does not fully understand or appreciate the problems caused by [her conduct]." It further noted:

> The Court has considered whether lesser sanctions and shorter time frames would be sufficient and has determined that they would not. The Court has further considered additional sanctions and longer time frames but in view of the fact that Ms. Sperando did apologize in open court, the serious effect [of] her well-publicized misconduct has no doubt already had on her reputation, the other mitigating factors reflected in this Order, and the other requirements of this Order, the Court finds that further sanctions would be unduly harsh for these violations and would serve no reasonable purpose. The Court has further considered a different mix of sanctions and time frames and finds that the sanctions imposed, taken together, are appropriate under all the circumstances.

(Footnote omitted.)

We emphasize that Sperando does not have a right to practice *pro hac vice* in this state. Her ability to do so is a privilege, the granting of which is entirely within the discretion of the court. Under N.C. Gen. Stat. § 84-28, attorneys practicing in this state, including those admitted *pro hac vice*, may be suspended from practice for up to five years for a violation of the Rules of Professional Conduct. The trial court's order in this case is comprehensive in its examination of the applicable law, and in its examination of all of the evidence, including equitable factors in favor of Sperando. We discern no abuse of the trial court's wide discretion in this matter.

With respect to the sanction of $53,274.50 in attorney's fees, the trial court found as follows:

> The Court finds that the attorneys' fees incurred by [Duke University] on appeal of this case were reasonable given the amount of the verdict and the seriousness of the issue; those fees total almost $190,000. A substantial issue before the Court of Appeals and the only issue before the Supreme Court was whether Ms. Sperando had broken the rules in her closing argument, which Ms. Sperando did not concede and indeed strenuously contested . . . . Thus, most of [Duke University's] attorneys' fees on appeal were incurred as a direct result of Ms. Sperando's unethical and unprofessional behavior. . . .
>
> The Court will require Ms. Sperando to pay to [Duke University] the sum of $53,274.50, which the Court finds to be the minimum

> amount spent by [Duke University] on attorneys' fees related to proceedings before the Supreme Court and this Court in connection with Ms. Sperando's misconduct.

(Footnote omitted.)

Although the trial court specifically found that "[t]here is no evidence before the Court that these fees were not incurred or that they were unreasonable," the record does not provide ample basis for determining whether the trial court's finding is in error. The only supporting evidence in the record is the affidavit of Niccolo A. Ciompi, a member of Duke University's Counsel staff, who opined that the fees incurred by the University were reasonable. While we do not doubt that these fees were actually incurred by Duke University, or that the University may view such amounts as reasonable, we cannot hold that it is reasonable to require opposing counsel to reimburse for attorney's fees that are not objectively reasonable based upon a determination of what is customarily charged for such services in the profession. As this Court has noted in other contexts, an award of attorney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence. *See, e.g., Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000).

Ciompi's affidavit was accompanied by twenty-two pages of invoices charged to the University by the law firms of Maxwell, Freeman and Bowman, P.A. and Robinson, Bradshaw & Hinson, P.A., in connection with the University's single-issue appeal to the Supreme Court. The bills submitted by Maxwell, Freeman and Bowman, P.A. clearly detail the work performed in connection with the appeal, and particularly time spent on each task, totaling approximately $8,000.00. However, the bills submitted by Robinson, Bradshaw & Hinson, P.A., provide only a total amount due for services rendered. Although the bills detail the dates on which particular tasks were performed, the bills do not contain any information regarding how much time was spent on any particular task, what rate was charged for the performance of such tasks, how many attorneys performed work on the matter, nor how much money was actually charged for each task. The bills only list total sums owed by Duke University, totaling approximately $48,000.00, including approximately $42,526.00 in attorney's fees, $4,720.52 in computerized research, and $452.52 in other expenditures.

The trial court in this case failed to make any findings of fact regarding the reasonableness of the fees charged to Duke University on appeal to the Supreme Court in light of what is customarily charged for similar services. Nor does the record allow us to determine the exact origin of approximately $42,526.00 of fees charged to Duke University. The absence of such findings and evidence is especially troubling in light of the substantial amount of attorney's fees charged to Duke University for their appeal to the Supreme Court on the sole issue of Sperando's jury argument, an issue previously briefed and argued by the parties before this Court.

We therefore reverse the trial court's imposition of $53,274.50 in attorney's fees and remand for a new hearing on this issue, with a focus on the exact amounts charged to Duke University for particular legal services, and whether the amounts charged for these services are objectively reasonable based upon the custom of the profession for the providing of similar services.

We have reviewed the remaining sanctions imposed upon Sperando, such as the censure, the requirement that she report the order as an Order of Discipline when required to do so, her reimbursement to Couch for any expenses she incurred as a result of the appeal to the Supreme Court, and that the order be delivered to the state bars of Florida and New York. We conclude that the ordering of these sanctions was within the trial court's authority and that the trial court did not abuse its discretion in doing so. These assignments of error are overruled.

V. Sufficiency of the Evidence

In her final argument, Sperando contends that the trial court's findings of fact and conclusions of law are not supported by sufficient evidence. We have carefully examined the record before us and conclude that, with the exception of the court's imposition of attorney's fees, the evidence was sufficient to support the trial court's findings of fact, which findings in turn support its conclusions of law.

We hereby affirm the trial court's imposition of all sanctions against Sperando except the requirement that she reimburse Duke University for its attorney's fees in the amount of $53,274.50. We remand to the trial court for a new hearing on the issue of attorney's fees.

Affirmed in part; reversed and remanded in part.

Judges TYSON and SMITH concur.

STATE OF NORTH CAROLINA v. DEWAYNE ANTHONY McNAIR

No. COA00-1202

(Filed 6 November 2001)

1. Indictment and Information— amendment—victim's name—typographical errors

The trial court did not err in a robbery with a dangerous weapon, second-degree kidnapping, and first-degree kidnapping case by allowing the State to amend the name of the victim in two of seven indictments from Donald Dale Cook to Ronald Dale Cook to comport with the evidence presented at the trial on the ground that they were typographical errors, because: (1) the correct name of the victim appears twice on the indictment for robbery with a dangerous weapon; (2) the variance was inadvertent, and defendant was neither misled nor surprised as to the nature of the charges; and (3) the amendment did not substantially alter the charge in the original indictment.

2. Criminal Law— prosecutor's argument—defendant's failure to present evidence of alibi

The trial court did not err in a robbery with a dangerous weapon, second-degree kidnapping, and first-degree kidnapping case by allowing the prosecutor to comment, over defendant's objection, on defendant's failure to present evidence of an alibi, because: (1) it was not an impermissible comment on defendant's decision not to testify; and (2) while a prosecutor may not comment on the failure of the accused to testify, he may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State.

3. Sentencing— firearms enhancement—second-degree kidnapping—issue not submitted to jury

Although the trial court erred by enhancing each of defendant's sentences for his convictions of second-degree kidnapping

by sixty months for possession of a firearm during the offense where the jury did not specifically pass on the issue, it was not plain error because there is no reasonable possibility that had the error in question not been committed that a different result would have been reached at trial.

4. Sentencing— firearms enhancement—second-degree kidnapping—fatally defective indictment

The trial court committed plain error by enhancing each of defendant's sentences for his convictions of second-degree kidnapping by sixty months for possession of a firearm during the offense based on a fatally defective indictment because the indictment failed to allege the facts to support the firearms enhancement found in N.C.G.S. § 15A-1340.16A.

Appeal by defendant from judgments entered 14 April 2000 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 13 September 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander Peters, for the State.

W. David Lloyd for defendant appellant.

McCULLOUGH, Judge.

Defendant Dewayne Anthony McNair was tried before a jury at the 27 March 2000 Criminal Session of Guilford County Superior Court. The facts shown at trial were that early on the morning of 2 October 1996 two black males, one matching the description of defendant, were picked up by a cab driver for the Red Bird Cab Company in Greensboro. Soon after the cab reached the on-ramp for Interstate 85 Business, one of the men pulled a gun and directed the driver to pull over. After being robbed of her collected fares, the driver was forced to get into the trunk of the cab.

While the driver was in the trunk, defendant and two other men stopped at the Bi-Lo grocery store at approximately 2:00 a.m. Once there, defendant forced two store employees who were stocking shelves into the store's bathroom and robbed them. Defendant then returned to the front of the store and assaulted another store employee until she became unconscious. In the meantime, the two other men with defendant had forced the store's manager and assistant manager to hand over all the store's cash and receipts.

The threesome left the store in the stolen cab. They parked the cab in a well-lit area, got into another car and left, leaving the driver in the trunk.

Defendant was indicted on four counts of robbery with a dangerous weapon, two counts of second degree kidnapping, and one count of first degree kidnapping. The jury convicted defendant on all counts. Defendant was sentenced to minimum terms of 146 months and maximum terms of 185 months for each of the convictions of robbery with a dangerous weapon; a minimum term of 168 months and a maximum term of 211 months for the first degree kidnapping conviction; minimum terms of 119 months and maximum terms of 152 months for each of the second degree kidnapping convictions, of which 60 months was based on the "firearm enhancement" pursuant to N.C. Gen. Stat. § 15A-1340.16A, all to run consecutively.

Defendant asserts that the trial court erred by (I) allowing the State to amend the indictments from Donald Dale Cook to Ronald Dale Cook to comport with the evidence presented at trial on the ground that they were typographical errors; (II) allowing the prosecutor to comment, over defendant's objection, on defendant's failure to present evidence of alibi in violation of his rights under both state and federal constitutions; and (III) enhancing each of defendant's sentences for his convictions of second degree kidnapping by 60 months for possession of a firearm during the offense where the jury did not specifically pass on the issue in violation of *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), as plain error.

I.

[1] Defendant's first assignment of error asserts that the trial court erred in allowing the State to amend the indictments against defendant.

N.C. Gen. Stat. § 15A-923(e) (1999) provides that "[a] bill of indictment may not be amended." An amendment within the meaning of this statute is " 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v. Marshall*, 92 N.C. App. 398, 401, 374 S.E.2d 874, 875 (1988) (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)), *cert. denied*, 328 N.C. 273, 400 S.E.2d 459 (1991).

This Court has held that "[a] change in an indictment does not constitute an amendment where the variance was inadvertent and

defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999); *see also Marshall*, 92 N.C. App. 398, 374 S.E.2d 874.

In the *Marshall* case, the trial court allowed the State to amend the victim's name in a rape indictment from "Regina Lapish" to "Regina Lapish Foster." *Marshall*, 92 N.C. App. at 401, 374 S.E.2d at 875. In that case there were four separate indictments for different criminal violations. *Id.* Only the rape indictment used the incorrect name of the victim. The Court, in affirming the trial court, said that "[i]t is clear that the rape indictment inadvertently omitted the last name of Regina Lapish Foster. At no time was defendant misled or surprised as to the nature of the charges against him." *Id.* at 401, 374 S.E.2d at 876.

In *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990), the trial court allowed the State to amend the victim's name on three indictments from "Pettress Cebron" to "Cebron Pettress." *Id.* at 475, 389 S.E.2d at 133. The Court, citing *Marshall*, concluded that the errors in the indictments were inadvertent, and said, "We discern no manner in which defendant could have been misled or surprised as to the nature of the charges against him." *Bailey*, 97 N.C. App. at 476, 389 S.E.2d at 133.

In the present case, the trial court allowed the State to amend two of seven indictments. Specifically, in case 00 CRS 23235, Count I indicts defendant for robbery with a deadly weapon of the victim, Ronald Dale Cook. It refers to the victim properly twice, but it refers to a "Donald Dale Cook" once. In case 00 CRS 23236, Count II indicts defendant for two counts of second degree kidnapping of the victim, who was also Ronald Dale Cook. However, in this Count, the indictment only refers to a "Donald Dale Cook." At trial, the "D's" were amended to "R's" so that both indictments read "Ronald" throughout.

The errors in the indictments were inadvertent. The correct name of the victim appears twice on the indictment for robbery with a deadly weapon. The defendant could not have been misled or surprised as to the nature of the charges against him, and the indictments were correct in all other respects. We hold that " 'the amendment to the indictment was permissible because it did not substantially alter the charge in the original indictment.' " *State v. Bowen*, 139 N.C. App. 18, 27, 533 S.E.2d 248, 254 (2000) (quoting *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994)).

We note that there is a line of cases by our Supreme Court which hold that "[a] change in the name of the victim substantially alters the charge in the indictment." *See State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) ("Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal."). *Id.* The *Abraham* case held that a change from Carlose Antoine Latter to Joice Hardin was such a change that substantially altered the indictment, and was fatal. *Id.* at 339, 451 S.E.2d at 143; *see also State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 522 (1998) (holding that a change from Gabriel Hernandez Gervacio to Gabriel Gonzalez was fatal); *State v. Bell*, 270 N.C. 25, 29, 153 S.E.2d 741, 744 (1967) (holding that a change from Jean Rogers to Susan Rogers was fatal); and *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962) (holding that a change from Frank E. Nutley to Frank E. Hatley was fatal). The defendant argues that our cases of *Bailey* and *Marshall* are irreconcilable with these cases. We disagree.

Our Court has recently cited *Abraham* for the proposition that a change in the defendant's name substantially alters the indictment. *See Bowen*, 139 N.C. App. 18, 533 S.E.2d 248; *State v. Grigsby*, 134 N.C. App. 315, 517 S.E.2d 195 (1999), *reversed on other grounds*, 351 N.C. 454, 526 S.E.2d 460 (2000). Likewise, the Supreme Court has cited the *Bailey* case and its holding permitting the change of a defendant's name with approval in *State v. Snyder*, 343 N.C. 61, 68, 468 S.E.2d 221, 225 (1996). We do not believe the Supreme Court intended the *Abraham* holding to be a blanket prohibition on changing the name of the victim in a criminal indictment. Correcting inadvertent mistakes in an indictment, which was done here and in the previous *Bailey* and *Marshall* cases, does not undermine the holding in *Abraham*. These cases can be read in harmony, rather than in opposition.

This assignment of error is overruled.

II.

[2] Defendant next assigns error to the trial court's overruling of his objection to the State's closing argument, and argues that it was an impermissible comment on defendant's decision not to testify. At the end of the State's closing, the following transpired:

> [MR. PANOSH: State]: And there has not been one shred of evidence to say that the defendant was not there that night, robbing the Bi-Lo. Ask yourself, ladies and gentlemen of the jury, if you

lived 800, 900 miles away from Greensboro, somewhere in Florida, and you were accused of something you didn't do on October the 2nd of 1996, don't you think you'd have one neighbor, one—

MR. LLOYD: Objection, Your Honor. Improper comment on the defendant's decision not to testify or present evidence.

THE COURT: Overruled.

MR. PANOSH: —one girlfriend, one wife, one fellow employee, one person who knows that you were down there in Florida, and not robbing the Bi-Lo? Couldn't you have that one person here to explain to this jury that it's all a big mistake?

The State's evidence is totally uncontroverted, and there's not been one shred of evidence to say he was anywhere but at the Bi-Lo, robbing the Bi-Lo, that he was anywhere but in Greensboro and High Point, planning the abduction, the kidnapping and the robbery of Ms. Martin and taking part in it. Not one shred of evidence consistent with innocence.

To put this into context, the parties had discussed on the record with the trial court their respective strategies before closing arguments were given. The State expressed its displeasure with the fact that defendant had forecasted an alibi in his opening statement by saying, "Our evidence will show that he was not there at the Bi-Lo," and then did not put on any evidence. The State asked for "substantial latitude" to address this fact in closing arguments. Defendant considered this a backdoor attempt to comment on defendant's decision not to testify. Defendant admitted that he had said, "Our evidence will show he was not at the Bi-Lo. He's not the one." The trial court decided to postpone any ruling and that defendant would have to object at the time.

"While a prosecutor may not comment on the failure of the accused to testify, he may 'comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State.' " *State v. Skeels*, 346 N.C. 147, 153, 484 S.E.2d 390, 393 (1997) (quoting *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993)). Defendant in this case argues that the State has created a "ruse" that creates the "inescapable conclusion that an innocent man would have presented evidence of his alibi through not only other people, but by taking the stand himself." We are not convinced. The prosecutor's comments were directed "solely toward the

defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself; as such, the statement did not constitute an impermissible comment on defendant's failure to testify." *State v. Jordan*, 305 N.C. 274, 280, 287 S.E.2d 827, 831 (1982); *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977). In *Jordan*, the district attorney noted in his closing argument "that defendant had not produced any alibi witnesses and stated, 'Where are the witnesses who can put him anywhere else?' " *Id.* at 279-80, 287 S.E.2d at 831. We find the comments here to be no different. *See also State v. Williams*, 341 N.C. 1, 459 S.E.2d 208 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996) (holding that prosecutor's statement that, if defendant was somewhere else on the dates of the crimes, someone would have come into court and told the jury where defendant was at the time of the crimes, was not improper, but directed toward defendant's failure to offer evidence to rebut State's case); *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995), *aff'd sub nom. Ward v. French*, 165 F.3d 22 (4th Cir. 1998), *cert. denied*, 526 U.S. 1124, 143 L. Ed. 2d 809 (1999) (holding that prosecutor's comments in closing arguing that defendant failed to produce forecasted evidence were not improper comments on defendant's failure to testify, but instead were fair and proper comments on defendant's failure to present any evidence).

This assignment of error is overruled.

III.

[3] Defendant's final assignment of error is that the trial court erred by enhancing his sentence by 60 months for possession of a firearm during the offense for which he was convicted where the jury did not specifically pass on the issue in violation of *Jones*, 526 U.S. 227, 143 L. Ed. 2d 311, and *Apprendi*, 530 U.S. 466, 147 L. Ed. 2d 435.

Since defendant filed this appeal, our Supreme Court has ruled on the applicability of *Jones* and *Apprendi* to North Carolina's sentencing in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). We note initially that *Lucas* controls in this case. The *Lucas* Court stated that "this ruling applies to cases in which the defendants have not been indicted as of the certification date of this opinion [9 August 2001] and to cases that are now pending on direct review or are not yet final." *Id.* at 598, 548 S.E.2d at 732. While defendant's appeal was docketed 16 October 2000, it was not heard until 13 September 2001.

As defendant notes in his brief, he did not raise an objection at trial and thus our review is limited to a review for "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Our Supreme Court adopted the plain error rule in *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983), with regard to N.C.R. App. P. 10(b)(1), "when no objection or exception to evidence presented and admitted was made at trial." *State v. Gardner*, 315 N.C. 444, 449, 340 S.E.2d 701, 706 (1986); *see also United States v. McCaskill*, 676 F.2d 995 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982). The N.C. Supreme Court reiterated the standard in *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986):

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

Id. at 39, 340 S.E.2d at 83-84 (citations omitted). It is with this standard in mind that we review defendant's appeal.

In *Lucas*, the Supreme Court analyzed the North Carolina sentencing enhancement located in N.C. Gen. Stat. § 15A-1340.16A in light of the *Jones* and *Apprendi* holdings. Those holdings state that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). The N.C. Supreme Court found that the enhancement did increase the penalty beyond the prescribed statutory maximum. See *Lucas*, 353 N.C. at 592-98, 548 S.E.2d at 728-32 (for full discussion on North Carolina's sentencing structure). Thus, the Court held as follows:

> [W]e hold that in *every* instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, *it must allege the statutory factors supporting the enhancement in an indictment . . . and submit those factors to the jury.* If the jury

> returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence.

Id. at 597-98, 548 S.E.2d at 731 (emphasis added). The Supreme Court did not find the enhancement unconstitutional on its face, only that it requires (1) the factors alleged in an indictment, (2) submitted to the jury, and (3) proven beyond a reasonable doubt. As long as this procedure is followed, the enhancement is constitutionally sound.

Neither of the three requirements set forth in *Lucas* were fulfilled in the present case. There is therefore error. However, this does not end our discussion under plain error review. The key now is to determine whether the jury would have reached a different verdict had the error not been committed. More precisely, could the jury, having been given the task of determining whether or not defendant used a firearm during the kidnapping of the two store employees who were stocking shelves, have answered in the negative.

The State argues that, because the evidence of the fact that defendant had a firearm in his possession during the commission of the kidnapping is overwhelming and uncontroverted, it is impossible that the jury could have come back with an answer in the negative. The jury convicted defendant of robbery with a dangerous weapon of the same two victims. The facts at trial showed that the dangerous weapon involved was a firearm. Defendant committed the robbery and the kidnapping simultaneously. All witnesses saw the gun. Defendant put on no evidence to refute the testimony of the State's witnesses.

The State cites as authority for its "overwhelming and uncontroverted" proposition *Neder v. United States*, 527 U.S. 1, 17, 144 L. Ed. 2d 35, 52 (1999). In *Neder*, a federal district court judge refused to give an instruction to the jury on an element of the offense charged [materiality in tax fraud]. While this was found to be error, the Supreme Court of the United States found it to be harmless error for two reasons: (1) While the jury did not make a finding of materiality, no jury could reasonably find that the accused's failure to report a substantial amount of income on his tax returns was not a material matter, where the government's evidence supporting materiality was so overwhelming that the accused did not argue to the jury, and does not argue on review, that his false statements of income could be found immaterial; and (2) where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and

was supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. *Id.* The U.S. Supreme Court justified its holding two ways, explaining that its approach reaches an appropriate balance between society's interest in punishing the guilty and the method by which decisions of guilt are made, and does not fundamentally undermine the purposes of the U.S. Constitution's Sixth Amendment guarantee of the right to a jury trial. *Id.*

Under North Carolina law, "[i]n deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79. Here there is no defect in the instruction; just no instruction. However, we feel that our law and *Neder* are harmonious.

It appears from the record to this Court beyond a reasonable doubt that defendant indeed possessed a firearm during the commission of the kidnapping of the two employees of the Bi-Lo. The evidence in the record is overwhelming and uncontroverted, and to such an extent that the jury could not have come to a differing conclusion. We hold that, while it was error not to submit to the jury the specific question of fact whether defendant possessed a firearm during the commission of the kidnapping, it was not plain error, because there is no " 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial,' " and defendant has failed to overcome its heavy burden. *State v. Kelly*, 120 N.C. App. 821, 825, 463 S.E.2d 812, 814 (1995) (quoting *State v. Parrish*, 275 N.C. 69, 76, 165 S.E.2d 230, 235 (1969)); *see State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *dismissal allowed, disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992) (trial court's failure to instruct on presence in acting in concert case did not have a probable impact on jury's finding of guilt because there was substantial evidence of defendant's constructive presence at the scene).

[4] This only resolves two of the requirements handed down by *Lucas*, namely that the facts are submitted to the jury and proven beyond a reasonable doubt. The third requirement of *Lucas* presents an entirely different dilemma as the indictment is now defective. Neither party addressed this issue; however, in the interest of justice, we address the issue, and *sua sponte* make a motion for arrest of

judgment. "A motion in arrest of judgment is generally made after verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper." *State v. Davis*, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972).

This Court reviewed the law of fatally defective indictments in *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416 (1998):

> Where there is a fatal defect in the indictment . . . which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment. A defect in an indictment is considered fatal if it "wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.

Id. at 691, 497 S.E.2d at 419 (footnotes omitted).

In the present case and under current law, the indictment is fatally defective because it fails to allege the facts to support the firearm enhancement found in N.C. Gen. Stat. § 15A-1340.16A as required by *Lucas*.

In its brief, the State cites *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000), *cert. denied sub nom. Reyes-Hernandez v. U.S.*, — U.S. —, 150 L. Ed. 2d 209, *cert. denied sub nom. Mojica-Baez v. U.S.*, — U.S. —, — L. Ed. 2d —, *cert. denied sub nom. Ramos-Cartagena v. U.S.*, — U.S. —, — L. Ed. 2d — (2001), in which the First Circuit upheld an indictment under a *Neder* plain error analysis. The facts of that case are analogous to the present case before us. In *Mojica-Baez*, the defendants were indicted and convicted of a crime and had their sentences increased because of the federal firearm enhancement. *Mojica-Baez*, 229 F.3d at 306. Subsequently, the Supreme Court ruled that certain factors which enhance the sentence must be alleged in the indictment and submitted to the jury, because they were elements to a separate offense and not merely sentencing factors. *See Castillo v. United States*, 530 U.S. 120, 147 L. Ed. 2d 94 (2000); *Apprendi*, 530 U.S. 466, 147 L. Ed. 2d 435. Thus, the defendant in that case made the argument that, because of this, the indictments were defective, and not subject to harmless

and/or plain error analysis because these are not trial errors, but structural errors requiring reversal. *Mojica-Baez*, 229 F.3d at 307-08. The court in that case held that the indictment was nevertheless subject to harmless error:

> No interest in safeguarding fair trials or vindicating compelling constitutional policies would be served by classifying the error here as structural. Nor do we think the integrity of the judicial system is implicated. *The reason the indictment in this case did not specify that a semiautomatic assault weapon or AK-47 had been used in the robbery was that circuit precedent at the time did not require it* . . . . It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite another thing to vacate a conviction or sentence based on an indictment *that was entirely proper at the time.*

Id. at 310 (emphasis added). We find this reasoning unpersuasive. *See United States v. Tran*, 234 F.3d 798 (2d Cir. 2000) (stating that *Mojica-Baez* failed to address the failure of an indictment to charge an offense as a jurisdictional matter, and that the Tenth Circuit case *United States v. Prentiss*, 206 F.3d 960 (10th Cir. 2000), had "convincingly reasoned that *Neder* was inapplicable to the failure of an indictment to state an offense"). *Tran*, 234 F.3d at 809 n.2.

Our Supreme Court has ruled that the enhancement found in our statutes was constitutional as long as the requirements of *Jones* and *Apprendi* were followed. It bears repeating what those requirements are: (1) the factors supporting the enhancement must be alleged in an indictment; (2) the issue must be submitted to a jury; and (3) the factors must be proven beyond a reasonable doubt. If these three requirements are not met, the enhancement is unconstitutional. Here, the State did not fulfill these requirements. It therefore follows that the enhancements at the time of trial and sentencing were impermissible under the test set forth by our Supreme Court in *Lucas*.

Accordingly, as to No. 00 CRS 023236 (two counts of second degree kidnapping), we vacate the 60-month enhanced sentence based on the firearm possession, judgment is arrested, and the case is remanded for resentencing.

As to No. 98 CRS 040303 (robbery with dangerous weapon), No. 00 CRS 023235 (two counts of robbery with dangerous weapon), No. 00 CRS 023237 (robbery with dangerous weapon and first degree kidnapping), no error.

Judges MARTIN and BIGGS concur.

STATE OF NORTH CAROLINA v. JAMES R. WOODS

No. COA00-1079

(Filed 6 November 2001)

1. **Drugs; Penalties, Fines and Forfeitures— cocaine—forfeiture proceeding—dismissal of state charges—federal conviction**

The trial court did not err by entering an order of forfeiture of defendant's property under N.C.G.S. § 90-112 for items allegedly purchased with the proceeds of illegal sales of substances even though the indictments against defendant for felonious trafficking in drugs and maintaining a vehicle to keep controlled substances had been dismissed by the State, because: (1) defendant was not acquitted since he was convicted of possession with intent to distribute fifty or more grams of cocaine in the federal court; (2) there is no requirement in N.C.G.S. § 90-112 for a state conviction, and it merely requires a felony under Article 5 of Chapter 90; and (3) there was no conflict between state and federal authorities concerning the forfeited items.

2. **Evidence— hearsay—testimony of a narcotics officer concerning informant's statements—forfeiture proceeding—failure to object**

The trial court did not err during a forfeiture proceeding by allowing a narcotics officer to testify concerning statements made by an informant about defendant's use of vehicles to deliver crack cocaine, because: (1) the narcotics officer subsequently testified, without objection, that the informant told him the vehicles were used in the delivery of crack cocaine; and (2) the evidence would have been admissible even if there had been an

objection since the Rules of Evidence are relaxed in a forfeiture proceeding.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 16 May 2000 by Judge W. O. Smith in Caswell County Superior Court. Heard in the Court of Appeals 18 September 2001.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

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

THOMAS, Judge.

Defendant, James R. Woods, appeals an order for the forfeiture of certain assets after he was convicted in United States District Court of possession with the intent to distribute in excess of fifty grams of cocaine.

Defendant contends the State of North Carolina had no right to the property unless the forfeiture was based on state convictions. He also argues that the trial court committed error at the forfeiture hearing by allowing a narcotics officer to testify as to the statements of an informant. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: On 12 January 1998, surveillance was conducted by the Narcotics Division of the Caswell County Sheriff's Department, pursuant to a confidential and reliable informant. The informant telephoned defendant and arranged to purchase one ounce of cocaine from him. Immediately after the phone call, defendant left his residence in Leasburg, North Carolina, and proceeded toward the rendezvous. Defendant was stopped by detectives from the Narcotics Division and asked if there were any drugs in his vehicle. Defendant said there were. The detectives found 79.6 grams of cocaine in a brown paper bag inside the vehicle. Defendant was arrested and charged with felonious trafficking in cocaine.

On the same date, Detective M. A. Kirby applied for a search warrant to search defendant's residence. The following items were among those seized: (1) 1973 Chevrolet Camaro automobile; (2) 1992 Chevrolet Silverado pickup truck; (3) 1994 Ford Aerostar van; (4)

1938 Chevrolet Coupe automobile; (5) 1993 Ford Taurus automobile; (6) 1993 Ford Mustang automobile; (7) 1982 Chevrolet Corvette automobile; (8) 1986 Ford Mustang automobile; (9) 1991 Infinity Q45 automobile; (10) 1991 Chevrolet S-10 Blazer sport-utility vehicle; (11) at least nine firearms; (12) two sets of digital scales; (13) Yamaha XT 350 dirt bike; (14) two Honda TRX 300 four-wheelers; (15) Honda Gold Wing motorcycle; and (16) over $5000 in cash. The federal government seized the Ford Taurus automobile, the Ford Aerostar van and the money taken from defendant's home.

On 26 January 1998, defendant was indicted in state court for felonious trafficking in drugs and for maintaining a vehicle to keep controlled substances. However, because of superceding indictments in the Federal District Court, Middle District of North Carolina, the state charges against defendant were dismissed by the district attorney. Defendant was subsequently convicted in federal court of possession with intent to distribute in excess of fifty grams of cocaine and sentenced to life imprisonment.

On 14 April 2000, the State moved in the case at bar for forfeiture of the items seized from defendant's home, alleging they were "purchased with the proceeds of illegal sales of substances included in the North Carolina Controlled Substances Act, and were purchased for the purpose of 'laundering' drug money." Defendant answered that the property was no longer required for evidence or for investigative purposes, that he is the titled owner, and that he has exclusive right to possession of the property.

In an order filed 16 May 2000, the trial court found that: (a) defendant had been stopped and drugs found in his possession; (b) certain aforementioned items were seized; (c) defendant had been convicted of multiple drug offenses; (d) it is a common practice of drug traffickers to purchase expensive vehicles and other costly items with narcotics proceeds to launder profits; (e) for the two years proceeding defendant's arrest, he reported no more than $10,000 gross income on tax documents; (f) the estimated value of the vehicles owned at the time of the search warrant was in excess of $40,000; (g) defendant was convicted in federal court of possession with intent to distribute in excess of fifty grams of cocaine; (h) defendant was sentenced to life without the possibility of parole; (i) the seized items were purchased with the proceeds of illegal sales of controlled substances; and (j) the equipment and vehicles were acquired by and used in the conveyance of controlled substances. The trial court con-

cluded the items were forfeited to the Caswell County Sheriff's Department pursuant to N.C. Gen. Stat. § 90-112. Defendant now appeals this order.

[1] By defendant's first assignment of error, he argues the trial court erred in entering the order of forfeiture on the grounds that the indictments against defendant had been dismissed by the State of North Carolina. We disagree.

This is a case of first impression in North Carolina.

Defendant relies upon *State v. Johnson*, 124 N.C. App. 462, 478 S.E.2d 16 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997), in which this Court held the State could not have money forfeited to it when the defendant was acquitted of possessing cocaine with the intent to sell or deliver. In the instant case, defendant contends because the State voluntarily dismissed charges against him, the trial court is precluded from declaring the items at issue forfeited under section 90-112. *Johnson* states that "[c]riminal forfeiture, therefore, must follow criminal conviction." *Id.* at 476, 478 S.E.2d at 25. However, in the instant case, defendant was not acquitted. He was convicted of possession with the intent to distribute fifty or more grams of cocaine in the federal court.

We note there is no requirement in the statute for a state conviction. The statute requires the following:

> (a) The following shall be subject to forfeiture:
>
> . . . .
>
> (2) All money . . . and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article;
>
> . . . .
>
> (4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2), except that
>
> . . . .

> c. No conveyance shall be forfeited unless the *violation* involved is a felony under this Article;

N.C. Gen. Stat. § 90-112 (1999) (Emphasis added). The statute clearly states the items seized by the State were subject to forfeiture. "When statutory language is clear and unambiguous, '[w]ords in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning.' " *Procter v. City of Raleigh Board of Adjustment*, 140 N.C. App. 784, 538 S.E.2d 621 (2000) (quoting *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000)). Some federal forfeiture statutes require a conviction based on a violation of a federal statute. *See* 18 U.S.C.A. § 1963 (2001); 21 U.S.C.A. § 853 (2001). We note the federal criminal forfeiture statute requires a conviction.

> (a) Property subject to criminal forfeiture
>
> Any person *convicted of a violation* of this subchapter ["Control and Enforcement"] or subchapter II ["Import and Export"] of this chapter ["Drug Abuse Prevention and Control"] punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C.A. § 853(a) (2001) (Emphasis added). However, our forfeiture statute, section 90-112, does not require a state conviction by its plain language. It merely requires that the *violation* be a felony under Article 5 of Chapter 90. N.C. Gen. Stat. § 90-112(a)(4a) (1999).

In *State ex rel. Thornburg v. Currency*, 324 N.C. 276, 378 S.E.2d 1 (1989), our Supreme Court held section 90-112(a)(2) is a criminal,

or *in personam*, forfeiture statute rather than a civil, or *in rem*, forfeiture statute. An *in personam* forfeiture requires a criminal conviction of the property's owner, whereas an *in rem* forfeiture only requires the government prove the property was used for an illegal purpose. *Johnson*, 124 N.C. App. at 476, 478 S.E.2d at 25 (quoting Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When is Everything Too Much?*, 53 U. Pitt. L. Rev. 1, 6-7 (1991)). In the case at bar, the government, although it was the federal government as opposed to the state government, proved beyond a reasonable doubt that defendant was guilty of the felony charged.

We further note the elements of the state violation and the federal violation are nearly identical. The North Carolina Controlled Substances Act provides, in pertinent part:

> (a) Except as authorized by this [Act], it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
>
> (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;
>
> (3) To possess a controlled substance.
>
> . . . .
>
> (h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.
>
> . . . .
>
> (3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . . or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:
>
> a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000)[.]

N.C. Gen. Stat. § 90-95 (1999). In comparison, the federal statute provides, in pertinent part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of . . .

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers; [or] . . .

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III)[.]

[S]uch person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual

21 U.S.C.A. § 841 (2001). Defendant violated both statutes and but for N.C. Gen. Stat. § 90-97, could have been prosecuted for both. "If a violation of [the North Carolina Controlled Substances Act] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State." N.C. Gen. Stat. § 90-97 (1999).

Further, in *United States v. Winston-Salem/Forsyth County Board of Education*, 902 F.2d 267 (M.D.N.C. 1990), the U.S. District

Court for the Middle District of North Carolina held that "when cash is administratively forfeited in a federal proceeding, it may be equitably shared with local law enforcement agencies pursuant to 21 U.S.C.A. § 881(e)(1)(A) and 19 U.S.C.A. § 1616a(c)" when the local law enforcement seized forfeited property pursuant to N.C. Gen. Stat. § 90-112. In *United States v. Winston-Salem/Forsyth County Board of Education*, the defendant was charged with possession of cocaine with the intent to sell or deliver it and intentionally maintaining a building to keep or sell controlled substances. The State seized cash from the defendant. However, the drug charges were voluntarily dropped by the State. The cash was transferred to the Drug Enforcement Administration (DEA), which did not prosecute the defendant. Subsequently, state charges were reinstated and the defendant was convicted. The DEA returned a portion of the cash to the local police department. The Board of Education sued to retrieve that portion pursuant to a statute stating money seized should be used for school purposes. The court held the federal and state authorities could share in the forfeited money as long as there was no conflict such that the state and federal laws could not stand together and as long as the Board of Education was not entitled to the money.

Similarly, in the case at bar, we note the federal authorities seized a portion of the total items seized. Section 90-112 authorizes the forfeiture of the remaining items to state authorities. There is no conflict here between state and federal authorities concerning the forfeited items. Thus, the property was appropriately seized and we hold the forfeiture valid. Consequently, we reject defendant's first assignment of error.

[2] By defendant's second assignment of error, he argues the trial court erred in allowing a narcotics officer to testify as to statements made by the informant about defendant's use of vehicles to deliver crack cocaine. We disagree.

After an objection, the trial court allowed Detective Glen Brandon (Brandon), of the narcotics unit, to testify as to why the informant could not tell authorities which vehicle defendant would be driving. Brandon responded, "[Defendant] at that time had a multitude of vehicles at his disposal, to use at any time. He used different vehicles every time he delivered crack cocaine to this individual." He further testified that the informant had indicated the vehicles at issue had been used before to deliver crack cocaine. Defendant argues Brandon's testimony was hearsay and speculative.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801. Nonetheless, our Supreme Court has held that " '[i]t is the well-established rule that when evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.' " *State v. Little*, 278 N.C. 484, 180 S.E.2d 17 (1971) (citations omitted). *See also State v. Featherson*, 145 N.C. App. 134, 548 S.E.2d 828 (2001); *State v. Berry*, 143 N.C. App. 187, 546 S.E.2d 145, *rev. denied*, 353 N.C. 729, 551 S.E.2d 439 (2001). In the case at bar, Brandon subsequently testified, without objection, that the informant told him the vehicles were "used in the delivery of crack cocaine." We hold the objection was then lost. However, we note that the Rules of Evidence are relaxed in a forfeiture hearing. *See Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (1985); *Tripp v. Tripp*, 17 N.C. App. 64, 193 S.E.2d 366 (1972). Thus, the evidence would have been admissible even if there had been an objection. Accordingly, we reject this assignment of error.

AFFIRMED.

Judge GREENE dissents.

Judge Campbell concurs.

GREENE, Judge, dissenting.

I do not agree a federal conviction of a drug offense can constitute a "violation" of Chapter 90, Article 5, the "North Carolina Controlled Substances Act." Thus, as the trial court was without authority to enter an order of forfeiture of defendant's property, I dissent.

Any property "subject to forfeiture" under the provisions of section 90-112(a) may be seized by law-enforcement officers "upon process issued by any district or superior court having jurisdiction over the property." N.C.G.S. § 90-112(b) (1999). The property subject to seizure, however, can be forfeited only upon an order issued by the trial court, N.C.G.S. § 90-112(c) (1999), and only after there has been a felony criminal conviction of either the owner or the possessor of the property used in connection with a violation of Chapter 90, Article 5, *State v. Johnson*, 124 N.C. App. 462, 476, 478 S.E.2d 16, 25 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997); N.C.G.S.

§ 90-112(a)(4)c (1999) (violation must be a felony under Chapter 90, Article 5); N.C.G.S. § 90-112(a) (1999) (items used or possessed "in violation of the provisions" of Chapter 90, Article 5); N.C.G.S. § 90-112(f) (1999) (forfeiture of conveyances must be in accord with section 18B-504); N.C.G.S. § 18B-504(e) (1999) (procedures for disposition of seized property after criminal trial). A conviction of a "nearly identical" federal drug offense is simply not a conviction of an offense enumerated in Chapter 90, Article 5 of the North Carolina General Statutes.

In this case, defendant was not convicted of any drug offense under state law. Indeed, the criminal charges against defendant were dismissed by the State. The order of forfeiture, therefore, must be reversed.

IN THE MATTER OF: THE ESTATE OF EDD DUDLEY MONK, DECEASED

No. COA00-1244

(Filed 6 November 2001)

1. Estate Administration— executors—revocation of letters testamentary

The trial court did not err by affirming the clerk of court's revocation of respondent executors' letters testamentary under N.C.G.S. § 28A-9-1(a), because: (1) the clerk and the trial court found that one of the respondents has a private interest that would tend to hinder or be adverse to a fair and proper administration of the estate since respondent's mother owned 75% of the funeral home that took care of decedent's funeral; (2) the clerk and the trial court found sufficient evidence of three allegations of misconduct, including payment by the estate of attorney fees to a law firm for creation of a limited liability company which did not benefit the estate for which payment the estate was not reimbursed, payment by the estate to an insurance account for which the estate was not reimbursed although respondent asserted that decedent had no insurance, and payment by the estate to a funeral home for decedent's funeral with no itemization or other justification for its cost; and (3) the clerk and trial court found that the remaining respondent has evidenced no inclination to act independently of the other respondent and has in the past been

required to follow specific directions of the other respondent regardless of the cost or waste involved to the estate or any dissatisfaction with such directions.

2. Estate Administration— removal of executors—entitlement to jury—abuse of discretion standard

The trial court did not err in a case involving removal of executors by holding that respondent executors were not entitled to have all issues of fact decided by a jury, because the decision was within the trial court's discretion and the trial court did not abuse its discretion.

Appeal by respondents from order entered 10 August 2000 by Judge Russell J. Lanier, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 17 September 2001.

Thompson & Mikitka, P.C., by E. C. Thompson, III and Susan Collins Mikitka, for petitioner-appellees.

Howard, Stallings, From & Hutson, P.A., by John N. Hutson, Jr. and Brian E. Moore, and Beaver, Holt, Sternlicht, Glazier, Carlin, Britton & Courie, P.A., by H. Gerald Beaver, for respondent-appellants.

HUDSON, Judge.

Lounell Mainor and James Ervin Southerland ("Respondents") appeal from an order of the Superior Court affirming the revocation of their Letters Testamentary ("Letters") by the Clerk of the Superior Court ("the Clerk"). We affirm.

The facts and procedural history relevant to this appeal are as follows. Edd Dudley Monk ("decedent") died on 19 August 1999. His Last Will and Testament ("the Will") provided that Respondents should serve as coexecutors of his Estate.

For several years prior to decedent's death, Respondent Mainor had his Power of Attorney. Several days prior to decedent's death, Respondent Mainor wrote a check for $14,000.00 on decedent's account to the Rose Hill Funeral Home Insurance Account. Additionally, the Rose Hill Funeral Home was paid $35,865.00 for decedent's funeral. Respondent Mainor's mother owned 75% of the Rose Hill Funeral Home, and Respondent Mainor worked there on a volunteer basis. Decedent had at one time owned the funeral home.

Decedent's will provided that certain specified lands should be sold and the proceeds distributed among the designated beneficiaries according to designated interests. Respondents created a limited liability company ("the LLC"), to which some of the lands were sold at their appraised values. Beneficiaries were given the option of buying shares in the LLC or receiving a cash amount equivalent to their designated interests in the appraised value of the land. Not all of the beneficiaries chose to buy shares in the LLC.

On 7 January 2000, Ronald Monk, Helen Newman, Robert Monk, Marion Swan, and Margaret Nixon ("Petitioners"), who were some of the beneficiaries of the Estate, filed a Petition for Revocation of Letters with the Clerk of the Duplin County Superior Court. The Clerk issued an Order Revoking Letters Testamentary on 9 March 2000. Respondents appealed to the Duplin County Superior Court. On 18 August 2000, the Superior Court filed an order affirming the order of the Clerk. Respondents have appealed this order.

Respondents raise two issues in this appeal. First, Respondents argue that the evidence does not support the Superior Court's order affirming the revocation of Respondents' Letters Testamentary. Second, Respondents argue that they are entitled to a jury trial on all factual issues.

As this Court has explained, on appeal from an order of the Clerk,

> the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings.

In re Estate of Pate, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (citations and internal quotation marks omitted), *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995). The trial court here found that the evidence supported the findings made by the Clerk. The standard of review in this Court is the same as that in the Superior Court. *See id.*, 459 S.E.2d at 2-3. We agree with the trial court that the evidence supports the findings made by the Clerk.

[1] Two grounds for revocation of Letters Testamentary are relevant here. They are below:

> (3) The person to whom [the Letters] were issued has violated a fiduciary duty through default or misconduct in the execution of his office, other than acts specified in G.S. 28A-9-2.
>
> (4) The person to whom [the Letters] were issued has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration. The relationship upon which the appointment was predicated shall not, in and of itself, constitute such an interest.

N.C. Gen. Stat. § 28A-9-1(a) (1999). Cases from our Supreme Court and this Court make clear that the determination of whether to revoke an executor's Letters should be guided by consideration of whether the Estate is harmed or threatened with harm. *See In re Taylor*, 293 N.C. 511, 521, 238 S.E.2d 774, 779 (1977); *Matthews v. Watkins*, 91 N.C. App. 640, 645, 373 S.E.2d 133, 136 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989); *In re Estate of Longest*, 74 N.C. App. 386, 391, 328 S.E.2d 804, 808, *disc. review denied*, 314 N.C. 330, 333 S.E.2d 488 (1985). Thus, for example, our Supreme Court has held that a clerk does not abuse his discretion in declining to remove an executor for failure to perform duties such as filing inventories, when such duties can be enforced by an appropriate proceeding. *See Jones v. Palmer*, 215 N.C. 696, 699, 2 S.E.2d 850, 852 (1939). However, an executor must be removed, when an omission of such a duty "is sufficiently grave to materially injure or endanger the estate." *Id.*; *see also Matthews*, 91 N.C. App. at 645, 373 S.E.2d at 136 (same).

With respect to a private interest, the Supreme Court has observed that the same standard should be applied to the determination of whether letters testamentary should be revoked as to the determination of whether letters testamentary should be issued in the first instance. *See In re Moore*, 292 N.C. 58, 66, 231 S.E.2d 849, 854 (1977). In *Moore*, the Court stated that "when it appears that the personal interests of the prospective executor are so antagonistic to the interests of the estate and those entitled to its distribution that the same person cannot fairly represent both, the testator's nominee is unsuitable and disqualified as a matter of law." *Id.* at 65, 231 S.E.2d at 854. Our Court has stated that "[w]here conditions are present, which will prevent the executor from impartially performing his fiduciary duties, he should not be allowed to serve." *In re Moore*, 25 N.C. App. 36, 39, 212 S.E.2d 184, 186-87, *cert. denied*, 287 N.C. 259, 214 S.E.2d 430 (1975).

While Petitioners have made many allegations of misconduct against Respondents, they have identified as most significant the following three alleged acts by Respondent Mainor: (1) the payment by the Estate of $6,313.51 in attorney's fees to the law firm of Pinna Johnston & Burwell, for which payment the Estate was not reimbursed, for the creation of the LLC; (2) the payment of $14,000.00, for which the Estate was not reimbursed, to the Rose Hill Funeral Home Insurance Account, although Mainor asserted that decedent had no insurance; and (3) the payment of $35,865.00 by the Estate to the Rose Hill Funeral Home for decedent's funeral, with no itemization or other justification for the cost. Although any one of these, if supported by competent evidence, would be sufficient to justify revoking the Letters, the Clerk and court found the evidence sufficient as to all three, as well as others.

With respect to the payment of attorney's fees, the Clerk made the following finding:

> 28. . . . [T]he expenses of creating the limited liability company were paid out of the funds of the Estate, including a filing fee to the Secretary of State in the amount of $225.00, and attorneys fees to Pinna Johnston & Burwell in the amount of $6,313.51, as reflected on Plaintiff's Exhibit 40 and in Respondent's notebook. The monies paid for the filing fee were reimbursed to the Estate, but the attorneys fees were not. Payment of such expenses from the Estate was inappropriate. No motion was filed with the Court or order obtained for prior approval of such expenditures.

Respondent Mainor admitted in her testimony before the Clerk that the attorney's fees for creating the LLC were paid by the Estate and that the Estate was never reimbursed for this expense. Therefore, there was sufficient evidence to support this finding of fact. The Superior Court found that there was sufficient evidence to support the finding that estate assets had been used "to create a separate entity which did not benefit the estate in any manner." The payment by the Estate of attorney's fees for the creation of such a limited liability company was adverse to the interests of the Estate. We believe the trial court properly affirmed the Clerk's legal conclusion that payment of these expenses was inappropriate.

With respect to the payment to the insurance account, the Clerk made the following finding:

> 34. Respondent Mainor testified that decedent had no insurance policies of any type, and none were identified on any inventories filed in this matter. Rose Hill Funeral Home maintains an "insurance account," where persons pay insurance premiums and the funeral home handles obtaining "all kinds" of insurance for them. Respondent Mainor's mother owns seventy-five percent (75%) of Rose Hill Funeral Home, and Respondent Mainor "volunteers" at the funeral home. A check was written from decedent's Centura checking account approximately five days before [decedent's] death in the amount of $14,000.00, payable to the Rose Hill Funeral Home Insurance Account (Plaintiff's Exhibit 29). These funds have not been reimbursed to the Estate, despite the assertions of Respondent Mainor that decedent had no insurance.

This finding is entirely consistent with the record and the transcript of Mainor's testimony before the Clerk. The Superior Court found that there was sufficient evidence to support this finding. This factual finding supports the Clerk's legal conclusion that "Respondent Mainor has a private interest that would tend to hinder or be adverse to a fair and proper administration" of the Estate, and the court properly affirmed it.

Finally, with respect to the funeral expenses, the Clerk found as follows:

> 36. The Estate has paid $35,865.00 to Rose Hill Funeral home for decedent's funeral, although the only outstanding factors of the funeral were fancy programs and a gold colored casket that opened full length. No itemization of services was provided in support of this figure. Decedent was placed into a pre-existing crypt, and all that was done with regard to his actual burial was engraving his date of death on the crypt. Such expenses are clearly excessive, and further reflect Respondent Mainor's conflict of interest in this matter, as well as her utter disregard for the obligations imposed upon Respondents in handling the affairs of this Estate.

No accounting was ever provided to the Clerk to justify the amount of funeral expenses. One of the beneficiaries described the casket as being the "most outstanding feature of the funeral." Respondent Mainor could speak only generally about what services were typically included in a funeral service, and could give no details regarding what was provided for decedent's funeral. Months after the hearing, Respondents submitted to the trial court affidavits from Respondent

Mainor and from an owner and president of a mortuary describing the casket in which decedent was buried. We agree with Petitioners that this does not constitute competent evidence. Although Respondents cite case law regarding what constitutes reasonable funeral expenses, it is impossible to evaluate whether the expenses here were reasonable without knowing for what the expenses were incurred. We affirm the trial court's finding and conclusion that there was sufficient evidence to support the Clerk's finding that the expenses were excessive.

On review, we agree with the trial court that the acts described above did not benefit the Estate and evidence a conflict of interest on the part of Respondent Mainor. Respondents argue that Respondent Southerland should not have been removed as executor because there is no evidence of misconduct on his part, and it was error for the Clerk and the trial court to impute Mainor's malfeasance to Southerland. We disagree. The Clerk found that "Respondent Southerland has evidenced no inclination to act independently of Respondent Mainor, and has in the past been required to follow specific directions of Respondent Mainor, regardless of the cost or waste involved to the Estate or any dissatisfaction with such directions." The trial court affirmed the "lack of independent action on behalf of Respondent Southerland." There is evidence in the record to support this conclusion. For example, one of the petitioners testified that when he asked Southerland about the Estate, Southerland answered: "This is Lounell's thing. I'm—I do what Lounell tells me to do." We believe the court properly concluded that both respondents violated their fiduciary duties and were properly removed.

The North Carolina cases cited by Respondents are inapposite. *Kerr v. Kirkpatrick*, 43 N.C. (8 Ired. Eq.) 137 (1851), addressed the issue of whether one coexecutor could be held personally liable for misconduct of his coexecutor. Moreover, the estate in that case consisted principally of bonds, notes, and open accounts, and the coexecutors divided these assets between them and took individual control over them. *See* 43 N.C. (8 Ired. Eq.) at 137. Each coexecutor was thus "answerable only for that part of [the estate] which came to his hands or was under his control." *Id.* at 140. Respondents concede that the issue of whether one coexecutor is responsible for the misconduct of another was not raised in *Longest*, a case in which one coexecutor sought the removal of the other, who had allegedly breached his fiduciary duty. *See* 74 N.C. App. at 387-88, 328 S.E.2d at 805-06.

[2] Citing *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967), Respondents assert that they were entitled to have all issues of fact decided by a jury. However, our Supreme Court clearly indicated in *Lowther* that, in cases involving removal of executors, it is within the court's discretion whether to submit factual issues to a jury. *See* 271 N.C. at 356, 156 S.E.2d at 702. We find no abuse of discretion here.

We hold that the trial court properly concluded that there is evidence to support the factual findings of the Clerk discussed above, and that these factual findings are sufficient to support the revocation of Respondents' Letters Testamentary. Additionally, we hold that the trial court did not abuse its discretion in refusing to submit the factual issues to a jury. Accordingly, we affirm the order of the Superior Court affirming the order of the Clerk.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. TYWUAN DANNELL GREEN

No. COA00-1165

(Filed 6 November 2001)

Search and Seizure— motion to suppress—drugs—plain view

The trial court did not err in a possession with intent to sell and deliver a controlled substance case by denying defendant's motion to suppress drug evidence which resulted in defendant's guilty plea in a situation where an officer inadvertently discovered a plastic baggie of drugs on defendant's body when defendant raised his arms in response to the officer's ordering defendant to remove his hands from his front pants pocket for safety reasons, because the totality of circumstances reveals that: (1) the officer saw in plain view approximately two inches of a plastic baggie sticking out of defendant's pants; (2) the officer testified that before seizing the baggie, he believed it contained a controlled substance since that is the way the officer finds it packaged every day, he saw the same packaging of narcotics in his narcotics classes, plus he had made numerous drug arrests

with the same type bags; (3) the officer testified he observed in the baggie a green vegetable material which he recognized as marijuana based on his education, experience, and training; (4) the officer had probable cause to seize the baggie from defendant's pants, regardless of whether defendant consented to a search when he raised his arms, since the raising of defendant's arms brought the plastic baggie into the officer's plain view; and (5) the officer came upon defendant late at night in an area known for drug activity and at a particular intersection known for drug transactions and arrests.

Appeal by defendant from judgment entered 15 March 2000 by Judge Benjamin G. Alford in Wayne County Superior Court. Heard in the Court of Appeals 12 September 2001.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General George W. Boylan, for the State.

Adrian M. Lapas for defendant-appellant.

HUNTER, Judge.

Tywuan Dannell Green ("defendant") appeals the trial court's denial of his motion to suppress, resulting in his plea of guilty to one count of possession with intent to sell and deliver a controlled substance. We affirm the trial court's denial of defendant's motion to suppress.

The evidence presented during the hearing of defendant's motion to suppress tended to establish the following. On 3 July 1999, Sergeant Steve Mozingo ("Sgt. Mozingo"), of the Wayne County Sheriff's Department, was on routine patrol as a member of the department's Aggressive Criminal Enforcement Unit designed to control street narcotics. At approximately 11:30 p.m., Sgt. Mozingo and another officer were patrolling an area of known drug activity in their patrol car. As the officers approached an intersection where drug transactions are common and arrests are routinely made, they observed three people congregated at the intersection.

Sgt. Mozingo testified that as he approached the three in his patrol car, he observed defendant bend down as though setting something on the ground. Defendant then began to walk away from where he had been standing. Sgt. Mozingo noticed a beer bottle on the ground near where defendant had been standing. The bottle was lying

on its side, and beer was flowing out of the bottle. Sgt. Mozingo exited his vehicle and asked defendant to return to where the beer bottle lay. Sgt. Mozingo testified that he wanted to verify defendant was not engaged in underage drinking, since defendant appeared to be under twenty-one years of age.

As defendant turned to face Sgt. Mozingo, he placed his right hand into his front pants pocket. Sgt. Mozingo requested defendant remove his hand for safety reasons, and defendant complied. Sgt. Mozingo asked defendant his age, to which defendant replied he was twenty-two years old. Sgt. Mozingo requested verification of defendant's age. Defendant responded that his identification was in his vehicle parked nearby. Sgt. Mozingo asked defendant what he had placed in his front pants pocket. Defendant responded, "[n]othing." Sgt. Mozingo then asked defendant if he would consent to a pat down. Defendant replied, "I ain't got nothing," and raised his hands above his head. As defendant raised his arms, his shirt rose above his waistband, revealing approximately two inches of a plastic baggie sticking out of his pants pocket. Sgt. Mozingo testified that based on his "prior experience and training, and knowing how drugs are packaged, [he] retrieved it and found [] green vegetable matter which appeared to . . . be marijuana."

Sgt. Mozingo went to retrieve his citation book from his patrol car, whereupon Corporal Mack Stapps ("Corporal Stapps") monitored defendant. Corporal Stapps observed defendant adjusting his jaw as though he had something in his mouth. Corporal Stapps asked defendant what was in his mouth. Defendant responded that he did not have anything in his mouth, whereupon Corporal Stapps observed "several dark looking objects with white specks in them." Corporal Stapps requested that defendant spit out the objects, and defendant complied. Defendant spit out several green-colored baggies containing what Corporal Stapps observed to be crack cocaine.

Defendant introduced evidence from Dana Lamb ("Lamb"), who testified that she was an eye-witness to the interaction between defendant and the officers. Lamb testified that the officers were "harassing" defendant, that defendant never raised his arms above his head, and that the officers searched defendant without his consent.

At the close of the evidence, the trial court entered an order denying defendant's motion to suppress the drug evidence. Following the denial of his motion, defendant entered a guilty plea to one count of

possession with intent to sell and deliver cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1) (1999). Defendant was sentenced to a minimum of six months' and a maximum of eight months' imprisonment. Defendant appeals the denial of his motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b) (1999).

Defendant argues: (1) the trial court's findings of fact were not supported by the evidence; and (2) the trial court erred in denying the motion to suppress because Sgt. Mozingo lacked probable cause to seize the plastic baggie protruding from defendant's pants.

Defendant first argues that the trial court's finding of fact number eleven is unsupported by the evidence presented at the hearing. The trial court found as follows:

> 10. At that time [that defendant raised his hands] Sgt. Mozingo saw in plain view a plastic baggie commonly used for wrapping sandwiches, and also, according to his education and experience, is used for the packaging and re-packaging of controlled substances, in particular marijuana.
>
> 11. Sgt. Mozingo further testified that this baggie appeared to have some green vegetable material in it, which his education and training indicated to him to be marijuana.

Defendant argues that it is implicit in finding of fact number eleven that Sgt. Mozingo observed the marijuana-like substance in the baggie while the baggie was still protruding from defendant's pants and prior to its seizure. Sgt. Mozingo's testimony at the suppression hearing established that he did not observe the marijuana-like substance until he had removed the baggie from defendant's pants.

Although the trial court's findings of fact could be more clear as to when Sgt. Mozingo observed the marijuana-like substance, finding of fact number eleven is clearly supported by the evidence. Sgt. Mozingo did testify that he observed in the baggie a green vegetable material which he recognized as marijuana based on his education, experience and training. We decline to draw implications from the trial court's finding beyond its plain words.

Defendant next argues that the trial court erred in denying his motion to suppress because Sgt. Mozingo did not have probable cause to seize the baggie from defendant's pants. We disagree. "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact " 'are conclusive on appeal if supported by competent

evidence, even if the evidence is conflicting." ' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001) (citation omitted)). Having determined the challenged finding of fact is supported by competent evidence, we address whether the findings of fact support the denial of defendant's motion to suppress.

The State argues that Sgt. Mozingo had the right to seize the plastic baggie from defendant's pants because defendant consented to a search when he raised his arms. Regardless of whether defendant consented to a search, the raising of his arms brought the plastic baggie into Sgt. Mozingo's plain view. We hold that Sgt. Mozingo's seizure of the plastic baggie was justified under the "plain view" exception to the Fourth Amendment. Under this doctrine,

> police may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband.

State v. Graves, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (citing *State v. Mickey*, 347 N.C. 508, 495 S.E.2d 669, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998)).

Defendant concedes the evidence presented was sufficient to satisfy the first two prongs of the plain view doctrine. Sgt. Mozingo had the right to briefly detain defendant for questioning as to whether defendant was involved in underage drinking. Moreover, Sgt. Mozingo's discovery of the plastic baggie was not the result of any deliberate search. The baggie was revealed inadvertently when defendant raised his arms. We therefore focus only on the requirement that it was immediately apparent to Sgt. Mozingo that the plastic baggie was evidence of a crime or contraband.

Our courts have defined the term "immediately apparent" as being satisfied where " ' ". . . the police have probable cause to believe that what they have come upon is evidence of criminal conduct." ' " *Graves*, 135 N.C. App. at 219, 519 S.E.2d at 772 (quoting *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389-90 (1993) (citation omitted)). " 'Probable cause exists where the "facts and circumstances within their [the officers'] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that"

an offense has been or is being committed.' " *Id.* (quoting *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (citation omitted)). " 'The circumstances leading to [a] seizure "should be viewed as a whole through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." ' " *Id.* (quoting *State v. Hendrickson*, 124 N.C. App. 150, 155, 476 S.E.2d 389, 392 (1996) (citation omitted)).

In *State v. Briggs*, 140 N.C. App. 484, 536 S.E.2d 858 (2000), this Court recently addressed the "immediately apparent" requirement within the context of the plain feel doctrine. In that case, the defendant was stopped in his vehicle at a routine license checkpoint. *Id.* at 486, 536 S.E.2d at 859. In conducting a pat-down search for weapons, the officer felt a cylindrical shape in defendant's pocket that appeared to be a cigar holder. *Id.* at 487, 536 S.E.2d at 859. Knowing that cigar holders are frequently used to store controlled substances, the officer removed and opened the cigar holder from defendant's pocket, revealing several rocks of crack cocaine. *Id.*

This Court noted that there exists a split of authority among states as to whether containers themselves can be immediately apparent as contraband. *Id.* at 489-90, 536 S.E.2d at 861-62. We further noted prior case law from this State fails to fall neatly into either category. *Id.* at 491, 536 S.E.2d at 862. We therefore determined the best approach for analyzing the issue is a totality of the circumstances inquiry. *Id.* at 493, 536 S.E.2d at 863. We stated that the determination of probable cause in such instances "does not require hard and fast certainty by an officer, but involves more of a common-sense determination. . . . [T]hat involves considering the evidence as understood by those versed in the field of law enforcement under the circumstances then existing." *Id.*

In reviewing the totality of the circumstances in that case, we considered evidence that the defendant was stopped late at night and in a high crime area; the officer recognized the defendant as someone who had previously been arrested for a drug offense; the officer smelled cigar fumes in the defendant's car, which he believed to be masking the smell of drugs; the defendant's eyes were red and glassy; and the officer's experience made him aware that cigar holders are commonly used to store controlled substances. *Id.* at 493-94, 536 S.E.2d at 863-64. We concluded the officer "had sufficient information to warrant a person of reasonable caution in the belief that the item he detected contained contraband." *Id.* at 494, 536 S.E.2d at 864.

In the present case, Sgt. Mozingo came upon defendant late at night in an area known for drug activity and at a particular intersection known for drug transactions and arrests. Defendant and two other people were congregated at the intersection. As the officers approached, defendant bent down, then began to walk away from the intersection. When asked by Sgt. Mozingo to return to where he had been standing, defendant immediately placed his hand in his front pants pocket, requiring that Sgt. Mozingo order him to remove his hand for safety reasons. When defendant later raised his arms, Sgt. Mozingo saw in plain view approximately two inches of a plastic baggie. Sgt. Mozingo testified that before seizing the baggie, he believed it contained a controlled substance because "[t]hat's the way we find it packaged every day, in clear plastic bags. I've been through several narcotics classes and they show us the packaging of narcotics; plus numerous arrests made using the same type bags."

Upon review of the totality of the circumstances, we hold the evidence sufficient to satisfy the third prong of the plain view doctrine, that it was immediately apparent to Sgt. Mozingo that the plastic baggie was evidence of a crime or contraband. The plastic baggie containing marijuana was properly admitted into evidence, and the trial court did not err in denying defendant's motion to suppress. We therefore need not address defendant's additional argument that the cocaine baggies recovered from his mouth must also be suppressed as "fruit of the poisonous tree."

Affirmed.

Judges WYNN and TYSON concur.

PERRY H. HILLIARD AND WIFE, MILDRED L. HILLIARD, PLAINTIFFS v. WARREN PEETE HILLIARD AND WIFE, ANNE B. HILLIARD, AND PHILIP WAYNE KESLER, DEFENDANTS

No. COA00-1225

(Filed 6 November 2001)

1. Easements— general warranty deed—rules of contract construction—plain language

The trial court did not err by concluding as a matter of law that plaintiffs do not have a thirty-foot easement that in part crosses over the lot owned by defendants, because the trial court properly applied the rules of contract construction in interpreting the plain language of the general warranty deed that conveyed the land to plaintiffs and granted a 15-foot easement.

2. Appeal and Error— font size violation—failure to file substitute brief—sanction—taxing costs against attorney

Defense counsel is personally taxed with the costs of an appeal, not including attorney fees, as a sanction for his failure to comply with a direct order of the Court of Appeals requiring defendants to file a substitute brief in full compliance with N.C. R. App. P. 26(g) which requires a font size of 65 characters per line.

Appeal by plaintiffs from order entered 5 October 1999 by Judge Robert H. Hobgood in Superior Court, Warren County. Heard in the Court of Appeals 12 September 2001.

Norman and Gardner by Larry E. Norman for Plaintiff-Appellants.

Marvin P. Rooker for Defendant-Appellees.

WYNN, Judge.

This appeal arises from a land dispute between brothers, Perry H. Hilliard and Warren Peete Hilliard. Defendant Philip Wayne Kesler has made no appearance in this action and is not involved in this appeal.

The Hilliard brothers along with their other brothers and sisters were co-tenants of certain real property located in Warren County. In 1988, that property was partitioned under a special proceeding which,

pertinent to this appeal, resulted in the allocation of (1) a lot designated as Tract A-13 containing 2.261 acres to Ralph F. Hilliard who subsequently conveyed that lot to Warren Hilliard and his wife, Anne; and, (2) an adjacent lot designated as Tract A-12 containing 2.261 acres to Albert Hilliard who subsequently conveyed that lot to Perry Hilliard and his wife, Mildred. The conveyance of those two lots to the Hilliard brothers and their wives resulted in a dispute in which Perry and Mildred Hilliard brought this action for the establishment and declaration of an easement over the lot owned by his brother Warren and his wife, Anne.

After hearing the evidence without a jury, the trial court entered judgment finding that Perry and Mildred Hilliard were not entitled to an easement over the lot owned by Warren and Anne Hilliard. Perry and Mildred Hilliard appealed to this Court.

[1] The sole issue on appeal is whether the trial court erred in concluding as a matter of law that Perry and Mildred Hilliard do not have a thirty-foot easement that in part crosses over the lot owned by Warren and Anne Hilliard. We uphold the trial court's judgment.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) of the Rules of Civil Procedure requires a trial judge hearing a case without a jury to make findings of fact and conclusions of law. *See Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 328 S.E.2d 849, *cert. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985). *See also* N.C. Gen. Stat. § 1A-1, Rule 52 (a)(1) (1999).

> To comport with Rule 52(a)(1), the trial court must make a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment. Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Curd v. Winecoff, 88 N.C. App. 720, 722, 364 S.E.2d 730, (1988) (citation omitted). "Where the trial court sits as trier of facts, the trial court must (1) find the facts on all issues joined in the pleadings, (2) declare the conclusions of law arising on the facts found, and (3) enter judgment accordingly." *Whitfield v. Todd*, 116 N.C. App. 335,

338, 447 S.E.2d 796, 798, *cert. denied*, 338 N.C. 529, 453 S.E.2d 170 (1994). "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

In the present case, the trial court made the following findings of fact:

> 1. That the Plaintiff, Perry H. Hilliard, and the Defendant, Warren Peete Hilliard, were parties to a partition proceeding in Warren County under file number 88 SP3 and that each party received a share of real estate in special proceedings; that the Report of Commissioners was filed on October 21, 1988, and the Amended Report of Commissioners was filed on January 23, 1989; that Ralph Hilliard, brother of Perry and Warren Hilliard, was apportioned tract A-13 in said proceedings and C. Albert Hilliard, brother of Perry and Warren Hilliard, was apportioned tract A-12 in said special proceeding.
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> 2. Elmer W. Harris, James G. Elam, and Wilson Fleming, Commissioners, partitioned the real estate of Charlie White Hilliard into twelve equal shares, with provision under Item III of the Will of Charlie White Hilliard that McElree Hilliard, Warren P. Hilliard and Gilbert Lee Hilliard have their shares adjoin the lands which the testator had previously given them for home sites.
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> 3. The Commissioners engaged Harry M. Williams, III, Registered Land Surveyor, to survey the land and to make division maps.
>
> 4. Tract A-13, containing 2.261 acres, more or less, was given a private easement of ingress, egress, and regress appurtenant, and running with the land, by whomsoever owned, measuring 30 feet in width, said width extending 15 feet on each side of the dividing line between Tract A-1 and Tract A-2 running from a point in the center of the right of way of State Road 1500, which beginning point is South 44 deg. 07 min. 24 sec. East 114.94 feet from the southernmost corner of Tract A-5, thence various metes and bounds to a point, the westernmost corner of Tract A-12 and the northernmost corner of Tract A-13.
>
> 5. Tract A-12, containing 2.261 acres, more or less, was given an identical private easement of ingress, egress and regress appur-

tenant, and running with the land, by whomsoever owned, measuring 30 feet in width, said width extending 15 feet on each side of the dividing line between Tract A-1 and Tract A-2 from the identical beginning point to the identical ending point as described in paragraph 4 above.

6. That on or about February 17, 1989, C. Albert Hilliard and wife, Dorothy S. Hilliard, conveyed Tract A-12 to Ralph Hilliard and wife, Mildred L. Hilliard, bought Tract A-12 from Ralph F. Hilliard and wife Elsie B. Hilliard, together with the same above-described easement as shown in Tract 2 of the warranty deed dated March 20, 1995, Plaintiffs' Exhibit 2.

7. The Defendants, Warren Peete Hilliard and wife, Anne B. Hilliard, bought Tract A-13 from Charles A. Hilliard and wife, Dorothy S. Hilliard, together with the same above described easement as shown in Tract 2 of the warranty deed dated March 8, 1989, Defendants' Exhibit 1.

8. Perry Hilliard presented a preliminary plat to subdivide his land (Tract A-12) into a trailer park to the Warren County Planning Board on October 3, 1995. Perry Hilliard asked for a 15 foot variance and depth requirement variance for his property so that he could put a trailer park on his property. The Warren County Planning Board disapproved the plat because it did not meet mobile home regulations (Defendants' Exhibit 5). That on or about January 15, 1996, the Plaintiffs conveyed a portion of Tract A-12 to the Defendant, Philip Wayne Kesler, by deed recorded at Book 615, Page 157 Warren County Registry, (Plaintiffs' Exhibit 3), without obtaining the approval of the Warren County Planning Board.

9. The Warren County Planning Board did not approve the plat of survey from which the deed referred to in paragraph 8 above was drawn. (Plaintiffs' Exhibit 4). The plat of survey dated August 31, 1995, (Plaintiffs' Exhibit 9, same as Defendants' Exhibit 2), was prepared by Harry M. Williams, III, Registered Land Surveyor, as a Preliminary Plat and was not intended by the surveyor for purposes of recording, sales or conveyance.

10. It was the clear intent of the Commissioners to provide both parcels, A-12 and A-13, with a 30 foot easement. This is the only rational inference from the length of the 30 foot easement shown on Plaintiffs' Exhibit 1. Elmer W. Harris, Commissioner, testified

that when the commissioners adopted the plat of survey, Plaintiffs' Exhibit 1, and made their report, it was their intent that Tracts A-12 and A-13 have the benefit of a 30 foot easement. Tracts A-1 and A-2 are each burdened with a 15 foot adjoining easement.

11. The Plaintiff, Perry H. Hilliard, intentionally attempted to mislead the Warren County Planning Board by making a false oral statement that a turning radius was acceptable to Warren Peete Hilliard and by presenting a plat containing a turning radius on Tract A-13 (Defendants' Exhibit 2). The oral statement of the Plaintiff, Perry H. Hilliard, and the plat containing a turning radius on Tract A-13 did not in fact mislead the Warren County Planning Board because the Board never relied on the statement of the Plaintiff or his plat of survey (Defendants' Exhibit 2) and never voted in favor of the Plaintiff.

Based on the findings of facts, the trial court concluded as a matter of law that:

1. This Court has jurisdiction [to] hear this matter.

2. The Plaintiffs can claim not greater title than they obtained by the warranty deed . . . The deed granted only a fifteen foot easement for the benefit of grantees at the point the easement adjoined the property line.

3. The Plaintiffs' claim for equitable relief must fail under the doctrine of unclean hands.

4. The Plaintiffs' only recourse to obtain additional 15 foot turning radius easement for Tract A-12 at the end of existing 30 foot easement is by purchase from the Defendants, Warren Peete Hilliard and wife, Anne B. Hilliard.

5. No predecessor in title to the Plaintiffs or Defendants objected to the Report of Commissioners which created the easement in question in Warren County Special Proceeding 88 SP 3.

"In an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties and must do so by clear, cogent and convincing evidence." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981). "There is always a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they had

agreed, and have chosen fit and proper words to express that agreement in its entirety." *Clements v. Life Ins. Co. of Virginia*, 155 N.C. 57, 61, 70 S.E. 1076, 1077 (1911).

> An easement deed, such as the one in the case at bar, is, of course, a contract. The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made . . . The intention of the parties is to be gathered from the entire instrument and not from detached portions. . . .

Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962).

After careful review of the record, there is no dispute that the general warranty deed that conveyed the land to Perry and Mildred Hilliard granted a 15-foot easement. "When an easement is created by an express conveyance and the conveyance is 'perfectly precise' as to the extent of the easement, the terms of the conveyance control." *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991) (quoting Restatement of Property § 483 comment d, at 3012 (1944)). We hold that the trial court properly applied the rules of contract construction in interpreting the plain language of the deed that grants a 15-foot easement for Tracts A-12 and A-13.

[2] Finally, we point out that defendants' brief contained more than 65 characters per line. "N.C.R. App. P. 26(g), as interpreted by *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996), requires a font size of 65 characters per line." *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 597-98, 516 S.E.2d 169, 172 (1999); see also N.C.R. App. P. 26(g) (1999). Defendants were notified of this violation in an Order from this Court that ordered defendants to file a substitute brief in full compliance with Rule 26(g). Defendants failed to file a substitute brief. An appellate court may impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. *See* N.C.R. App. P. 25 and 34 (1999). If this was only a matter of a font size violation, we would be inclined to ignore the violation. However, the failure to comply with a direct order of this Court is unacceptable to this Court. Accordingly, for failing to follow the specific Order of this Court to file a substitute brief in compliance with Rule 26(g), we tax the costs of this appeal, not including attorney's fees, personally against the counsel for the defendants—not against the defendant parties.

For the reasons stated above, the judgment of the trial court is,

Affirmed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. JUAMANE RASHOD PARKER

No. COA00-1279

(Filed 6 November 2001)

1. Possession of Stolen Property— felonious—sufficiency of evidence

The trial court erred by convicting defendant for felonious possession of stolen property instead of misdemeanor possession of stolen property based on the State's failure to introduce sufficient evidence of the value of the stolen goods in defendant's possession, because: (1) although the owner of the stolen property testified that the total estimated value of all stolen items was $5,000, there is no evidence regarding the total value of the items contained in the trial court's charge; and (2) the testimony of two pawn shop employees regarding the money they loaned defendant for some of these stolen items is not sufficient evidence from which a jury could determine to any certainty the value of the VCR, cameras, and photography equipment.

2. Indictment and Information— amendment—obtaining property by false pretenses—nonessential variance

The trial court did not err by convicting defendant for two counts of obtaining property by false pretenses even though the State amended the indictment to change the items listed that defendant represented as his own from two cameras and photography equipment to a Magnavox VCR, because: (1) the amendment was not a substantial alteration of the charge since the description of the item or items which defendant falsely represented as his own is irrelevant to proving all essential elements of the charge; and (2) the proof required to convict defendant under the amended indictment was the same as that required by the original indictment.

Appeal by defendant from judgments entered 2 August 2000 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 9 October 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General D. David Steinbock, for the State.

Paul M. Green for defendant-appellant.

HUNTER, Judge.

Juamane Rashod Parker ("defendant") appeals convictions of felonious possession of stolen property and two counts of obtaining property by false pretenses. We vacate defendant's conviction for felonious possession of stolen property and remand for entry of judgment and re-sentencing on misdemeanor possession of stolen property. We find no error in defendant's convictions and sentence for obtaining property by false pretenses.

On 28 April 1999, Pamela Goodman ("Goodman") returned home from work to discover she and her husband had been robbed. Various items were stolen from the house, including VCRs and photography equipment. Goodman gave a list of stolen items to the investigating officer. Goodman estimated the total value of items stolen to be $5,000.00. The police recovered three VCRs, two cameras and a remote control that had been stolen from the Goodman house. The items were recovered from a local pawn shop.

Melinda Mitchell ("Mitchell"), a pawn shop employee, testified that she prepared a pawn ticket for defendant on 28 April 1999 in which she loaned defendant $80.00 for a Minolta camera, a Canon camera, a lens, and a flash unit and converter. Effie Hayes ("Hayes"), also a pawn shop employee, testified that she prepared a pawn ticket for defendant on 30 April 1999 in which she loaned defendant $40.00 for a Magnavox VCR. Hayes testified that she loaned defendant $40.00 based on the estimate that she could resell the VCR for $80.00.

Defendant was charged with felonious possession of stolen property and two counts of obtaining property by false pretenses, based on his pawning of the stolen goods. On 2 August 2000, a jury returned guilty verdicts on all charges. Based on his prior record level, defendant was sentenced to prison for a minimum of twenty months and a maximum of twenty-four months. Defendant appeals.

Defendant makes two arguments on appeal: (1) the evidence was insufficient to support his conviction for felonious possession of

stolen property; and (2) the indictment charging defendant with obtaining property by false pretenses was improperly amended. We address each argument in turn.

[1] Defendant first argues that the evidence was insufficient to support his conviction for felonious possession of stolen property. Specifically, defendant argues the State failed to present evidence from which the jury could conclude the value of the items stolen by defendant was over $1,000.00. We agree.

A defendant may be found guilty of felonious possession of stolen property where the State proves "(1) defendant was in possession of personal property, (2) valued at greater than [$1,000.00], (3) which has been stolen, (4) with the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) with the possessor acting with dishonesty." *State v. Brantley*, 129 N.C. App. 725, 729, 501 S.E.2d 676, 679 (1998); *see also State v. Raynor*, 128 N.C. App. 244, 251, 495 S.E.2d 176, 181 (1998).

In *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987), our Supreme Court vacated the defendant's conviction for felonious possession of stolen property where the State failed to present direct evidence of the value of the stolen vehicle. There, the State presented evidence tending to show that the vehicle was a 1975 Chrysler Cordoba; it was the owner's favorite vehicle and he took especially good care of it; and the owner always parked the vehicle under a shed. *Id.* The State also introduced a photograph of the vehicle.

The State maintained that such evidence was sufficient to establish the value of the vehicle exceeded $400.00, the statutory minimum applicable at that time. *Id.* The Supreme Court rejected the argument, stating that "the substantiality of the evidence is insufficient for presentation of the issue of value to the jury. The jury may not speculate as to the value." *Id.* It concluded that such evidence "was not such as would justify the jury in finding that the value of the Cordoba exceeded four hundred dollars." *Id.* The court therefore vacated the defendant's conviction for felonious possession of stolen property and remanded for pronouncement of a judgment of guilty of misdemeanor possession of stolen property and for re-sentencing. *Id.*

In this case, the State likewise failed to introduce sufficient evidence of the value of the stolen goods in defendant's possession. The

trial court instructed the jury that defendant's charge was based upon his possession of "a Magnavox VCR, cameras, and photography equipment." Although Goodman testified that the total estimated value of all stolen items was $5,000.00, there is simply no evidence regarding the total value of the items contained in the trial court's charge. The only evidence relating to these items was Hayes' testimony that she loaned defendant $40.00 for a Magnavox VCR based on her estimate that she could resell it for $80.00, and Mitchell's testimony that she loaned defendant $80.00 for two cameras and some photography equipment. Such evidence is not sufficient evidence from which a jury could determine to any certainty the value of the VCR, cameras, and photography equipment. The jury must not be left to speculate about the value of these items. *See Holland*, 318 N.C. at 610, 350 S.E.2d at 61. We therefore vacate defendant's conviction for felonious possession of stolen property in 99CRS011124. We remand that matter to the trial court for entry of a judgment of guilty of misdemeanor possession of stolen property, and for re-sentencing accordingly. *See id.*

[2] Defendant next argues his convictions for two counts of obtaining property by false pretenses must be vacated because the State improperly amended the indictment. The original indictment listed the items defendant represented as his own as "two (2) cameras and photography equipment." The trial court permitted the State to amend the indictment to change the items listed to a "Magnavox VCR."

"Pursuant to N.C.G.S. § 15A-923(e) (1999), a bill of indictment may not be amended in a manner which substantially alters the charge set forth." *State v. Haywood*, 144 N.C. App. 223, 228, 550 S.E.2d 38, 42, *appeal dismissed and disc. review denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). In *State v. Bowen*, 139 N.C. App. 18, 27, 533 S.E.2d 248, 254 (2000), we noted that "the purpose of an indictment is to give a defendant notice of the crime for which he is being charged." Therefore, if the court finds "that the proof was in line with the indictment," an amendment does not substantially alter the charge within the meaning of N.C. Gen. Stat. § 15A-923(e). *Id.*

This Court has further noted that while the evidence must correspond to the allegations in the indictment which are essential to charge the offense, "a non-essential variance is not fatal to the charged offense." *State v. Grady*, 136 N.C. App. 394, 396, 524 S.E.2d 75, 77 (holding change in address on indictment for maintaining a

dwelling for the use of a controlled substance was not substantial alteration), *appeal dismissed and disc. review denied*, 352 N.C. 152, 544 S.E.2d 232 (2000); *see also State v. Joyce*, 104 N.C. App. 558, 573, 410 S.E.2d 516, 525 (1991) (holding change from " 'knife' " to " 'firearm' " in indictment for assault with a deadly weapon did "not alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury"), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992).

In this case, the elements of obtaining property by false pretenses are " '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Hutchinson*, 139 N.C. App. 132, 138, 532 S.E.2d 569, 573 (2000) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)); *see also* N.C. Gen. Stat. § 14-100(a) (1999).

We hold that the amending of the items listed on the indictment from cameras and photography equipment to a VCR was not a substantial alteration of the charge. The description of the item or items which defendant falsely represented as his own is irrelevant to proving all essential elements of the charge. Under the amended indictment, the State was still required to prove (1) that defendant falsely represented a subsisting fact; (2) which defendant calculated and intended to deceive; (3) which did in fact deceive; and (4) by which defendant obtained value from another. The proof required to convict defendant under the amended indictment was the same as that required by the original indictment. Therefore, the amendment was a non-essential variance which did not substantially alter the charge in the original indictment. *See Bowen*, 139 N.C. App. at 27, 533 S.E.2d at 254. The amended indictment properly served its purpose of providing defendant notice of the crime being charged. Defendant's conviction must therefore stand.

No error as to 99CRS011122, 011123; judgment vacated in 99CRS011124 and remanded.

Judges GREENE and THOMAS concur.

WILLIAM WASHINGTON AND DWYANETTE WASHINGTON, PLAINTIFFS V. MARILYN DEMARLOW MITCHELL, ANNIE MITCHELL, AND CHRISTOPHER LLOYD MITCHELL, DEFENDANTS

No. COA00-1348

(Filed 6 November 2001)

Fraud— fraudulent conveyances—voluntariness—valuable consideration—reasonably fair price

A judgment debtor's conveyances of church lots to family members-church trustees and burial plots to a family member were not voluntary and thus were not fraudulent as against plaintiff judgment creditors, although the trial court found that the judgment debtor had actual intent to defraud creditors, where the family members had no knowledge of the fraud; a $50,000 note and deed of trust were given by the church to the judgment debtor for the church lots; the grantee paid the judgment debtor $500 for the burial plots; there was no evidence from which the trial court could find that these were not reasonably fair prices; and the conveyances were thus made for valuable consideration.

Appeal by plaintiffs from judgment entered 23 May 2000 by Judge Charles M. Neaves, Jr., in Stokes County District Court. Heard in the Court of Appeals 18 September 2001.

Jeffrey S. Lisson for plaintiffs-appellants.

Mark H. Badgett for defendants-appellees.

WALKER, Judge.

In 1991, Andrew Mitchell, father of defendant Marilyn Mitchell (Marilyn) and defendant Christopher Mitchell (Christopher) and husband of defendant Annie Mitchell (Annie), deeded lots # 122 through 125 (burial plots) and lots # 126 and 127 (church lots) in Stokes County to Marilyn in separate deeds. On 12 December 1995, plaintiffs filed a lawsuit in the Superior Court of Forsyth County against Marilyn, Perry Mitchell (Perry), and Andrew Mitchell. Plaintiffs alleged that the defendants defrauded them, converted property, and committed unfair and deceptive trade practices.

On 17 January 1997, with the case scheduled for trial in February 1997, Marilyn deeded the church lots to defendants Annie and Christopher, who were trustees in Grace Temple Church (the

Church). Simultaneously, by separate deed, she conveyed the burial plots to Annie "for the purpose of creating a place for a family burial area." Annie paid $500 to Marilyn for these lots. The deed to the church lots had stamps in the amount of $150 placed on it. The deed to the burial lots did not contain stamps but made reference to the church lots deed regarding the stamps.

The Church had begun constructing a church building in 1995 and Marilyn had provided money to the Church from the start of this construction. As a result, the Church incurred a total indebtedness of $75,000 to Marilyn, of which $25,000 was paid to her on 17 January 1997. The balance of $50,000 was to be paid pursuant to an unrecorded agreement and deed of trust placed on the church lots, which the Church executed to Marilyn on 17 January 1997.

On 28 February 1997, the jury found for plaintiffs in their original suit and the trial court entered judgment for $89,848.21 plus interest. Defendants appealed the trial court's judgment and this Court affirmed.

On 23 June 1998, plaintiffs filed the present action to set aside both deeds as fraudulent transfers and requested that the court require the property to be transferred to the plaintiffs and applied to the judgment against the defendants in the original matter. The parties waived a jury and the trial court, after hearing the evidence, made findings of fact including:

> Six. On January, 1997, Marilyn Demarlow Mitchell deeded lots # 122 through 125 to Annie Mitchell only, for the purposes of a family burial plot . . . and at the same time in a different deed, Marilyn Demarlow Mitchell did deed to Annie Mitchell and Christopher Lloyd Mitchell lots # 126 and 127 . . . . This is the current property that the church is located on.
>
> Seven. On January, 1997 the Grace Temple Church did execute to Marilyn Demarlow Mitchell an unrecorded agreement and deed of trust in the amount of $50,000.00 for lots # 126 and 127. Andrew Mitchell, Christopher Mitchell and Annie Mitchell, and Marilyn Demarlow Mitchell signed this agreement; no other trustees executed this agreement.
>
> . . .
>
> Nine. On or about the date of the execution of the deed from Marilyn Mitchell to Annie Mitchell and from Marilyn Mitchell to

Annie Mitchell and Christopher Mitchell, Marilyn Mitchell and her parents, Andrew Mitchell and Annie Mitchell, went to David Cathey, Attorney at Law, Winston-Salem, to discuss with him the transferring of the deed concerning the burial site and the church property. He advised them they could transfer the property since there were no judgments against Marilyn Mitchell at the time. A note and deed of trust was [sic] discussed but they never got back to him about preparing the note and deed of trust. . . . Christopher Mitchell was not present at David Cathey's office.

Ten. The evidence indicated that Annie Mitchell paid Marilyn Demarlow Mitchell $500.00 for the lots # 122 through 125 upon which there are no improvements. This is known as the burial plot.

Based on its findings, the trial court concluded in part:

One. That the conveyance from Marilyn Mitchell to Annie Mitchell for the burial lots was not a voluntary conveyance, in that it was transferred for value in the amount of $500.00. The court cannot conclude as a matter of law what the fair market value of these lots were [sic] on January, 1997 but does conclude that the transfer was for value.

Two. The court does conclude as a matter of law that the conveyance from Marilyn Mitchell to Annie Mitchell and Christopher Mitchell, lots # 126 and 127 were [sic] also not voluntary and that they were for value because there was an agreement that the grantor be repaid moneys which she had advanced for construction of the church.

Three. The two transfers of lots # 122 through 127 were made for valuable consideration and were made with the actual intent to defraud creditors.

Four. The court cannot conclude as a matter of law that the grantee, Annie Mitchell, participated in the defrauding of creditors when she paid value for the land and sought the advice of an attorney in paying this value.

Five. Christopher Mitchell did not participate in the defrauding of creditors in that he was not present at the attorneys' office and there is no evidence that he was aware of any impending judgment against her, his sister.

The trial court further concluded that the plaintiffs failed to carry their burden of proof to set aside these deeds.

In a trial without a jury, the judge is required to make findings of fact and conclusions of law. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1999). On appeal, this Court must determine whether there is competent evidence to support the findings and whether the findings support the conclusions. *Farmers Bank v. Brown Distributors,* 307 N.C. 342, 345-46, 298 S.E.2d 357, 359 (1983); *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 774, 522 S.E.2d 118, 121 (1999). Here, the record contains the following stipulation of the parties: "[T]he Findings of Fact of the District Court are supported by competent evidence, and that only conclusions of law and the ultimate disposition of this matter are at issue in this appeal." Therefore, this Court needs only to determine whether the conclusions are supported by the findings.

The leading case setting forth the law of fraudulent conveyance in this State is *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). In that case, our Supreme Court summarized the five principles of fraudulent conveyances as follows:

> (1) If the conveyance is voluntary and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.
>
> (4) If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid.

> (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he has notice, it is void.

Aman, 165 N.C. at 227, 81 S.E. at 164 (emphasis in original). The burden is on the plaintiff to show that the conveyance is fraudulent. *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 173-74, 506 S.E.2d 267, 271 (1998).

Here, the trial court found that there was actual intent to defraud creditors on the part of the grantor, Marilyn. It also concluded that Christopher and Annie did not participate in the fraud and had no knowledge of the fraud. These conclusions are not challenged.

Therefore, in order for the plaintiffs to prevail on a claim of fraudulent conveyance, they must prove that the transfers were voluntary and thus void as set forth in the third principle of *Aman*. *Aman*, 165 N.C. at 227, 81 S.E. at 164. A conveyance is considered voluntary "when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 128, 252 S.E.2d 826, 832 (1979).

The trial court's findings establish that the deed of trust and the $50,000 note from the Church was given to Marilyn for the church lots. Likewise, the $500 paid to Marilyn for the burial plots established they were conveyed for value.

Because the findings support the conclusion that the two transfers were made for valuable consideration and there was no evidence from which the trial court could find there was not "a reasonably fair price," the trial court did not err in concluding that the transfers were not voluntary.

The trial court's findings support its conclusions that the conveyances were not fraudulent.

Affirmed.

Judges MARTIN and TYSON concur.

NANCY BELL AND HUSBAND, ADRIEN BELL, PLAINTIFFS v. NATIONWIDE INSURANCE COMPANY, DEFENDANT

No. COA00-1464

(Filed 6 November 2001)

Insurance— homeowners—fire—material misrepresentation on application

The trial court did not err in plaintiffs' action to recover for the loss of their dwelling and contents destroyed by fire by granting summary judgment in favor of defendant insurance company on the issue of material misrepresentation under N.C.G.S. § 58-44-15 based on plaintiffs' application for homeowners insurance, because: (1) an application for insurance containing material misrepresentations is filled in by the agent before being signed by the applicant and presumes that the insured adopts all statements made in the application he signs; (2) plaintiffs misrepresented on their application for insurance the facts that they filed bankruptcy within the last seven years, had a policy canceled or not renewed, and had past losses by signing the application below a statement declaring the facts in the application were true after the agent typed "no" on the application in response to these questions; and (3) there was no showing of fraud on the part of the insurance agent or defendant, and plaintiffs cannot raise the issue of bad faith for the first time on appeal.

Appeal by plaintiffs from judgment entered 15 September 2000 by Judge Gary E. Trawick in Duplin County Superior Court. Heard in the Court of Appeals 11 October 2001.

Thompson & Mikitka, P.C., by E. C. Thompson, III and Susan Collins Mikitka, for plaintiffs-appellants.

Cox & Associates, by J. Thomas Cox, Jr., for defendant-appellee.

TYSON, Judge.

Nancy Bell and husband, Adrien Bell ("plaintiffs") appeal the entry of summary judgment in favor of Nationwide Insurance Company ("defendant"). We affirm the trial court's judgment.

I. Facts

On 14 July 1995, plaintiffs applied for a homeowners insurance policy from defendant. Defendant issued a policy of insurance, containing the standard provisions for fire insurance coverage as set forth under N.C. Gen. Stat. § 58-44-15. The policy was renewed on 13 June 1996.

On 15 and 16 September 1996, plaintiffs' dwelling and contents were destroyed by fire. Plaintiffs filed a claim for the loss which defendant denied on the grounds that plaintiffs had made material misrepresentations in their application for insurance. Plaintiffs filed their complaint on 3 June 1997 to compel payment of their insurance claim. Defendant moved for summary judgment on the issue of material misrepresentation. On 20 September 2000, the trial court entered summary judgment in favor of the defendant. Plaintiffs appeal.

II. Issues

The sole issue presented on this appeal is whether, based on the factual showing made at the summary judgment hearing, defendant is entitled to judgment as a matter of law on the material misrepresentation defense. Plaintiffs argue that a genuine issue of material fact exists as to whether plaintiffs' application contained material misrepresentations. We disagree.

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. Gen. Stat. § 1A-1, Rule 56(c) (1999).

N.C. Gen. Stat. § 58-44-15 (1999) sets out the "Standard Fire Insurance Policy for North Carolina" which provides:

> This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

"It is a basic principle of insurance law that the insurer may avoid his obligation under the insurance contract by a showing that the insured made representations in his application that were material and false." *Pittman v. First Protection Life Insurance Co.*, 72 N.C. App. 428, 433, 325 S.E.2d 287, 291 (1985). Misrepresentations on an insurance

application are material if "the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract and accepting the risk." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 67 N.C. App. 616, 621, 313 S.E.2d 803, 807 (1984), *rev'd on other grounds*, 313 N.C. 362, 329 S.E.2d 333 (1985). In order to void the policy pursuant to G.S. § 58-44-15, defendant must show that the insured made statements that were: (1) false; (2) knowingly and willfully made; and (3) material. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 370, 329 S.E.2d 333, 338 (1985).

The record shows that plaintiffs misrepresented on their application for insurance the facts that they filed bankruptcy within the last seven years, had a policy canceled or not renewed, and had past losses. Plaintiffs do not argue that these misrepresentations were not material. Plaintiffs contend that these misrepresentations were not knowing and willful. Plaintiffs assert that the defendant's agent, Kim Daniels, never asked whether or not they had filed bankruptcy, had a previous policy of insurance canceled or not renewed, or had previous losses, but simply typed in "no" in response to these questions. Our Supreme Court addressed the same argument, in *Goodwin v. Investors Life Ins Co. of North America*, 332 N.C. 326, 419 S.E.2d 766 (1992), where plaintiff claimed that she should not be bound by the misrepresentation concerning her husband's driving record because she was unaware of the driving record question on the application and the agent's inaccurate response to it. The Court stated that "plaintiff and her husband signed the application thereby representing that they had read it and that the information contained therein was true." *Id.* at 330-31, 419 S.E.2d at 768. " 'It made no difference whether the plaintiff knew what was in the agreement or not. He signed it, and the law presumes he did know what was in it, and he will not be heard, in the absence of any proof of fraud or mistake, to say that he did not.' " *Id.*, 419 S.E.2d at 769 (citing *Jones v. Home Security Life Ins. Co.*, 254 N.C. 407, 413, 119 S.E.2d 215, 219 (1961) (quoting *Weddington v. Insurance Co.*, 141 N.C. 234, 243, 54 S.E. 271, 274 (1906)).

In *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N.C. 480, 2 S.E. 258 (1887), plaintiff signed the insurance application next to the following statement: "I affirm and warrant that the foregoing answers are true, and that they shall constitute the basis of the policy that may be issued to me on this application." Plaintiff proposed to prove that the questions in which misrepresentations were given were in fact not asked, and that he signed the application without knowledge that the

application contained those questions. Our Supreme Court held that "[t]here was no error in excluding the proposed evidence. In the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a contract signed by him." *Id.* at 347, 2 S.E. at 261.

At bar, there is no dispute that plaintiff, Adrian Bell, signed the application below a statement which read: "I hereby declare that the facts stated in the above application are true and request the company to issue the insurance and any renewals thereof in reliance thereon." Our Supreme Court has held "if an application for insurance containing material misrepresentations is filled in by the agent before being signed by the applicant, these are material misrepresentations of the applicant which bar recovery." *McCrimmon v. North Carolina Mut. Life Ins. Co.*, 69 N.C. App. 683, 685, 317 S.E.2d 709, 710 (1984) (citing *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496, (1937)).

Plaintiffs argue that bad faith on the part of the agent or defendant overcomes the presumption that the insured adopts all statements made in the application he signed. *Pittman*, 72 N.C. App. at 435, 325 S.E.2d at 291. Plaintiffs contend that the actions of the agent, filling in answers without asking plaintiffs the questions, constituted bad faith. The trial court granted summary judgment after hearing the evidence and arguments of counsel, and based upon the pleadings, depositions, admissions, and discovery responses. The record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that the issue of bad faith was presented to the trial court. Since plaintiffs failed to raise this issue before the lower court, we refuse to address the issue for the first time on appeal. N.C. R. App. P. 10(b) (1999).

We are bound in this case by the holdings of this Court and our Supreme Court. We conclude that the misrepresentations were false, there was no showing of fraud on the part of the agent or defendant; therefore, plaintiffs will be held to the statements in the application for insurance. We affirm the trial court's granting of summary judgment in favor of the defendant.

Affirmed.

Judges MARTIN and WALKER concur.

STATE OF NORTH CAROLINA v. CHALMERS LOWERY GREENLEE

No. COA00-1355

(Filed 6 November 2001)

1. **Drugs— intent to sell and deliver cocaine—sale of cocaine—authentication of chemical analysis report—chain of custody**

N.C.G.S. § 90-95(g)-(g1) does not represent the exclusive procedure for authenticating a report on the chemical analysis of a controlled substance and for establishing chain of custody, and the laboratory report determining that the substance purchased from defendant was cocaine was admissible in an intent to sell and deliver cocaine and sale of cocaine case, because: (1) N.C.G.S. § 90-95(g) merely establishes a procedure through which the State may introduce into evidence the laboratory report of a chemical analysis conducted on an alleged controlled substance without further authentication; (2) a forensic chemist testified and authenticated the report, making it irrelevant whether the State complied with the notice requirements set forth in N.C.G.S. § 90-95(g); and (3) the State's evidence as to the chain of custody was sufficient.

2. **Evidence— officer's testimony—substance bought from defendant—crack cocaine—failure to object—opinion**

The trial court did not err in an intent to sell and deliver cocaine and sale of cocaine case by overruling defendant's objections to a police officer's testimony that the substance he bought from defendant was a rock of crack cocaine, because: (1) the officer mentioned the rock of crack cocaine three times without defendant objecting to the classification; (2) N.C.G.S. § 90-95(g) does not require a chemical analysis before an opinion on the nature of a substance will be admissible; (3) the officer's testimony was proper under N.C.G.S. § 8C-1, Rule 701 as opinion testimony by a lay witness since it was based on his specialized training and work experience; and (4) even if the testimony was inadmissible, it was harmless error since the report established the rock was cocaine.

Appeal by defendant from judgment dated 5 January 2000 by Judge Loto G. Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 16 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General David G. Heeter, for the State.

Leah Broker for defendant-appellant.

GREENE, Judge.

Chalmers Lowery Greenlee (Defendant) appeals a judgment dated 5 January 2000 and entered consistent with a jury verdict finding Defendant guilty of possession with intent to sell and deliver cocaine and sale of cocaine, N.C.G.S. § 90-95(a)(1) (1999), and of being a habitual felon, N.C.G.S. § 14-7.1 (1999).

On 9 June 1999, Asheville police officers Danny Holden (Holden) and Joseph Palmer were working undercover when Holden bought what he believed to be one rock of crack cocaine from Defendant. After placing the rock in a small piece of plastic, Holden drove away and radioed Defendant's description to another police car. Defendant was arrested almost immediately after his transaction with Holden.

Holden brought the evidence to the Asheville Police Department. He proceeded to weigh the rock and place it, along with the plastic wrap he had previously used to store the rock, into a clear zip-lock-type envelope. He dated and initialed the envelope and placed it inside a yellow narcotics evidence envelope (the evidence envelope), which he then sealed. Holden also completed an SBI-5 Request for Examination of Physical Evidence form (the request form). He placed the request form, along with the evidence envelope, in the drop box of the property control room of the Evidence Annex.

Sandra Burton (Burton), an Asheville Police Department evidence technician, delivered the evidence envelope to Nancy Somrak (Somrak), a State Bureau of Investigation (SBI) evidence technician, who in turn gave the evidence envelope to Special Agent and Forensic Chemist Jay Pintacuda (Pintacuda) for analysis of the substance within. Upon receipt and delivery, each individual signed their name in the chain of custody section of the request form.

The testing conducted by Pintacuda determined that the rock indeed consisted of cocaine, which Pintacuda noted in his laboratory report (the report). At trial, Holden stated he had been in law enforcement for seventeen years with approximately 500 hours of specialized training in narcotics investigation and experience working with the

drug task force. During the course of his testimony, Holden at least five times referred to the substance he had bought from Defendant as a "rock of crack cocaine." Defendant did not object to the classification as "crack cocaine" until Holden's fourth reference. Both Holden and Pintacuda testified that the substance entered into evidence appeared to be in substantially the same condition as when they had last seen it. Pintacuda also testified that he recognized Burton's and Somrak's signature on the chain of custody portion of the request form and that he had received the evidence envelope in a sealed condition.

The issues are whether: (I) N.C. Gen. Stat. § 90-95(g)-(g1) represents the exclusive procedure for authenticating a report on the chemical analysis of a controlled substance and for establishing chain of custody; and (II) the trial court erred in permitting Holden to testify that the substance he bought from Defendant was "crack cocaine."

I

[1] Defendant argues the State did not comply with the conditions set forth in N.C. Gen. Stat. § 90-95(g)-(g1) and therefore the report determining the substance purchased from Defendant to be cocaine was inadmissible. We disagree.

Section 90-95(g) merely establishes a procedure through which the State may introduce into evidence the laboratory report of a chemical analysis conducted on an alleged controlled substance without further authentication. N.C.G.S. § 90-95(g) (1999); *State v. Carr*, 145 N.C. App. 335, 339, 549 S.E.2d 897, 900 (2001). It, however, does not establish the exclusive method for authenticating such a report. In this case, the trial court was not presented with a self-authenticating document as section 90-95(g) envisions. Pintacuda himself testified and authenticated the report. It is therefore irrelevant whether the State complied with the notice requirements set forth in section 90-95(g).

Defendant also argues that admission into evidence of the chain of custody signed by Burton, Somrak, and Pintacuda on the request form was error because the State did not comply with the conditions set forth in N.C. Gen. Stat. § 90-95(g1)(3) and was therefore required to call as witnesses all persons who had handled the rock Holden had bought. This contention is misplaced. Section 90-95(g1) provides a procedure for establishing the chain of custody of a piece of evidence

without having to call unnecessary witnesses. N.C.G.S. § 90-95(g1) (1999). The statute states:

> a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is *prima facie evidence* that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

N.C.G.S. § 90-95(g1)(1) (1999) (emphasis added). This statute, however, does not dictate the only proper method of proving the chain of custody when not all persons in the chain are called to testify.

A detailed chain of custody has to be established "only if the evidence offered is not readily identifiable or is susceptible to alteration and such alteration has been alleged." *State v. Brown*, 101 N.C. App. 71, 75, 398 S.E.2d 905, 907 (1990). If there are weak links in the chain of custody, as Defendant contends, these links relate to the weight of the evidence, not its admissibility. *Id.*

In this case, Holden testified he sealed the evidence envelope and put it in a drop box. When Pintacuda received the evidence envelope, it was still sealed. Both Holden and Pintacuda testified that the substance appeared to be in the same condition as when they had last seen it. Consequently, the State's evidence as to chain of custody was sufficient, and the trial court did not err in admitting either the report or Pintacuda's testimony as to the results of his laboratory analysis into evidence.

II

[2] Defendant further argues Holden's reference in his testimony to that "rock of crack cocaine" was error. Because Holden mentioned the "rock of crack cocaine" three times without Defendant objecting to the classification, this assignment of error was not properly preserved for appeal. *See* N.C.R. App. P. 10(b)(1). Furthermore, section 90-95(g) does not require a chemical analysis before an opinion on the nature of a substance will be admissible. Holden's testimony was proper under N.C. Gen. Stat. § 8C-1, Rule 701 as opinion testimony by a lay witness because it was based on his specialized training and work experience. *See* N.C. Gen. Stat. § 8C-1, Rule 701; *State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000) (police officer who had years of experience in the

enforcement of motor vehicle laws and investigated nearly 200 driving while impaired cases was competent to express an opinion that the defendant was under the influence of alcohol at the time of the accident). In any event, even if Holden's testimony were inadmissible, it would be harmless error because the report established the rock to be cocaine. The trial court therefore did not err in overruling Defendant's objections to Holden's testimony.

No error.

Judges HUNTER and THOMAS concur.

IN THE MATTER OF THE ESTATE OF DANIEL R. HANNER, (98 E 0411) PATRICIA H. HANNER, PETITIONER V. DANIEL R. HANNER AND CATHRYN H. MCKNIGHT, RESPONDENTS

No. COA00-1123

(Filed 6 November 2001)

Intestate Succession— election of life estate in marital home—presumption of validity of second marriage

Even though respondents, decedent's children, contend that petitioner was not the wife of intestate decedent at the time of his death since petitioner allegedly had never been validly divorced from her first husband when she married decedent, the trial court did not abuse its discretion by finding that petitioner was married to decedent at the time of his death and that petitioner was entitled to elect a life estate in the marital home in addition to a fee simple interest in the household furnishings in lieu of an intestate share of the estate because respondents failed to meet their burden of proof to overcome the presumption of the validity of petitioner's second marriage to decedent when petitioner presented evidence of a marriage license between petitioner and decedent.

Appeal by respondents from judgment entered 23 May 2000 by Judge Michael E. Beale in Union County Superior Court. Heard in the Court of Appeals 22 August 2001.

Essex, Richards, Morris, Jordan & Matus, P.A., by Stephen H. Morris and Lisa T. Kelly, for petitioner-appellee.

Clark, Griffin & McCollum, L.L.P., by Richard S. Clark and Bobby H. Griffin, for respondents-appellants.

HUDSON, Judge.

On 2 February 1999, petitioner filed a Notice of Election of Life Estate in the Matter of the Estate of Daniel R. Hanner. On 4 March 1999, Daniel R. Hanner, Jr., a respondent in this issue, filed an answer to petitioner's Notice praying that the petition be denied. Respondent averred that petitioner was not the wife of decedent at the time of his death. The issue was heard in a special proceeding by the Clerk of Superior Court in Union County on 30 November 1999. The Clerk of Court found that petitioner was married to the decedent at the time of his death and "made an Election of Life Estate in the usual dwelling place of the decedent . . . along with a fee simple interest in the household furnishings located therein. . . ." The Clerk of Court entered an order on 16 December 1999 that a jury "shall be appointed who shall allot and set apart" the life estate and fee simple interest in the property. Respondents, the decedent's son and daughter, appealed the Clerk of Court's Order. The Union County Superior Court heard respondents' appeal *de novo* and entered judgment on 23 May 2000. The court found that petitioner was married to decedent at the time of his death, and that she was entitled to a life estate in the real property in addition to a fee simple interest in the household furnishings. Respondents appealed, and we affirm the trial court.

Petitioner married Craig T. Evers on 1 September 1978. They separated and Mr. Evers filed a Petition for Dissolution of Marriage with the Thirteenth Judicial District Court of New Mexico seeking divorce from petitioner. On 15 August 1991, the court entered a "FINAL DECREE" that appeared to dissolve the marriage between Mr. Evers and petitioner. The decretal part of the decree, however, appears to be part of a form which merely restates the allegation of grounds for divorce. Both parties signed the "FINAL DECREE" and married other persons soon afterward.

Petitioner married the decedent, Daniel R. Hanner, Sr., on 3 March 1992 in South Carolina, and they had no children during their marriage. The couple lived together at 9323 Machado Drive, Indian Trail, Union County, North Carolina up until the death of decedent, Mr. Hanner, on 1 October 1998. Decedent was survived by petitioner

and his two children from a previous marriage, Daniel R. Hanner, Jr. and Cathryn McKnight.

Decedent Daniel R. Hanner, Sr. died intestate and petitioner was appointed administrator of the estate. Petitioner filed a Notice of Election of Life Estate, pursuant to N.C. Gen. Stat. § 29-30 (1999), in which she elected to take a life estate in the marital home instead of her intestate share of the estate. At some point, petitioner requested from the district court in New Mexico a copy of her divorce decree from Craig Evers. On 29 October 1999, evidently without any prompting from the parties involved, the Thirteenth Judicial District Court of New Mexico entered a *nunc pro tunc* "FINAL DECREE OF DIVORCE" for petitioner and Craig Evers. This Decree ordered:

> 1. That the marriage of the parties is hereby dissolved on the grounds of incompatibility.
>
> 2. That the effective date of this Decree shall be considered as of August 15, 1991, because it is clear from the attached Exhibit "A", that the parties had a good faith basis to believe they were divorced on that date, and that the Honorable Martin G. Pearl believing that he was dissolving the marriage between the parties at the time of the signing thereof.

The respondents objected to petitioner receiving a life estate in the marital property, based on their contention that petitioner had never been actually divorced and thus, she and the deceased were never validly married. Thus began this case.

On appeal, respondents raise five assignments of error. Because we hold that respondents failed to overcome the presumption that the marriage between petitioner and the decedent was valid, we need only address respondents' second assignment of error. Our Supreme Court, in *Kearney v. Thomas*, first articulated the presumption of the validity of a second marriage: "[a] second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage." 225 N.C. 156, 164, 33 S.E.2d 871, 877 (1945) (citations omitted). The Court in *Denson v. Grading Co.* reiterated this presumption:

> '[t]he decided weight of authority . . . is that when two marriages of the same person are shown, the second marriage is presumed

> to be valid; that such presumption is stronger than or overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. When both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce.'

28 N.C. App. 129, 131, 220 S.E.2d 217, 219 (1975) (quoting *Parker v. American Lumber Corp.*, 56 S.E.2d 214, 216 (Va. 1949)). Here, respondents have that burden. Petitioner presented a marriage license issued to Daniel Richard Hanner, Sr. (decedent) and Patricia Harris Evers (petitioner) on 3 March 1992 in York County, South Carolina. This evidence is sufficient to invoke the presumption that petitioner's marriage to the decedent was valid. *See Mayo v. Mayo*, 73 N.C. App. 406, 410, 326 S.E.2d 283, 286 (1985) (holding that the first wife successfully rebutted the presumption that husband's second marriage was valid after the second wife invoked the presumption of legitimacy).

Respondents argue that petitioner's previous marriage to Craig Evers was not validly dissolved, meaning that petitioner's subsequent marriage to decedent was invalid. Respondent's introduction of the "FINAL DECREE" entered in the Thirteenth Judicial District Court of New Mexico does not meet respondents' burden. We need not decide whether this "FINAL DECREE" is valid or not, because we note that from the record it appears that the court in New Mexico believed that it was taking an action amounting to a final divorce between petitioner and Craig Evers.[1]

Here, as in other domestic law decisions, "appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). We find no abuse of discretion in the trial court's finding that respondents did not meet their burden of proof to overcome the presumption of the validity of petitioner's marriage to the decedent. Therefore, we do not address the other issues raised by respondents.

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1. Under a New Mexico statute, *nunc pro tunc* orders may be entered "[w]henever determined to be in the interest of justice." N.M. Stat. Ann. § 34-6-31 (1999). To the extent that the original decree was defective, we presume that the Union County district court believed either that the New Mexico court validly corrected the same, in the interest of justice, or that the respondent did not prove otherwise.

Affirmed.

Judges McGEE and JOHN concur.

ALFONSO GODETTE, JR. v. WENDELL GODETTE

No. COA00-992

(Filed 6 November 2001)

1. Trespass— motion for directed verdict—ownership of land

The trial court erred in a trespass action by granting defendant's motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 based on failure to prove title, because plaintiff presented sufficient evidence of ownership when: (1) plaintiff amended his complaint to conform to the survey map; (2) plaintiff presented uncontradicted testimony that he and his siblings owned the land as heirs of their father; and (3) defendant conceded in his brief that plaintiff had an undivided one-quarter interest in the property.

2. Trespass— motion to dismiss—ejectment action—tenancy in common—necessary parties

The trial court erred in a trespass action by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(7) based on plaintiff's failure to join his three siblings as necessary parties, because: (1) plaintiff owned an undivided one-quarter interest in the land in fee simple as a tenant in common, and a tenant in common who owns an undivided interest in land can maintain an action for ejectment and damages without joining his co-tenants in common; and (2) even if it had been necessary, a Rule 12(b)(7) motion is only appropriate when the defect cannot be cured and a court ordinarily should allow a continuance for the absent party to be brought into the action.

Appeal by plaintiff from judgment entered 29 June 2000 by Judge James E. Ragan, III in Craven County Superior Court. Heard in the Court of Appeals 13 August 2001.

Henderson, Baxter, Taylor & Gatchel, by David S. Henderson for plaintiff-appellant.

Wendell Godette, pro se, *defendant-appellee.*

THOMAS, Judge.

Plaintiff, Alfonso Godette, Jr., appeals an order granting a directed verdict motion in his attempt to obtain both restitution for damages and injunctions in an action for trespass.

The trial court ruled plaintiff had not shown ownership and, even if he had, could not maintain suit without joining the other property owners as parties. Plaintiff sets forth two assignments of error. For the reasons discussed herein, we reverse and remand.

Plaintiff presented evidence in a jury trial that his father, Alfonso Godette, Sr. (Godette, Sr.), had maintained ownership of the land in question from 1941 until he died intestate in 1963. Plaintiff, his brother, and two sisters were the only heirs. The tract consisted of approximately 2.6 acres. Godette, Sr. had allowed others in the area to occasionally use a road on the property, but the land was primarily worked as a farm. After Godette, Sr.'s death, plaintiff's two sons eventually built homes on the land. One of plaintiff's sons, Lovindus E. Godette, had lived there for more than nineteen years at the time of trial.

In July 1999, defendant, Wendell Godette, allegedly entered the property with a chainsaw and cut the water line, water meter, shrubbery and approximately 100 trees. Plaintiff filed suit, seeking restitution and preliminary and permanent injunctions against defendant. Defendant answered and counterclaimed that plaintiff did not own the land, the road was "public," and plaintiff had wrongfully attempted to block the road.

At the close of plaintiff's evidence, defendant made a Rule 50 motion for directed verdict for failure to prove title and a Rule 12(b)(7) motion to dismiss for failure to join the co-tenants in common as necessary parties. The trial court granted both motions. Plaintiff appeals.

[1] By plaintiff's first assignment of error, he argues the trial court erred in directing a verdict because he had introduced sufficient evidence of ownership. We agree.

"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." *Crist v. Crist*, 145 N.C. App. 418, 550 S.E.2d 260 (2001) (citing *Streeter v. Cotton*, 133 N.C. App. 80, 514 S.E.2d 539 (1999)).

In the instant case, plaintiff had the burden of proof to show ownership. In his complaint, plaintiff alleged he owned the land in fee simple absolute, but the legal description of the land in plaintiff's complaint did not match his evidence of a survey map at trial. However, the trial court allowed him to amend his complaint to conform to the survey map. He also presented uncontradicted testimony that he and his siblings owned the land as heirs of Godette, Sr. There was testimony that plaintiff's sons had both built homes on the land, one of whom had continuously lived there for more than nineteen years preceding trial. While plaintiff did not produce a deed establishing his ownership, defendant conceded in his brief that plaintiff had an undivided one-quarter interest in the property. Thus, in the light most favorable to plaintiff, there was sufficient evidence of plaintiff's interest in the land for submission to the jury.

[2] By plaintiff's second assignment of error, he argues a tenant in common who owns an undivided interest in land can maintain an action for ejectment and damages without joining his co-tenants in common. We agree.

Defendant moved to dismiss based on plaintiff's failure to join his three siblings as necessary parties pursuant to Rule 12(b)(7). "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) (citations omitted). However, plaintiff claimed he could maintain his action as an owner in fee simple. Ownership in fee simple is "one in which the owner is entitled to the entire property, with unconditional power of disposition during one's life, and descending to one's heirs and legal representatives upon one's death intestate." Black's Law Dictionary 615 (6th ed. 1990). Plaintiff stated he inherited a one-quarter interest in the land, along with his three siblings. Thus, while plaintiff may not have owned all of the land in fee simple, he did own an undivided one-quarter interest in fee simple as a tenant in

common. *See Rawls v. Williford*, 121 N.C. App. 762, 468 S.E.2d 460 (1996); *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943).

A tenancy in common is "a tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship." Black's Law Dictionary (7th ed. 1999). It is well-established that one tenant in common may maintain an action for trespass upon the lands. In *Lance v. Cogdill*, our Supreme Court held

> [o]ne tenant in common may sue alone and recover possession of the common property, as against a third party claiming adversely to him and his cotenants, even though he can prove title to only an undivided interest, since each tenant in common is entitled to possession of the whole, except as against a cotenant.

Lance v. Cogdill, 238 N.C. 500, 505, 78 S.E.2d 319, 323 (1953). *See also Rogers v. Kelly*, 66 N.C. App. 264, 311 S.E.2d 43 (1984); *Baldwin v. Hinton*, 243 N.C. 113, 117, 90 S.E.2d 316, 319 (1955). Consequently, plaintiff did not need to join his siblings in order to maintain the suit. Even if it had been necessary, a Rule 12(b)(7) motion is only appropriate when the defect cannot be cured, and a court ordinarily should allow a continuance for the absent party to be brought into the action and plead. *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22 (1980), *cert. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). Without joinder, plaintiff will only be able to recover one-fourth of the damages in a pro-rata share. *Lance*, 238 N.C. at 505, 90 S.E.2d at 323.

We therefore hold plaintiff presented sufficient evidence to allow the case to go to the jury and the trial court erred in granting defendant's motion for directed verdict and motion to dismiss based on Rules 50 and 12(b)(7). We reverse and remand this case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. GLENN WEST

No. COA00-1347

(Filed 6 November 2001)

1. Appeal and Error— preservation of issues—jury instructions

A defendant properly preserved for appeal his objection to the trial court's jury instructions in an assault on a female case as required by N.C. R. App. P. 10(b)(2) when he tendered the proposed jury instructions and the trial court refused to submit these instructions to the jury because the purpose of Rule 10(b)(2) is to bring errors in jury instructions to the trial court's attention in order to prevent unnecessary new trials.

2. Assault— on a female—jury instructions on battery

The trial court did not err in an assault on a female case by refusing to use defendant's proposed jury instructions defining battery as the unlawful application of force to the person of another by the aggressor himself or by some substance which he puts in motion, because the trial court's jury instructions defining battery as an assault whereby any force, however slight, is actually applied to the person of another directly or indirectly presented in substance what defendant had requested.

3. Assault— on a female—jury instructions on battery—clarification

The trial court's clarification in an assault on a female case on the jury instructions for battery by substituting the word "touch" for the word "force" was not error because the clarification did not change the substance of the jury instructions and created no conflict for defendant even though he claims he relied on the earlier use of the word "force" in framing his closing argument.

Appeal by defendant from judgment dated 20 January 2000 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 16 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Lisa C. Glover, for the State.

Law Offices of Janet I. Pueschel, by Janet I. Pueschel, for defendant-appellant.

GREENE, Judge.

Glenn West (Defendant) appeals a judgment dated 20 January 2000 and entered consistent with a jury verdict finding Defendant guilty of misdemeanor assault on a female by a male person over the age of eighteen, N.C.G.S. § 14-33(c)(2) (1999).

On 27 January 1999, Sandi Joyce Honeycutt (Honeycutt) asked Defendant, a coworker, for assistance in operating a copy machine with which she was unfamiliar. As Defendant was helping Honeycutt, he complimented her on her looks. Defendant next reached under Honeycutt's jacket and touched her breast with his hand.

On 6 February 1999, Honeycutt filed a criminal complaint against Defendant, and a criminal summons for misdemeanor assault on a female was issued for Defendant that day. The Superior Court of Wake County tried the case before a jury. Both Honeycutt and Defendant testified at trial that Defendant had complimented Honeycutt and then proceeded to touch her breast. At the close of all the evidence, Defendant's attorney proposed the following jury instructions on the element of assault:

> An assault may also be committed by battery. Battery is the unlawful application of force to the person of another by the aggressor himself or by some substance which he puts in motion.

The trial court instructed the jury in pertinent part:

> [F]or you to find the [D]efendant guilty of assault on a female by a male person, the State must prove . . . .
>
> First, that the [D]efendant intentionally used force, however slight, to cause contact with the alleged victim. Second, that such bodily contact actually offended a reasonable sense of her personal dignity. Third, that such bodily contact occurred without the alleged victim's consent.

The jury retired to begin deliberations but returned to request instructions from the trial judge on the definitions of "slight" and "force." The trial judge conferred with counsel and, over Defendant's objection, amended his jury instructions to read: "And the new first element would be first, that the [D]efendant intentionally touched, however slight, the body of the alleged victim. So instead of the word 'force' I have substituted the word 'touch.' " The jury then rendered a

unanimous guilty verdict to which Defendant gave notice of appeal in open court.

The issues are whether: (I) Defendant properly preserved his first assignment of error for appeal; (II) the trial court committed error in not using Defendant's proposed jury instructions; and (III) following the jury's request for further instructions, the trial court's substitution of the word "touch" for "force" was error.

I

[1] The State argues because Defendant did not object to the trial court's instructions before the jury retired, Defendant did not properly preserve his first assignment of error for appeal as required by N.C.R. App. P. 10(b) (2). The State therefore contends our review of Defendant's assignment of error must be limited to whether the trial court committed plain error by rejecting Defendant's proposed jury instructions. The purpose of Rule 10 (b)(2), however, is to bring errors in jury instructions to the trial court's attention in order to prevent unnecessary new trials. *Wall v. Stout*, 310 N.C. 184, 188, 311 S.E.2d 571, 574 (1984). "[T]his policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request." *Id.* at 189, 311 S.E.2d at 574. Consequently, Defendant's tender of proposed jury instructions and the trial court's refusal to submit these to the jury sufficed to preserve the issue for appeal, and our review is not restricted to plain error.

II

[2] Defendant argues the trial court's refusal to use Defendant's proposed jury instructions was error. A judge must provide the jury with the substance of an instruction requested by a party if the instruction is correct and supported by the evidence at trial. *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). Assault on a female may be proven by finding either an assault on or a battery of the victim. *State v. Britt*, 270 N.C. 416, 418, 154 S.E.2d 519, 521 (1967). Assault is defined as " 'an intentional attempt, by violence, to do injury to the person of another.' " *Id.* at 419, 154 S.E.2d at 521 (quoting *State v. Davis*, 23 N.C. 125 (1840)). Battery "is an assault whereby any force is applied, directly or indirectly, to the person of another." *Id.* at 418, 154 S.E.2d at 521 (citing *State v. Sudderth*, 184 N.C. 753, 755, 114 S.E. 828, 829 (1922)). The trial court's jury instructions only define assault as committed by a battery, and it is the trial court's definition of battery which Defendant appeals.

In this case, Defendant's proposed instructions derive from *State v. Hefner*, 199 N.C. 778, 155 S.E. 879 (1930), in which our Supreme Court defines battery as "the unlawful application of force to the person of another by the aggressor himself, or by some substance which he puts in motion." *Id.* at 780, 155 S.E. at 881. The actual jury instructions given by the trial court were taken verbatim from *State v. Sudderth*, 184 N.C. at 755, 114 S.E. at 829 (defining battery as "an assault whereby any force, however slight, is actually applied to the person of another, directly or indirectly"). Although our Supreme Court has over time used slightly different language to define battery, *see Britt*, 270 N.C. at 418, 154 S.E.2d at 521; *Hefner*, 199 N.C. at 780, 155 S.E. at 881; *Sudderth*, 184 N.C. at 755, 114 S.E. at 829, the definition of battery has remained the same in substance, *see State v. Wallace*, 351 N.C. 481, 525, 528 S.E.2d 326, 353, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Thus, while Defendant's proposed jury instructions were certainly a correct statement of the law, the trial court's jury instructions were proper as they presented in substance what Defendant had requested. *See Harvell*, 334 N.C. at 364, 432 S.E.2d at 129.

III

[3] Defendant next contends had the original jury instructions not been erroneously altered, there would have been a reasonable probability that the jury could have reached a different result. We disagree that the trial court's subsequent use of the word "touch" was error. As the State correctly points out, " 'a battery . . . may be proved by evidence of any unlawful touching of [a] person.' " *Sudderth*, 184 N.C. at 756, 114 S.E. at 829 (citation omitted). This simply presents a further variation on the definition of battery. *See Wallace*, 351 N.C. at 525, 528 S.E.2d at 353. Hence, the trial court's clarification did not change the substance of the jury instructions and created no conflict for Defendant who claims to have relied on the earlier use of the word "force" in framing his closing argument.

No error.

Judges HUNTER and THOMAS concur.

STATE OF NORTH CAROLINA v. ISRAEL CAMPOS GARCIA

No. COA00-1267

(Filed 6 November 2001)

Assault— show of violence—arrest warrant—reasonable apprehension of immediate bodily harm

The trial court erred by failing to dismiss the charge of simple assault by show of violence under N.C.G.S. § 14-33(a) because the arrest warrant did not sufficiently allege the crime when it omitted facts supporting the element of a reasonable apprehension of immediate bodily harm on the part of the victim.

Appeal by defendant from judgment dated 15 March 2000 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

GREENE, Judge.

Israel Campos Garcia (Defendant) appeals a judgment dated 15 March 2000 entered consistent with a jury verdict finding him guilty of simple assault.

On 13 February 1998, a Mecklenburg County Magistrate issued a warrant for Defendant's arrest finding there was probable cause that on 12 February 1998, Defendant "did unlawfully, and willfully assault Lori Rupp [(Rupp)] by means of jumping from the bushes and chasing the victim causing her to deviate from her normal activities" in violation of N.C. Gen. Stat. § 14-33(a).

Prior to trial, Defendant made a motion to dismiss the warrant against him arguing there was no indication in the arrest warrant on what theory of assault the State intended to proceed, specifically the warrant failed to allege "harmful or offensive touching . . . [or] a reasonable apprehension of immediate bodily harm." The State contended the warrant alleged an assault by "show of violence" and alleged facts supporting elements that Rupp was "scared of immedi-

ate bodily harm or unwilful [sic] contact . . . [and Defendant's] actions caused her to deviate from her normal activities." The trial court denied Defendant's motion.

The dispositive issue is whether an arrest warrant for simple assault by show of violence sufficiently alleges the crime when it omits facts supporting a "reasonable apprehension of immediate bodily harm" on the part of the victim.

A warrant for an arrest "must contain a statement of the crime of which the person to be arrested is accused. No warrant for arrest . . . is invalid because of any technicality of pleading if the statement is sufficient to identify the crime." N.C.G.S. § 15A-304(c) (1999). If the arrest warrant, however, is used as a criminal pleading pursuant to N.C. Gen. Stat. § 15A-921(3), it must contain "[a] plain and concise factual statement . . . which . . . asserts facts supporting every element of [the] criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (1999). Generally, a warrant which substantially follows "the words of the statute is sufficient [as a criminal pleading] when it charges the essentials of the offense in a plain, intelligible, and explicit manner." *State v. Barneycastle*, 61 N.C. App. 694, 697, 301 S.E.2d 711, 713 (1983). If the statutory language, however, "fails to set forth the essentials of the offense, then the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged." *Id.*

The statute under which Defendant is charged, N.C. Gen. Stat. § 14-33(a), does not list the essentials of the offense of simple assault. *See* N.C.G.S. § 14-33(a) (1999). Therefore, in order to charge a defendant with assault under N.C. Gen. Stat. § 14-33(a), the statutory language must be supplemented by other allegations. A warrant charging an assault by show of violence must allege: (1) a show of violence by the defendant; (2) "accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed"; (3) causing the victim "to engage in a course of conduct which [s]he would not otherwise have followed." *See State v. McDaniel*, 111 N.C. App. 888, 891, 433 S.E.2d 795, 797-98 (1993) (setting forth the elements for assault by show of violence).

In this case, the State argues the arrest warrant charged Defendant with an assault by show of violence. While the arrest warrant alleged an assault and listed facts supporting the elements of a show of violence (Defendant jumping from the bushes and chasing Rupp) and a deviation from her normal activities by the victim, the arrest warrant fails to allege any facts to support the element of "reasonable apprehension of immediate bodily harm or injury on the part of the person assailed." As this is an essential element of an assault by show of violence, the arrest warrant, by omitting facts supporting the element of a "reasonable apprehension of immediate bodily harm," fails to charge Defendant with the commission of an assault under this theory. Accordingly, as the arrest warrant failed to sufficiently charge Defendant with a crime in the manner required by N.C. Gen. Stat. § 15A-924(a)(5), the trial court erred in failing to dismiss the charge as stated in the criminal pleading. *See* N.C.G.S. § 15A-924(e) (1999); *see also* N.C.G.S. § 15A-954(a)(10) (1999) (the trial court must dismiss the charge against a defendant if the criminal pleading fails to charge an offense); *State v. Madry*, 140 N.C. App. 600, 601, 537 S.E.2d 827, 828 (2000) (warrant insufficient because "it did not adequately apprise defendant of the specific offense with which he was being charged").

Vacated.

Judges HUNTER and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 OCTOBER 2001

CAROLINA BEVERAGE CORP. v. COCA-COLA BOTTLING CO. No. 00-1383	Rowan (95CVS432)	No error
CLINE v. GALAXY-O-CARS, INC. No. 00-182	Cumberland (95-CVS-7554)	Affirmed
EMANUEL v. CRAVEN No. 01-231	Harnett (99CVS1724)	No error
GOSSETT v. BL PARTNERS, L.L.C. No. 00-972	Brunswick (97-CVD-432)	Reversed and remanded for further proceedings not inconsistent with this opinion
HAGER v. SMITH No. 00-1353	Mecklenburg (00CVS8508)	Affirmed
IN RE BERUBE No. 00-1436	Durham (99J37)	Affirmed
IN RE CIBRIAN No. 01-201	McDowell (98J33)	Affirmed
IN RE FRANKLIN No. 00-1434	Durham (99J262)	Affirmed
IN RE MORRILL No. 01-160	Wake (00J419)	Dismissed
LOVEKIN v. LOVEKIN No. 00-1026	Catawba (97CVD1567)	Affirmed
LOVEKIN v. LOVEKIN No. 00-1331	Catawba (97CVD1567)	Affirmed
NAVE v. NAVE No. 01-87	Buncombe (00CVD1504)	Dismissed
RASHEED v. T.J. MAXX No. 00-933	Ind. Comm. (I.C. 524921)	Affirmed
SHOEMAKE v. SHOEMAKE No. 00-1206	Caldwell (97CVD780)	Affirmed
SIMS v. FLACCAMIO No. 00-1424	Forsyth (97CVD1972)	Affirmed
STATE v. BAGLEY No. 01-202	Wake (98CRS95062)	No error

STATE v. BECKHAM No. 01-210	Mecklenburg (99CRS18215) (99CRS19679) (99CRS20515) (99CRS130947) (99CRS130948)	No error
STATE v. BLACKMON No. 00-1134	Moore (98CRS5328) (99CRS2409)	Affirmed
STATE v. BRYANT No. 01-42	Lenoir (00CRS2049) (00CRS7043)	No error
STATE v. BYRD No. 01-297	Forsyth (99CRS5980) (99CRS17795)	No error
STATE v. CROCKETT No. 00-1173	Durham (98CRS050339)	Affirmed
STATE v. DAVIS No. 00-1313	Moore (96CRS12498)	No error
STATE v. DEAN No. 01-318	Guilford (99CRS62766)	No error
STATE v. DUCKWORTH No. 00-293	Guilford (94-CRS-74896) (94-CRS-74897) (99-CRS-23705) (99-CRS-96947) (99-CRS-96948) (99-CRS-96949)	Affirmed
STATE v. DUNIGAN No. 00-1108	Harnett (97CRS15697) (97CRS15744A) (98CRS1755) (98CRS1756) (98CRS9943) (98CRS9985) (98CRS9986)	No prejudicial error
STATE v. DUNLAP No. 00-1201	Forsyth (98CRS51920)	No error
STATE v. FLOWERS No. 00-1490	Forsyth (99CRS45220) (00CRS20014)	Affirmed; remanded for correction of prior record points; petition for writ of certiorari denied

STATE v. GADDY No. 00-1085	Union (98CRS17199) (99CRS5685)	No error
STATE v. GIBBS No. 01-37	Guilford (00CRS80288)	No error
STATE v. HAMPTON No. 00-1531	Wilkes (98CR9613) (00CR381) (00CR676) (00CR4511)	Affirmed
STATE v. HENDERSON No. 00-853	Gaston (99CRS11587) (99CRS11588)	Vacated in part, no error in part and remanded for resentencing.
STATE v. HOPKINS No. 00-644	Forsyth (98CR36874) (98CR36875) (98CR37023) (98CR37024) (98CR37025) (98CR37027) (98CR37028) (98CR37029) (98CR37030) (98CR37031)	No error; remanded for correction of "information[s]" to reflect issuance in Forsyth County District Court
STATE v. HUDSON No. 01-20	Mecklenburg (97CRS26747) (97CRS131380)	Motion to dismiss is denied; judgment is affirmed
STATE v. JOHNSON No. 00-964	Davidson (98CRS19035)	Affirmed in part, vacated in part
STATE v. LANGLEY No. 00-1371	Robeson (96CRS16528)	No error
STATE v. LENOIR No. 01-244	Gaston (00CRS052069) (00CRS052070) (00CRS052072)	No error
STATE v. McCLELLAND No. 01-327	Davidson (00CRS146)	No error
STATE v. OWENS No. 00-1352	Guilford (99CRS110941) (00CRS76099)	No error
STATE v. OWENS No. 01-216	Guilford (99CRS112566)	No error

STATE v. RHEW No. 00-692	Durham (97CRS36078)	No prejudicial error
STATE v. SHANKLE No. 01-151	Cabarrus (00CRS006723) (00CRS006725)	No error
STATE v. SPINKS No. 00-1350	Randolph (98CRS8216) (99CRS80)	No error
STATE v. TAYLOR No. 00-1500	Macon (99CRS2765)	No error
STATE v. THOMPSON No. 00-1208	Craven (99CRS005651)	No error
STATE v. TRICE No. 01-137	Durham (98CRS52266)	Affirmed
STATE v. TRUESDALE No. 01-461	Wake (98CRS13002)	Affirmed
STATE v. TSHONA No. 00-1174	Mecklenburg (99CRS009706)	No prejudicial error
STATE v. WINSTEAD No. 00-1250	Harnett (99CRS6056)	No error
STATE v. WOMACK No. 00-1492	Guilford (99CRS108147)	No error
STATE v. YANG No. 00-1176	Burke (99CRS002243)	No error
VAUGHN v. CVS REVCO D.S., INC. No. 00-1046	Orange (00CVS301)	Reversed and remanded
WALKER v. DAVE'S CONSTR. SERV., INC. No. 00-1508	Ind. Comm (I.C. 757315)	Affirmed

FILED 6 NOVEMBER 2001

CHAIGNEAU v. WHEELER No. 00-955	Orange (98CVD1759)	Affirmed
DAVIS v. DAVIS No. 00-451	Forsyth (98-CVD-1744)	Affirmed in part, reversed and remanded in part
GETT v. BOSTIC No. 01-44	Granville (97CVS452)	Appeal dismissed
HORNE v. FLACK No. 00-1310	Rutherford (96CVD784)	No error

HOWIE v. ASHOUR No. 00-910	Mecklenburg (99CVS10751)	Affirmed
HUGHES v. RHODES, INC. No. 00-1505	Ind. Comm. (I.C. 279832)	Affirmed
IN RE CARTER No. 00-1421	Wilson (98J41B)	Affirmed
IN RE JOHNSON No. 00-1261	Onslow (00J77)	Affirmed
IN RE SAWVEL No. 00-1537	Harnett (99J74) (99J75)	Affirmed
IN RE STEWART No. 00-1115	Gaston (98J333)	Affirmed
JACKSON v. ADMINISTRATIVE OFFICE OF THE COURTS No. 00-1324	Guilford (99CVS9148)	Affirmed
KOONE v. BENTON No. 00-1254	Watauga (99CVD547)	Affirmed
LINKER v. COY'S AUTO PARTS No. 00-931	Ind. Comm. (I.C. No. 646299)	Affirmed
LUNDY v. MELEX USA, INC. No. 00-803	Johnston (98CVS1397)	Affirmed
PAAR v. GLENAIRE, INC. No. 00-828	Wake (98CVS13013)	Affirmed in part, reversed and remanded in part
PIZZINO v. PIZZINO No. 00-1304	Forsyth (99CVD7911)	Affirmed
STATE v. BERNAL No. 00-1423	Mecklenburg (00CRS3008)	No error
STATE v. BLOUNT No. 01-30	Alexander (97CRS4127)	Affirmed
STATE v. BROWN No. 00-1345	Forsyth (00CRS27620)	Affirmed in part and remanded
STATE v. BYRD No. 00-1272	Guilford (99CRS100936) (99CRS100937)	No prejudicial error
STATE v. CHAMBERLAIN No. 00-1087	Harnett (98CRS15021) (98CRS15022) (98CRS9804)	No prejudicial error

STATE v. COVERT No. 00-1241	Forsyth (99CRS54137) (00CRS27454)	No error
STATE v. DAVIS No. 00-1277	Rowan (98CRS12998)	No error
STATE v. FONVILLE No. 01-148	Craven (99CRS14063)	No error
STATE v. GALINDO No. 00-605	Buncombe (98CRS10545) (98CRS002751) (98CRS10547) (98CRS56101)	No error as to 98CRS2751 and 98CRS10545. New trial as to 98CRS56101 and 98CRS10547
STATE v. GLENN No. 00-1300	Randolph (98CRS5540) (98CRS5541)	No error
STATE v. HARDEE No. 01-28	Columbus (98CRS9160) (98CRS6579)	Affirmed
STATE v. JENKINS No. 01-139	Person (99CRS7039)	No error
STATE v. KEY No. 00-1367	Forsyth (00CRS20219) (00CRS20885)	No error
STATE v. LEE No. 00-1144	Cumberland (00CRS14518)	Affirmed
STATE v. McDONALD No. 00-1061	Durham (99CRS68896) (99CRS68897)	No error
STATE v. McLENDON No. 01-88	Union (99CRS17291) (99CRS17292) (99CRS17775) (99CRS17776) (99CRS18039) (99CRS18040) (99CRS18041) (99CRS18042) (00CRS3993)	Affirmed
STATE v. MITCHELL No. 00-1297	Cumberland (98CRS73090) (98CRS73141)	Affirmed

STATE v. MORALES-BERRIOS No. 00-1422	Moore (99CRS4339)	Reversed and remanded for a new hearing
STATE v. MORGAN No. 00-1305	Forsyth (99CRS46367) (00CRS3262)	No prejudicial error
STATE v. NEWSOME No. 00-1012	Wayne (98CRS14020) (98CRS14828) (98CRS16619)	No error
STATE v. OGUNDEJI No. 01-133	New Hanover (99CRS025804)	No error
STATE v. PAIGE No. 00-1322	Cumberland (99CRS67537)	No error
STATE v. PERRY No. 00-1366	Franklin (97CRS6122) (98CRS5760)	No error
STATE v. ROBINSON No. 00-1409	Lenoir (99CRS5754)	No error
STATE v. SCOTT No. 00-1493	Alamance (99CRS57105) (00CRS202) (00CRS203)	Remanded for resentencing
STATE v. SHORT No. 00-1419	Durham (00CRS51233)	No error
STATE v. SMITH No. 00-1226	Buncombe (99CRS008010) (99CRS008014) (99CRS008019) (99CRS0053741) (99CRS008011) (99CRS008021)	No error
STATE v. SYKES No. 00-1547	Forsyth (99CRS18175)	No error
STATE v. THOMPSON No. 00-1442	Guilford (98CRS45077)	No error
STATE v. TUCKER No. 00-1478	Rowan (99CRS17411)	No error
STATE v. WARD No. 00-1503	Guilford (99CRS65176) (00CRS23399)	Affirmed

STATE v. WATTS No. 00-1223	Hertford (99CRS2786) (99CRS2787) (99CRS2789) (99CRS2790)	No error
WIDEWATERS PROP. DEV. CO. v. INVESTORS TITLE INS. CO. No. 00-1372	Orange (00CVS240)	Reversed and remanded

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WORD AND PHRASE INDEX

HEADNOTE INDEX

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APPEAL AND ERROR—Continued

ARBITRATION AND MEDIATION

CONSTITUTIONAL LAW—Continued

Double jeopardy—robbery and kidnapping—victim's greater danger—The trial court did not err in a prosecution for common law robbery and second-degree kidnapping by denying defendant's motion to vacate the second-degree kidnapping conviction on the ground of double jeopardy where defendant placed the victim in a choke hold, hit him in the side three times, wrestled with him on the floor, grabbed him around the throat, and marched him to the front of the store with a gun to his head. Defendant did substantially more than force the victim to walk from one part of the restaurant to another and there was sufficient evidence of restraint and removal separate and apart from that which is inherent in common law robbery. **State v. Muhammad, 292.**

Due process—billboard moratorium without notice—no vested property right—judicial review provided—Plaintiff's due process rights were not violated where it began construction of a billboard without the required DOT permit and a local sign moratorium was passed without notice just before plaintiff applied for the permit. There was no need for notice and a hearing because plaintiff did not have a vested property right; moreover, plaintiff could and did challenge DOT's determination that its sign was illegal by filing a petition for judicial review under N.C.G.S. § 136-134.1. **PNE AOA Media, L.L.C. v. Jackson Cty., 470.**

Effective assistance of counsel—failure to object—A defendant was not denied effective assistance of counsel in a trafficking in heroin case based on his counsel's failure to object to a detective's testimony regarding the fact that defendant had invoked his right to remain silent and to have counsel present during questioning. **State v. Jones, 394.**

Effective assistance of counsel—failure to object—A defendant in an assault with a deadly weapon inflicting serious injury case was not denied effective assistance of counsel based on his attorney's alleged failure to object to the trial court's use of an habitual felon count listed in the habitual felon indictment to enhance defendant's sentencing level. **State v. Skipper, 532.**

Resentencing—probation conditions—no right to counsel—The trial court did not err by not appointing counsel for a resentencing hearing for the unauthorized practice of law because the resentencing in this case was not a critical stage of the criminal proceeding where the trial court, on remand from the Court of Appeals, only addressed the issue of how to modify the special condition of probation that defendant not file documents in any court without prior approval of his probation officer, and the trial court was not likely to either sentence defendant to an active term of imprisonment or fine defendant five hundred dollars or more. **State v. Lambert, 360.**

Right of confrontation—opportunity to cross-examine witness—The trial court did not violate defendant's rights under the Sixth Amendment Confrontation Clause in a taking indecent liberties and attempted first-degree statutory sexual offense case by denying defendant an opportunity to cross-examine a four-year-old minor victim during her competency voir dire. **State v. Beane, 220.**

Right of confrontation—right to be present at all stages—habitual felon proceeding in defendant's absence—The trial court did not violate defendant's right of confrontation in an assault with a deadly weapon inflicting serious

EVIDENCE—Continued

First-degree murder—photographs of victim's body—The trial court did not abuse its discretion in a first-degree murder case by allowing the State to introduce into evidence eight photographs of the victim's body. **State v. Patterson, 113.**

Hearsay—corroboration—The trial court did not err in a taking indecent liberties and attempted first-degree statutory sexual offense case by admitting testimony by a four-year-old minor victim's family members and by a detective concerning the victim's out-of-court statements where the statements were used for corroboration. **State v. Beane, 220.**

Hearsay—medical diagnosis or treatment exception—The trial court did not err in a first-degree sexual offense case by allegedly allowing hearsay statements of the seven-year-old child victim. **State v. Stancil, 234.**

Hearsay—school records—offered for impeachment—The trial court did not err in an automobile accident action by permitting the introduction of the school records of the minor plaintiff where the records were offered to impeach other testimony and not for the truth of the matter asserted. **Sterling v. Gil Soucy Trucking, Ltd., 173.**

Hearsay—state-of-mind exception—relevancy—The trial court did not err in a first-degree murder case by admitting hearsay evidence of the victim's statements tending to show that defendant did not like the fact that the victim would not allow defendant to move in with him. **State v. Patterson, 113.**

Hearsay—testimony of a narcotics officer concerning informant's statements—forfeiture proceeding— failure to object—The trial court did not err during a forfeiture proceeding by allowing a narcotics officer to testify concerning statements made by an informant about defendant's use of vehicles to deliver crack cocaine. **State v. Woods, 686.**

Lay witness—observations of child sexual assault victim—relevancy—The trial court did not err in a first-degree sexual offense case by allowing a lay witness to testify regarding her personal observations of the seven-year-old child victim. **State v. Stancil, 234.**

Opinion testimony—confession—not under influence of drugs, narcotics, or alcohol—The trial court did not err in a first-degree murder case by allowing an S.B.I. agent to testify that defendant did not appear to be under the influence of drugs, narcotics, or alcohol or any other controlled substance when defendant spoke to agents at the Pitt County Detox Center about the victim's death. **State v. Patterson, 113.**

Medical bills—negligence action—sufficient causal relationship—There was a sufficient foundation for the admission of medical bills in an automobile negligence action where plaintiff testified that she began to experience severe pain and suffering in her neck, back, and shoulder immediately following the collision and a doctor's testimony established a causal relationship between the accident and the injuries. **McCurry v. Painter, 547.**

Medical bills—rebuttable presumption of reasonableness—The reasonableness of plaintiff's medical bills in an automobile accident case was conclusively established under N.C.G.S. § 8-58.1 where plaintiff testified concerning her

EVIDENCE—Continued

injuries and her medical treatment and introduced copies of her medical bills, but defendants presented no evidence and did not rebut the statutory presumption that the bills were reasonable. **McCurry v. Painter, 547.**

Motion to suppress—grounds—other than stated in motion—The trial court did not err by granting defendant's motion to suppress evidence obtained during an impaired driving checkpoint on grounds other than those stated in the motion. N.C.G.S. § 15A-977(c) provides that the judge may summarily deny a motion that does not allege a legal basis; the decision is vested in the discretion of the trial court and, once the court decides not to dismiss the motion but to have a hearing, it may base its conclusion on grounds other than those set forth in the motion. **State v. Colbert, 506.**

Officer's testimony—substance bought from defendant—crack cocaine—failure to object—opinion—The trial court did not err in an intent to sell and deliver cocaine and sale of cocaine case by overruling defendant's objections to a police officer's testimony that the substance he bought from defendant was a rock of crack cocaine. **State v. Greenlee, 729.**

Pornographic videotape—testimony regarding content—The trial court did not err in an indecent liberties, crimes against nature, and statutory sex offenses case by admitting into evidence a pornographic videotape seized by a detective from defendant's bedroom and his accompanying testimony regarding the content of the video. **State v. Williamson, 325.**

Pretrial order—school records not included—opportunity to examine—The trial court did not abuse its discretion in an automobile accident action by admitting the school records of the minor defendant even though plaintiffs objected on the grounds that they were not in the pretrial order. The court responded that plaintiffs would be given an opportunity to look at the records, plaintiffs did not argue that they were surprised by the records, and plaintiffs did not request additional time to investigate and prepare rebuttal evidence. **Sterling v. Gil Soucy Trucking, Ltd., 173.**

Prior crimes or acts—DWI convictions—The trial court did not err in a first-degree murder case, arising out of a fatal vehicle collision occurring after defendant drove his vehicle at an excessive rate of speed through an intersection in an effort to elude pursuing law enforcement officers, by admitting evidence of and instructing the jury on defendant's prior DWI charges and convictions. **State v. Woodard, 75.**

Prior crimes or acts—lewd and lascivious behavior—common plan or scheme—remoteness—The trial court did not abuse its discretion in an indecent liberties, crimes against nature, and statutory sex offenses case by allowing into evidence testimony regarding defendant's prior Florida conviction for lewd and lascivious behavior, that occurred about ten years earlier, under N.C.G.S. § 8C-1, Rule 404(b). **State v. Williamson, 325.**

Scientific—turbidity samples from lake and creek water—The trial court did not abuse its discretion in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by allowing the introduction of turbidity samples from the lake and creek water into evidence. **Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 449.**

MOTOR VEHICLES—Continued

that were used in defendant's first habitual impaired driving conviction were used again in defendant's second habitual impaired driving conviction. **State v. Vardiman, 381.**

Impaired driving checkpoint—officers observing defendant and making arrest—There is nothing in the impaired driving checkpoint statute or case law to support the argument that the officer who observed defendant in his vehicle must be the officer who performs the alcohol screening test and makes the arrest, or that the officers observing defendant, administering the screening test, and arresting defendant must be members of the agency which made the plan for the checkpoint. **State v. Colbert, 506.**

Impaired driving checkpoint—validity of plan—screening procedure—The trial court erred by dismissing evidence gained from an impaired driving checkpoint on the grounds that it did not meet the requirement of N.C.G.S. § 20-16.3A in that it did not designate in advance the pattern for requesting that drivers be stopped to submit to screening tests. The plan required that every vehicle be stopped, that every driver be administered a series of alcohol screening procedures such as engaging the driver in conversation, and that a driver would be taken to a second location for the alco-sensor test only if there was a reasonable and articulable suspicion of impairment. The fact that an officer must make a judgment as to whether there is reasonable and articulable suspicion does not vitiate the validity of the plan nor offend the requirement that officers not be permitted unbridled discretion. **State v. Colbert, 506.**

Impaired driving—sufficiency of evidence—The trial court did not err by dismissing a charge of driving while impaired for insufficient evidence where the only evidence presented by the State was that defendant stopped his vehicle in an intersection after being signaled by an officer; defendant jumped out of the vehicle, approached the officer, and returned to his car when ordered by the officer; the officer smelled alcohol within the vehicle and on defendant; the officer noticed a half-full open bottle of beer on the seat beside defendant; and defendant had slurred speech. The State did not offer any evidence that defendant had difficulty controlling the vehicle, that he appeared appreciably impaired or that defendant's car had been weaving; there were limited places in which to pull the vehicle over; defendant did not appear to stumble or have difficulty walking when he left the vehicle; defendant was compliant, courteous, and noncombative at all times; defendant was not asked to submit to field sobriety tests; and defendant refused the Intoxilyzer test. **State v. Scott, 283.**

NEGLIGENCE

Gross—restaurant employee spat in trooper's food—summary judgment—The trial court erred by granting summary judgment in favor of defendant Restaurant Management on the issue of gross negligence based on an incident where an employee of the restaurant spat in the food that plaintiff trooper ordered while the employee was in the act of performing his job of preparing that food for the trooper. **Phillips v. Restaurant Mgmt. of Carolina, L.P., 203.**

NUISANCE

Corporate—interference with use and enjoyment of land—sufficiency of evidence—The trial court did not err in an action to recover the repair and

SENTENCING—Continued

STATUTE OF LIMITATIONS—Continued

statute of limitations where another party filed a class action complaint covering the same claim, class certification was denied, and there was an interlocutory appeal. The statutes of limitations on claims raised in a class action complaint are tolled as to all putative members of the class from the filing of the complaint until a denial of class action certification by the trial court. If an interlocutory appeal is taken from the denial of certification, tolling continues during the pendency of the appeal. Tolling ends at the trial court's denial of certification if an interlocutory appeal is not taken, regardless of whether the denial of certification is subsequently appealed at the conclusion of the action. **Scarvey v. First Fed. Savings & Loan Ass'n, 33.**

TERMINATION OF PARENTAL RIGHTS

Clear, cogent, and convincing evidence—neglect—Grounds for termination of respondent mother's parental rights have not been established by clear, cogent, and convincing evidence based on neglect as defined under N.C.G.S. § 7A-517(21) in a situation where the child had not been in the custody of respondent mother for a significant period of time prior to the termination hearing. **In re Pierce, 641.**

Clear, cogent, and convincing evidence—substance abuse—domestic violence—Grounds for termination of respondent mother's parental rights have not been established by clear, cogent, and convincing evidence based on substance abuse and alleged domestic violence in the home. **In re Pierce, 641.**

Dispositional order—statement of standard of proof required—An order terminating parental rights was reversed and remanded where the court did not state that the findings as to neglect or any of the other grounds were made by clear, cogent and convincing evidence. The trial court must recite the standard of proof in the adjudicatory order and the trial court's statement of the standard of proof in the dispositional order did not cure the defect. **In re Lambert-Stowers, 438.**

Statutory requirement—diligent efforts to strengthen family ties—The trial court did not err in a parental rights termination case by failing to address whether the Department of Social Services (DSS) had made diligent efforts to strengthen family ties. **In re Pierce, 641.**

TRADE SECRETS

Attorney fees—findings as to calculation—The trial court erred in an award of attorney fees in a trade secret misappropriation action by not making findings as to how the award was calculated. **Barker Indus., Inc. v. Gould, 561.**

Attorney fees—misappropriation—The trial court did not err by denying attorney fees under N.C.G.S. § 66-154(d) for bringing a trade secret misappropriation claim in bad faith where the court found that the plaintiff acted with legal malice in its final judgment. The fact that a suit was brought with malicious intent does not exclude the possibility of a good faith belief that the suit has a legitimate basis. **Reichhold Chemicals, Inc. v. Goel, 137.**

Breadth of injunction—attempt to evade more specific order—An order granting injunctive relief against defendant Gould was not overly broad where

TRADE SECRETS—Continued

the order permanently enjoined the manufacture or sale of all inorganic or oregano-metallic chemical compounds in an action arising from defendant's use of a prior employer's information. It is apparent that the trial court felt it necessary to broaden the injunctive relief from an earlier, more specific order, given a history of bad faith and underhanded dealing which indicated that defendants would continue to try to evade the court's order. Moreover, defendants had no skills in this area apart from the trade secrets misappropriated from plaintiff. **Barker Indus., Inc. v. Gould, 561.**

Information commonly known—The trial court's conclusion that plaintiff's information was not a trade secret was supported by competent evidence that the information was commonly known. **Reichhold Chemicals, Inc. v. Goel, 137.**

Misappropriation—damages—The trial court did not err in the amount of compensatory damages it awarded in a trade secret misappropriation action where defendants complained that the court's figures did not take into account defendants' costs but presented no evidence as to those costs. **Barker Indus., Inc. v. Gould, 561.**

TRESPASS

Land disturbing activities—sufficiency of evidence—The trial court did not err in an action to recover the repair and restoration costs for plaintiff's creek and lake property caused by the sedimentation emanating from defendant's property by denying defendant's motion for a directed verdict, its motion for judgment notwithstanding the verdict, or alternatively a new trial based on alleged insufficient evidence for a trespass claim. **Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 449.**

Motion for directed verdict—ownership of land—The trial court erred in a trespass action by granting defendant's motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 based on failure to prove title. **Godette v. Godette, 737.**

Motion to dismiss—ejectment action—tenancy in common—necessary parties—The trial court erred in a trespass action by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(7) based on plaintiff's failure to join his three siblings who were joint tenants as necessary parties. **Godette v. Godette, 737.**

TRIALS

Automobile accident—verdict not contrary to evidence—The trial court did not abuse its discretion in an automobile accident case by denying plaintiff's Rule 59 motion for a new trial where plaintiff contended that the verdict was contrary to the evidence, but the evidence of causation was conflicting and plaintiff's testimony inconsistent; it cannot be concluded that the court's decision to defer to the jury's findings was a manifest abuse of discretion or probably amounted to a substantial miscarriage of justice. **Taylor v. Ellerby, 56.**

Continuance to obtain counsel—denied—no abuse of discretion—The trial court did not abuse its discretion by refusing to grant defendants an additional continuance to obtain counsel where the court had granted defense counsel's

TRIALS—Continued

motion to withdraw four months before trial was scheduled to begin and had given defendants a thirty-day stay and a one day continuance on the day of trial. **Barker Indus., Inc. v. Gould, 561.**

Motion for new trial—nine-month delay in ruling—The trial court did not abuse its discretion in an automobile accident case by taking nine months to rule on plaintiff's Rule 59 motion for a new trial where there was no indication that the court did not have a vivid recollection of the trial. The court had before it a letter from defendant reviewing the evidence and reminding the court that it had not ruled on the motion, as well as a detailed review of the evidence in plaintiff's original motion. **Taylor v. Ellerby, 56.**

Reopening evidence after party rested—no abuse of discretion—The trial court did not abuse its discretion in an automobile accident case by allowing plaintiff to reopen her case after she had rested where defendants moved to exclude testimony about plaintiff's medical bills on the grounds that she had failed to submit the bills to the jury in support of her testimony and the court allowed plaintiff to reopen her case for the limited purpose of introducing those bills. **McCurry v. Painter, 547.**

UNFAIR TRADE PRACTICES

Attorney fees—denied—The trial court correctly denied plaintiffs' motion for attorney fees under N.C.G.S. § 75-16.1 where plaintiffs did not prevail on their claim under N.C.G.S. § 75-1.1. **Durling v. King, 483.**

Contract for repairs—summary judgment—The trial court properly entered summary judgment in favor of defendant on the unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1 arising out of the parties' contract to repair plaintiff's loader. **Rowell v. N.C. Equip. Co., 431.**

Damages—basis for—The trial court should not have awarded damages to plaintiffs for alleged unfair or deceptive trade practices based upon a jury finding where the judge correctly found that the defendant's acts did not meet the requirements for recovery under N.C.G.S. § 75-1.1. The judge's ruling eliminated plaintiffs' theory of recovery and left no basis for the award of damages beyond those resulting from a breach of contract. **Durling v. King, 483.**

Filing lawsuit—objectively reasonable—federal antitrust reasoning—The trial court did not err by granting summary judgment for plaintiff on defendant's counterclaim for unfair trade practices arising from a non-compete agreement and a lawsuit filed against another company (Imperial) with whom defendant had a consulting agreement where the suit was for no legitimate purpose but was objectively reasonable. Chapter 75 of the North Carolina General Statutes was modeled after federal antitrust law and the reasoning of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, and *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, apply to N.C.G.S. § 75-1.1. Moreover, there was no indication that plaintiff's activities preceding the filing of its suit (including filing a complaint with the FBI) were undertaken for any trade purpose other than preparation for the suit. **Reichhold Chemicals, Inc. v. Goel, 137.**

Sufficiency of evidence—in or affecting commerce—The trial court did not err by denying plaintiffs' motions for treble damages under N.C.G.S. § 75-16

WORKERS' COMPENSATION

Attorney fees—calculation—The Industrial Commission did not err in ordering plaintiff's attorney to pay $1,000 in costs and attorney fees incurred in scheduling a deposition after plaintiff's attorney failed to stipulate a medical record and to timely notify defendant's counsel of his change in position when only $680 in attorney and paralegal fees were billed to defendant for scheduling the deposition. There is no requirement that the amount of attorney fees set by the Commission in its discretion under Rule 612 equal any set formula and this $1,000 fee was not unreasonable. **Hawley v. Wayne Dale Constr., 423.**

Attorney fees—failure to stipulate to medical report—deposition ordered but not taken—Workers' Compensation Rule 612(2) applied where plaintiff did not stipulate to a medical report, a deposition was ordered, and time and effort were spent preparing for a deposition. The fact that a deposition was never taken has no bearing on the applicability of Rule 612(2). **Hawley v. Wayne Dale Constr., 423.**

Attorney fees—failure to stipulate to medical report—no abuse of discretion—The Industrial Commission did not abuse its discretion by imposing costs and attorney fees against plaintiff's attorney in a workers' compensation action where plaintiff's attorney initially refused to stipulate to a doctor's report and then failed to notify defense counsel when he changed his mind; defense counsel continued to try to locate the doctor in Arizona and spent more time and money scheduling the deposition; and defense counsel only learned that plaintiff had agreed to the stipulation when she contacted plaintiff's counsel to arrange a deposition. The Commission's decision was supported by the facts and is valid under Rule 612(2). **Hawley v. Wayne Dale Constr., 423.**

Attorney fees—failure to stipulate to medical report—validity of rule—The Industrial Commission did not err in a worker's compensation action by assessing attorney fees against plaintiff's attorney under Rule 612(2) of the Workers' Compensation Rules for not stipulating to a medical report. Rule 612(2) is entirely consistent with the Workers' Compensation Act and aids in carrying out the provisions and manifest purpose of the Act by allowing the Commission to access costs against an attorney or party who slows the litigation process by refusing to stipulate to medical records where authenticity is not an issue. Stipulating to the record's authenticity is not the same as stipulating to the accuracy of the diagnosis or prognosis. **Hawley v. Wayne Dale Constr., 423.**

Benefits and legal malpractice settlement—no double recovery—A workers' compensation claimant did not receive a double recovery where he settled his workers' compensation action, his attorney did not file an action against a third party within the statute of limitations, the employee settled a malpractice action against the attorney, and the court allowed the employee to keep the entire malpractice settlement rather than extending the employer's subrogation lien to the settlement. The malpractice insurer had reduced its award by the amount of malpractice benefits. **Grant Constr. Co. v. McRae, 370.**

Chronic fatigue syndrome—causation—expert testimony—There was competent and sufficient evidence in a workers' compensation action to support the Commission's finding that being sprayed with raw sewage caused plaintiff's chronic fatigue syndrome in medical testimony from the director of a facility specializing in the research, evaluation and treatment of chronic fatigue syndrome. The witness had previously worked with the Centers for Disease Control

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

Related legal malpractice claim—separate actions—An employer who settled a workers' compensation claim did not have an attorney-client relationship with the employee's attorney, who failed to timely file a negligence action against a third party. There would have been a clear conflict had the attorney also been deemed the employer's attorney; moreover, the attorney was hired by the employee to represent him and his malpractice did not impede the employer's ability to sue the third party. The malpractice claim is separate from the workers' compensation claim. **Grant Constr. Co. v. McRae, 370.**

Settlement negotiations—existence of Form 21 admitted—terms not disclosed—The Industrial Commission did not improperly consider evidence of settlement negotiations in a worker's compensation action where the deputy commissioner allowed the existence of a Form 21 to be introduced in rebuttal but did not allow the terms of the form to be disclosed. The evidence was relevant to an issue raised by plaintiff and there is no indication it had any bearing on the Full Commission's final decision. **Hawley v. Wayne Dale Constr., 423.**

Subrogation lien—additional legal malpratice proceeds—The trial court did not have the authority under N.C.G.S. § 97-10.2(j) to determine the amount of a workers' compensation subrogation lien and then to distribute the recovery, and payment should not have gone to the Commission under that statute, where an employee settled his workers' compensation claim, his attorney allowed the statute of limitations to lapse without filing a claim against a third party, the employee settled a malpractice claim against the attorney, and the employer sought to assert a lien against the malpractice settlement. The lawyer and his malpractice insurer were not third parties within the meaning of the Workers' Compensation Act. **Grant Constr. Co. v. McRae, 370.**

Subrogation lien—failure to file action against third party—The trial court properly granted a Rule 12(b)(6) dismissal of an action by an employer against a lawyer, his malpractice insurer, and a workers' compensation claimant where the workers' compensation claim was settled, the attorney allowed the statute of limitations to lapse without filing a personal injury claim against a third party, the malpractice suit was settled, and plaintiff brought this action seeking to extend its subrogation lien to the malpractice settlement. **Grant Constr. Co. v. McRae, 370.**

Violation of discovery order—appeal to Full Commission—no automatic stay—Discovery sanctions in a workers' compensation action were not improperly calculated where defendant contended that noncompliance did not begin until its appeal to the full Commission was denied as interlocutory. Rule 703 provides only that a stay may be entered, not that the effect of a challenged order is automatically stayed by appeal from that order. **Woody v. Thomasville Upholstery, Inc., 187.**

WRONGFUL INTERFERENCE

Business relationship—knowledge of relationship—A plaintiff was not shielded from liability on a counterclaim for tortious interference with a consulting agreement by the fact that it may not have known of the consulting agreement. Plaintiff's knowledge of the business relationship satisfies the knowledge requirement of tortious interference. **Reichhold Chemicals, Inc. v. Goel, 137.**

ZONING—Continued

erect a billboard where the county passed a sign moratorium between the time plaintiff began construction and the time it applied for a required DOT permit. The common law vested rights doctrine has four elements; plaintiff satisfied the first and fourth elements in that it made expenditures prior to the amendment of the zoning ordinance and in that the ordinance was a detriment to its pecuniary interest, but did not satisfy the second and third elements in that plaintiff knew the proper course for securing DOT permits and did not act in good faith, and did not rely on the issuance of a valid building permit. Even though no county permit was required, it is clear that the necessary DOT permit was not issued before plaintiff began to erect the sign. **PNE AOA Media, L.L.C. v. Jackson Cty., 470.**

Revocation of billboard permit—standard of review—The superior court's decision to uphold a county board of adjustment's decision to revoke petitioner's building permit for the construction of a billboard and to deny petitioner's request for a variance is reversed and remanded because it cannot be determined whether the superior court used the appropriate standard of review and properly applied this standard. **Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust., 388.**

Statutory vested right—billboard moratorium—police power—Plaintiff did not have a statutory vested right to erect a billboard under N.C.G.S. § 153A-344.1 where there were no local regulations at the time it began building. The local sign moratorium and subsequent ordinance were passed under the general police powers granted to counties by N.C.G.S. § 153A-121. **PNE AOA Media, L.L.C. v. Jackson Cty., 470.**

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